Registration test decision

Application name	Wilyakali
Name of applicant	Maureen O'Donnell, Dulcie O'Donnell, Glen O'Donnell
State/territory/region	South Australia
NNTT file no.	SC12/1
Federal Court of Australia file no.	SAD33/2012
Date application made	8 February 2012
Date of most recent amendment	19 March 2012
Date of decision	30 March 2012
Name of delegate	Heidi Evans

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: 13 April 2012

____

Heidi Evans

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument 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 Wilyakali claimant application to the Native Title Registrar (the Registrar) on 9 February 2012 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

The claimant application was made on 8 February 2012. Before being considered under s. 190A, the application was amended in order to rectify an issue with the map and written description of the application area. The Tribunal received a copy of the amended application from the Court on 19 March 2012. It is the application, as amended on 19 March 2012, that is the subject of this decision.

I am satisfied, the application never having been considered under s. 190A, that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

The Wilyakali application was filed in response to a future act notice issued by Uranium One Australia Pty Ltd. In accordance with the two month statutory notice period required for South Australia, the notice period ran from 21 December 2012 until 21 February 2012. Upon receipt of the application, the Tribunal advised the applicant that it was highly unlikely that the application would be able to be registration tested within this period. I note that the timeframe for testing within the required period pursuant to s. 190A(2) has now passed.

Following the completion of the correct map and description by the Tribunal's Geospatial Services and their being provided to the applicant, the applicant sought leave for the application to be amended on 7 March 2012. The Court subsequently granted leave by order dated 12 March 2012. On Monday 19 March 2012, the applicant filed the amended application, containing the new map and description.

Registration test

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

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

Information considered when making the decision

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

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

The following is a list of all the information and documents that I have had regard to in making my decision:

- Wilyakali native title claimant application and amended claimant application (SC12/1; SAD33/2012);
- Registration test brief for the Wilyakali claimant application SC12/1;
- Future act notice for Uranium One mining exploration licence EL3904;
- Federal Court order dated 12 March 2012 (Mansfield J) granting leave for the Wilyakali application to be amended;
- Geospatial assessment and overlap analysis dated 15 February 2012 (GeoTrack: 2012/0271);
- Geospatial assessment and overlap analysis dated 21 March 2012 (GeoTrack: 2012/0489);
- Attachment A of the Ngadjuri Nation #2 claimant application (SC11/2);
- Register extract for the Ngadjuri Nation #2 claimant application (SC11/2);
- Letters to the state government (the state) and the representative body dated 9 February 2012 pursuant to ss. 66(2) and 66(2A);
- Letter from the state dated 19 February 2012 advising that the state wished only to comment regarding their concerns of the lack of detail in the map and description within the application;
- Letter to the applicant dated 16 February 2012 advising of receipt of the application, and the delegate's inability to meet the statutory notice period for the Uranium One mining exploration notice;
- Letter to the applicant dated 27 February 2012 regarding receipt of a further future act notice, advising of a proposed registration test decision date, and inviting the provision of additional material in line with the proposed date;
- Email from the Tribunal's case manager dated 6 March 2012 informing the delegate of the Federal Court call-over date for the application of 2 April 2012;
- Email from the applicant dated 8 March 2012 advising that leave to amend the application had been sought on 7 March 2012;
- Letter from the state dated 27 March 2012 confirming that submissions would not be made regarding the application.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or

203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

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

Following receipt of the application from the Court, in accordance with s. 66(2), the Tribunal's case manager sent a copy of the application to the state on 9 February 2012 and invited the state to make submissions in relation to the application. The correspondence advised that submissions were to be received by 23 Febraury 2012.

On 23 February 2012, the Tribunal received a letter from the state (dated 19 February 2012), advising that the state did not wish to make comment on the application, excepting for the state's concerns regarding the lack of clarity in the map and description contained in the application, and the need to identify potential overlaps with adjacent claimant applications.

In accordance with the requirements of s. 66(2A), a copy of the application was provided to the General Manager of the relevant representative body for the area, South Australian Native Title Services Limited (SANTS) on 9 February 2012.

The applicant was also advised of receipt of the application by letter dated 16 February 2012, and informed that the delegate would be unlikely to make a decision whether to register the application within the statutory notification period stipulated by the relevant future act notice (the 'best endeavours' date).

The case manager wrote again to the applicant on 27 February 2012, advising that the statutory notification period for registration imposed as a result of further future act notices (that is, registration by the 16 March 2012) would similarly not be able to be achieved and that the delegate proposed to make a decision on or about 2 April 2012.

On 19 March 2012, the applicant amended the application. In accordance with s. 64(4), the Court provided the Registrar with a copy of the application.

By correspondence dated 20 March 2012, the state was provided with a copy of the application, as amended, and invited to make submissions to the Registrar, in relation to the application by 26

March 2012. The state wrote on 27 March 2012 advising that they did not wish to provide any comments on the amended application.

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] FCA 1384 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s. 61(1)

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

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

Following from Mansfield J's decision in *Doepel*, I note that my concern at s. 61(1) is a procedural one only, that is, whether the application sets out the native title claim group in the terms

required by that provision. There is no requirement to consider whether 'the native title claim group is in reality the correct native title claim group' – at [36] and [37].

Subsequently, it is only where if on the face of the application itself it appears that the native title claim group described is a subgroup of, or does not include all of those persons in the group that the application will not meet the requirement of s. 190C(2).

The description of the native title claim group appears at Schedule A and Attachment A of the application. There is nothing within the description indicating that it seeks to exclude persons that are of the native title claim group, or that it is merely a subgroup of those persons comprising the group.

Therefore I am satisfied that the description meets the requirements of s. 61(1) for the purposes of s. 190C(2).

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

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

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

The names of the persons jointly comprising the applicant appear immediately above Part A of the application. The applicant's address for service is provided at Part B.

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

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

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

The Court in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) considered the provisions of s. 61(4) for the purposes of s. 190C(2), and held that the delegate's task is a 'matter of procedure' and does not require consideration of whether the description is sufficiently clear, but merely that one is provided – at [31] and [32]. A consideration of the sufficiency of that description I consider to be the task at the corresponding merit condition at s. 190B(3).

The application contains a description in the form of s. 61(4)(b) at Schedule A and Attachment A.

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 three affidavits sworn by each of those persons jointly comprising the applicant. Each of the affidavits is competently witnessed, and executed by the deponent. The affidavits all contain the same four [4] paragraphs, which in my view, include statements in the form of those stipulated in ss. 62(1)(a)(i) to (v).

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

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

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

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

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

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

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

A written description of the external boundary of the application area appears at Attachments B and B1 to Schedule B. Attachment B is titled 'Wilyakali - External boundary description' and contains a metes and bounds description of the external boundary of the application area. It has been prepared by the Tribunal's Geospatial Services and is dated 27 February 2012. Attachment B1 lists general exclusions, that is areas within the external boundary not covered by the application.

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

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

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

Schedule C refers to Attachment C, which is titled 'Wilyakali' and contains an A3 colour map marking the external boundaries of the application area. It has been prepared by the Tribunal's Geospatial Services and is dated 27 February 2012.

Searches: s. 62(2)(c)

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

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

Schedule D of the application provides that the applicant has not undertaken any searches to determine the existence of any non-native title rights and interests in relation to the land and waters covered by the application.

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

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

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

Attachment E to Schedule E of the application contains a description of the native title rights and interests claimed in relation to the lands and waters of the application area. I am of the view that this description is more than merely 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.

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).

A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and addressing the three assertions at ss. 62(2)(e)(i) to (iii) appears at Attachment F to Schedule F of the application. This description is more than merely a recital of those three assertions – see *Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) at [17] to [23].

The requirements of s. 62(2)(e) for the purposes of s. 190C(2) are met.

Activities: s. 62(2)(f)

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

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

Schedule G of the application lists the activities currently undertaken by the claim group in relation to the land and waters of the application area. Schedule G also refers to Attachment F as containing information pertaining to such activities.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been

> made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

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

Schedule H of the application provides that the Wilyakali application overlaps the Ngadjuri native title claim (SAD304/2011).

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

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

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

Schedule HA provides that the applicant is not aware of any s. 24MD notifications that relate to the whole or part of the application area.

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

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

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

Schedule I of the application states that a current notice has been given pursuant to s. 63M of the *Mining Act 1971* (SA) by Uranium One, that was received by the applicant on 21 December 2011.

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).

In undertaking the task at s. 190C(3), I note that it is only where a previous application meets all three criteria at subsections (a), (b) and (c) of that provision that the requirement to consider common members between applications is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland*) at [9].

I refer to the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services dated 21 March 2012 (GeoTrack: 2012/0489) (geospatial assessment), which provides that as at the date of the geospatial assessment there is one overlapping application that appears on the Register of Native Title Claims (the Register), Ngadjuri Nation #2 (SC11/1; SAD304/11) (Ngadjuri Nation #2 application). The application overlaps approximately 36 percent of the current application. Subsequently, the condition at s. 190C(3)(a) is met.

Regarding whether the Ngadjuri Nation #2 application was on the Register when the current application was made, I have undertaken a search of the Register and find that the previous application was accepted for registration and entered onto the Register on 20 January 2012. I note that the relevant date for the purposes of when the application was made is the date the current application was filed in the Federal Court, being 8 February 2012. Subsequently, I have formed the view that the Ngadjuri Nation #2 application was on the Register at the time the current application was made, and the condition at subsection (b) is met.

Subsection (c) requires that a previous application was entered onto the Register, and not removed, as a result of the application being accepted for registration following its consideration under s. 190A. As the Ngadjuri Nation #2 application was first filed with the Court on 21 November 2011, after the introduction of the registration test amendments to the *Native Title Act 1993*, it follows that the application can only have been entered onto the Register as a result of its consideration against the requirements of s. 190A. The condition of subsection (c) is therefore met.

As all three criteria in subsections (a), (b) and (c) of s. 190C(3) are met by the Ngadjuri Nation #2 application. Thus, it is a previous application as defined by s. 190C(3). I am now required to turn my mind to the issue of common claimants between the overlapping applications.

Schedule O of the current application states that 'the applicant and members of the native title claim group have not been members of other applications that were made in relation to the whole or part of the area covered by the application'. To allow me to reach the level of satisfaction necessary at s. 190C(3) however, I have turned my mind to the information entered on the Register regarding those persons comprising the native title claim group for the previous application.

A copy of the register extract for the previous application provides that the native title claim group is described as follows:

> The individuals who comprise the Ngadjuri Nation #2 native title claim group are the biological descendants of the following apical ancestors:
>
> Fanny Winnininnie, who was born at Winnininnie and her spouse Gudjari;
>
> Richard (Dick) Warrior;
>
> The un-named mother of Ned Edwards;
>
> The un-named mother of the Armstrong siblings;
>
> The un-named mother of Alice Morris;
>
> The un-named mother of William John Miller and Amelia Miller;
>
> Eliza McGrath, antecendent of the McGrath family.

The description of the native title claim group for the current application I have reproduced in full at s. 190B(3). That description provides that the members of the native title claim group are those persons biologically descended from three apical ancestor individuals, and one apical ancestor couple. While there do not appear to be any common names between the apical ancestors for the previous application and the current application, I note that three of the apical ancestors for the previous application are 'un-named' females. I have therefore turned to consider the possibility that any of these un-named females may, in fact, be one of those females named in the description of the native title claim group for the current application.

I note that the native title claim group description for the previous application, as it appears on the Register, is followed by the following note:

> Attachment A to the application contains some information relating to each of the identified ancestors in Schedule A of the application. This information includes birth and death dates/periods during which some of the apical ancestors were born/died, where the apical ancestors were born/dies, details about their children and grandchildren and family names associated with the apical ancestors.

Being unable to be satisfied that there are no common apical ancestors between the applications, I obtained a copy of Attachment A for the previous application, to determine whether the additional information provides further insight as to the identity of those un-named apical ancestor females in the previous application.

Attachment A of the previous application provides further information pertaining to the identity of those apical ancestors named in the application. The additional information includes birth places and birthdates for some of the apical ancestors and their descendants, and the family names associated with the particular ancestor.

For the purposes of determining whether there are any common claimants between the applications, I have only considered the information relating to the un-named females in the previous application, and have considered it against the information regarding named females provided in the claim group description for the current application.

- *The un-named mother of Ned Edwards, who was born at Booyoolee, near Gladstone*

This un-named female was born between 1820 and 1830 in Gladstone. There are 57 family names associated with this apical ancestor. I note that none of these names are included in any of the information pertaining to the claim group members of the current application.

- *The un-named mother of the Armstrong siblings who was born at Canowie*

This un-named female was born around 1840 in Canowie. There are 63 family names associated with this apical ancestor. I note that there is one name, Williams, which is also included within the claim group description of the current application.

- *The un-named mother of Alice Morris, who was born at Canowie*

There is little information pertaining to this un-named female, except that her daughter was born at Canowie between 1860 and 1870. There are 12 family names associated with this apical ancestor, none of which are included in the claim group description for the current application.

Based on this information, I have formed the view that none of the un-named apical ancestor females included in the claim group description for the previous application are also included

within the claim group description for the current application. In forming this view, I have had regard to the fact that none of the names associated with two of the three un-named females from the previous application appears anywhere in the claim group description for the current application. The birth dates of the three un-named females indicate they are estimates only, and I note that none of these birth dates directly correlates with the birthdates given for the females included in the claim group description for the current application. Similarly, none of the locations associated with any of the three un-named females correlates with the locations referred to for the females in the description in the current application. I have mapped the locations referenced in the previous application's claim group description and find that they are all located on the south-west side of the area covered by the previous application, furthest from the area overlapping the current application.

For these reasons, I am satisfied that there are no common apical ancestors between the previous application and the current application and subsequently, I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous application.

The application meets the condition at s. 190C(3).

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

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

The geospatial assessment confirms that the application area falls completely within the region for which the South Australian Native Title Services (SANTS) is the responsible representative body. It is SANTS that have provided the certification of the Wilyakali application, at Attachment R. The certificate has been signed by the General Manager of SANTS and is dated 26 October 2011.

In considering the certification at Attachment R for the purposes of s. 190C(4)(a), I am of the view that there are two elements to which I must turn my mind. Firstly, whether SANTS has the power to certify the application, and secondly, whether the certification meets the requirements of a valid certification pursuant to s. 203BE(4). I have addressed these two elements in my reasons below.

Does SANTS have the power to certify?

The certification at Attachment R asserts that SANTS performs all the functions of a representative body for the Greater South Australia region pursuant to s. 203FE, with funding provided by the Australian Government in accordance with subsection (1) of that section. The certification also asserts that the functions and powers of SANTS are set out in Part 11, Division 3, s. 203B of the Act. Section 203B lists the functions of representative bodies, which include certification.

I have understood these assertions to mean that SANTS, while not a recognised representative body pursuant to s. 203AD, is funded pursuant to s. 203FE(1) to perform all of those same functions which a recognised representative body is authorised to perform, including the function of certification. In order to satisfy myself of this matter, I have also considered the Tribunal's nationwide Geospatial Services map and information regarding representative Aboriginal/Torres Strait Islander body areas. The map provides that there is no recognised body for the Greater South Australia region, and that SANTS is funded under s. 203FE(1) to perform functions for the region.

This information is consistent with that asserted by SANTS in the certificate at Attachment R. Based on this, I am satisfied that SANTS has the requisite power to certify the Wilyakali application.

Does the certification meet the requirements of s. 203BE(4)?

Section 203BE(4) appears as follows:

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

Subsections (a) and (b) of s. 203BE(2) provide that the representative body must not certify unless it is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application, and that all reasonable efforts have been made to ensure that the application describes all the persons in the native title claim group.

Paragraph [4] of the certification provides a statement in accordance with the terms of s. 203BE(4)(a), that SANTS is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. Subsequently, I am satisfied that the requirement of s. 203BE(4)(a) is met.

Paragraph [5] of the certification sets out SANTS' reasons for being of that opinion. Information provided includes details of SANTS' history working with the Wilyakali community, details of

the process undertaken by SANTS and certain Wilyakali representatives to notify and identify those persons who hold or may hold native title in the application area, and details regarding the meeting at which the applicant was authorised, including the decision-making process employed to authorise those persons. The information provided is in my view sufficient to meet the requirement of 'briefly' setting out, as prescribed by the provision.

I am therefore satisfied that the requirement of s. 203BE(4)(b) is met.

Paragraph [6] of the certification states:

> SANTS have been working, and continues to work with representatives of the Wilyakali and Ngadjuri native title claimants with a view to resolve an overlap between the groups. Thus SANTS is of the opinion that SANTS continues to make reasonable efforts to comply with the requirements of section 203BE(3) of the NTA.

Schedule H of the application consistently provides that the applicant is aware of an overlap with the Ngadjuri claimant application (SAD304/2011).

While pursuant to subsection (3), SANTS are required to 'make all reasonable efforts' to either achieve agreement between the claimants of overlapping applications, or minimise the number of applications covering the area, I note that subsection (3) specifically provides that a failure by the representative body to comply with the subsection does not invalidate any certification of the application.

In my view, the fact that the certificate speaks to the issue at subsection (3) is sufficient for the purposes of s. 203BE(4)(c), and I am thus satisfied that this requirement is met.

In conclusion, the application meets the requirements of s. 190C(4)(a), in that it has been duly certified by each representative body that could certify the application.

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 wording of s. 190B(2) makes it clear that it is to the information and map contained in the application pursuant to ss. 62(2)(a) and (b) that I am to turn my mind at this condition of the registration test.

A written description of the external boundaries of the application area appears at Attachments B and B1 to Schedule B. Attachment B describes the application area in terms of metes and bounds, with reference to geographical coordinates based on the Geocentric Datum of Australia 1994 (GDA94), rivers, road reserves and native title determination application SAD6001/98 Adnyamathanha No. 1 (SC99/1).

Attachment B1 contains a list of general exclusion clauses, describing those areas within the external boundary that are not covered by the application.

Attachment C contains an A3 colour map of the application area prepared by the Tribunal's Geospatial Services and dated 27 February 2012. The map includes:

- the application area depicted by a bold navy outline and labelled 'Wilyakali';
- neighbouring native title determination application SAD6001/98 Adnyamathanha No. 1 (SC99/1) depicted by a dashed purple line and labelled;
- land tenure with pastoral leases labelled;
- Yunta and Manunda creeks;
- topographic information including major roads, rivers, towns and lakes;
- scalebar, northpoint, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map.

In relation to those areas not covered by the application, the case law confirms that a description of these areas by way of general exclusion clauses as provided within Attachment B1 is sufficient to meet the requirements of s. 190B(2) – see for example *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

I note that the geospatial assessment concludes that the map and description are consistent and identify the application area with reasonable certainty. There is nothing before me that suggests that this is not the case, and upon consideration of the map and description, I agree with the geospatial assessment. I am therefore satisfied that the information and map contained in the application 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 meets the condition at 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).

Commenting on the task at s. 190B(3), Mansfield J in *Doepel* found that the focus was whether the information and description contained in the application 'enables the reliable identification of the persons in the native title claim group' – at [16] and [51].

An approach involving consideration of the correctness of the description and whether the persons described in fact qualify as members of the group was specifically rejected as being within the scope of the delegate's role at s. 190B(3) by Mansfield J in *Doepel* (at [37]), and Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) - at [34]. Kiefel J found that what was required was 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' – at [34].

The Wilyakali native title claim group is described at Schedule A and Attachment A.

The description at Schedule A appears as follows:

> The individuals who comprise the Wilyakali native title claim group are the biological descendants of the following apical ancestors:
>
> Jack Tyler born in South Australia in 1857
>
> Outalpa Dick and his wife Mary Bone
>
> Crancey
>
> Minnie Williams

Schedule A then refers to Attachment A which provides a more detailed version of the description, including information pertaining to particular persons identified as the descendants of those named apical ancestors.

As claim group members are described, rather than named, I note that it is the requirements of subsection (b) of s. 190B(3) to which I must turn my mind.

In my view, the description before me is a relatively straightforward one, with little uncertainty surrounding the steps to be undertaken in determining those persons who fall within the claim group. Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) dealt with a description involving the application of a set of three rules or conditions by which the claim group members were to be identified, and found that the fact that it was necessary to engage in some factual inquiry in the application of those rules, was not fatal to the description's ability to meet the requirement at s. 190B(3)(b) – at [67].

I note that, unlike the situation in *WA v NTR*, the description in the application before me involves the application of only one rule or condition in identifying those persons who are members of the group, that is, that the person must be a biological descendant of one of those four apical ancestors named above.

The description at Attachment A includes the further statement that:

The Wilyakali are defined by broad cognatic descent from the ancestors who owned the country surrounding Broken Hill and to the west in South Australia in the pre-contact and early contact period, and from known, named apical ancestors belonging to more recent history.

And also:

The Wilyakali claim group comprises those people who hold in common the body of traditional laws and customs governing the area subject of the claim and who are related by means of the principle of descent to:

[*list of apical ancestors and certain named descendants of those ancestors*]

I do not, however, understand this additional information as in anyway changing the primary condition by which claim group members are to be identified, as both statements refer to descent from named apical ancestors as the central operative rule in defining the Wilyakali claim group members.

In my view, biological descent provides a sufficiently certain or objective means by which claim group members can be identified. I note that Carr J in *WA v NTR* accepted a description involving the application of rules referencing biological descent – at [64] and [67].

For these reasons, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The application meets the condition at s. 190B(3)(b).

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

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

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

The wording of s. 190B(4) indicates that it is the description contained within the application as required by s. 62(2)(d) to which I am to turn my attention – see also *Doepel* at [16]. In the case of *Doepel*, Mansfield J held the test of identifiability as being 'whether the claimed native title rights and interests are understandable and have meaning' – at [99].

In addition to this, I am of the view that the rights and interests claimed should be able to be understood with reference to the definition of 'native title rights and interests' found in s. 223(1). I have not, however, turned my mind to whether the claimed rights and interests meet that definition, and have left this for consideration at s. 190B(6).

In undertaking the task at s. 190B(4), I consider that it is an acceptable approach to read the entire description, including any stated qualifications or restrictions in relation to the claimed native title rights and interests so that 'properly understood there was no inherent or explicit contradiction' within the description – *Doepel* at [123].

The applicant's description of the native title rights and interests claimed appears at Attachment E. Paragraph [1] states that the applicant claims, where it can be recognised, a right to possess, occupy, use and enjoy the land and waters of the application area as against the whole world. In my view, such a broad claim to exclusive possession does not offend s. 190B(4) – see *Strickland* at [60].

The non-exclusive rights claimed by the applicant are listed at paragraph [2] of the description and appear as follows:

> 2. Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:
>
> (a) the right to access and move about the application area;
>
> (b) the right to hunt on the application area;
>
> (c) the right to fish on the application area;
>
> (d) the right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;
>
> (e) the right to use the natural water resources on the application area;
>
> (f) the right to live, to camp and to erect shelters on the application area;
>
> (g) the right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;
>
> (h) the right to share or exchange subsistence resources or other traditional resources obtained from the application area;
>
> (i) the right to engage in and participate in cultural activities and conduct traditional pursuits on the application area;
>
> (j) the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;
>
> (k) the right to maintain and protect places of significance under traditional laws and customs on the application area;
>
> (l) the right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice;
>
> (m) the right to be accompanied on to the application area by those people who, though not members of the native title claim group, are:
>
> (i) spouses of members of the native title claim group;
>
> (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the application area;

(iii) people required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.

This list of non-exclusive rights claimed is then followed by the following qualifications:

> 3. The rights described in paragraphs 2(b), (c), (d), (e), (f) and (j) are traditional rights exercised in order to satisfy personal, domestic, or communal needs.
>
> 4. The native title rights and interests are subject to:
>
> a) the valid laws of the State of South Australia and the Commonwealth of Australia; and
>
> b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia.

I have considered the list of rights and interests at paragraphs [1] and [2] and in my view, they are clear and easily understood. With reference to the definition at s. 223(1), I am also of the view that each can be understood as being of the nature of a native title right or interest.

Reading together the rights and interests claimed, including a right to exclusive possession, and the stated qualifications in paragraphs [3] and [4], there is nothing on the face of the description at Attachment E that in my view creates any inherent contradiction in the way those rights and interests are framed.

For these reasons, I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified. The application meets the condition 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 assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

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).

In considering the applicant's factual basis material for the purposes of s. 190B(5)(a), I am of the view that there must be information which speaks to an association, spiritual or physical, of the claim group as a whole, with the geographical particularity of the application area – see *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

In *Gudjala 2007*, Dowsett J, in a part of his judgment not criticised on appeal to the Full Court, gave considerable guidance as to information of the type required to address s. 190B(5)(a). His Honour found that the following kinds of information may be necessary to support the assertion that the claim group have, and their predecessors had, an association with the application area:

- 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;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

I note that both Dowsett J in *Gudjala 2007* and the Full Court in *Gudjala #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) suggest that it is sufficient if the applicant's factual basis material speaks of an association between the predecessors of the claim group and the application area back to European settlement of the area, rather than sovereignty – see *Gudjala 2007* at [65] to [66] and *Gudjala FC* at [96].

The applicant's factual basis material – s. 190B(5)(a)

The applicant's factual basis material appears at Attachment F to Schedule F of the application. Attachment F is a report entitled 'Wilyakali Native Title Claim' (the report), containing a summary of various ethnographic, anthropological and historical sources, and including statements from certain claim group members, regarding the three assertions at s. 190B(5).

Having turned my mind to the factual basis material in the report, I have formed the view that the strongest means by which claim group members assert an association with the application area is through direct descent from apical ancestors who were born on and lived on the application area, and are asserted to have 'owned' the traditional lands of the Wilyakali people – see p. 9 and also p. 10. Much of the information within the report pertains to the lines of descent between specific claimants and their predecessors, and the apical ancestors listed in Schedule A.

> [*text removed*]

The report includes the following statement from a claim group member regarding this association through the claim groups' ancestors:

> ...Being a member of the Broken Hill community comes from my strong family ties, everyone is a part of some community as it is a region that we are born into as well as where our ancestors come from that makes it our country and were [*sic*] [we] belong – at p. 14.

Subsequently, the association is stated as a spiritual connection to country based on the fact that claim group members' ancestors were born and lived on the application area – at p. 10. This spiritual association is also shown through information pertaining to the mythological stories known by claim group members and their predecessors regarding particular features in the

landscape on the application area. This is seen in the following statement recorded from a claim group member regarding the travel of the Mambi Bronzewing Pigeon across the application area:

> My family talked of stories that go along way. The pigeon, Mambi, starts in South Australia. The start is not in Wilyakali country and I cannot speak for that part of the story further over there. But that story travels into Wilyakali country and then we speak of that story and no one else can, the story then goes on into other people's country. We cannot speak for that story when it goes over there – at p. 17 and 18.
>
> [*text removed*]

Despite some physical barriers to accessing all areas of the application area, such as the need to ask permission from pastoralists (see p. 10), the report asserts that claim group members continue to maintain their connection with country through these spiritual means, and through physical means. The information indicates that claimants continue to visit and camp on the application area today – see p. 11. The information also indicates that the physical association held by claim group members today mirrors the association held by their predecessors. The following statement by a claim group member describes hunting on the application area, and the passing down of knowledge of hunting methods and techniques to younger generations:

> When we go out on country we usually go as a family, and that's how it has always been, the family groups go out and get food and what was needed. The boys will go out and get a kangaroo (or emu) and bring it back. Then the boys will skin that kangaroo and the grandkids are there too and they help, and the boys show them how to do the things, and show them the bits of the kangaroo that you cannot eat and the bits to put aside. Then we put them in the ground (Kangaroo and Emu) and cook it – at p. 23.

Similarly, the report includes historical records that speak of the claimants' predecessors hunting on their traditional lands – see for example p. 21.

In providing information with geographical particularity to the application area, there are references throughout the report to various locations within the area, and the report states whether such locations are within, or outside the external boundary of the area. Locations within the application area mentioned, namely places where claimants and their predecessors, including named apical ancestors, were born and/or worked and lived include Olary, Poolamacca Station, Outalpa Station, Mulyungarie Station, Mundi Mundi, Taltabooka, Mutooro, and Cockburn. I have mapped these locations with the use of the Tribunal's iSpatial View database and have formed the view that such locations are within the external boundaries of the application area.

The report also makes the broad assertion that 'records indicate that the majority of the Wilyakali people and their children and their children's children were born within the wider Wilyakali country' – at p. 10. This information supports a physical association between the claimants and the application area as maintained today.

The above statement and a number of others within the report suggest that traditional Wilyakali country is wider than the lands and waters covered by the application. The records included in the report refer throughout to certain Wilyakali persons being associated with the locations of Broken Hill and Silverton, both of which are in New South Wales and not included within the

application area – see for example p. 10. I am of the view, however, that consideration of this issue is beyond my role at this condition of the registration test, and am reminded that I am not to approach the material 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim' – *Gudjala FC* at [93].

Regarding an association between the predecessors of the whole group and the area over the period since sovereignty, I am of the view that material pertaining to an association between the claimants' predecessors and the application area back to European settlement of the area is sufficient – see *Gudjala 2007* at [64] to [66] and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [26].

There is little reference within the material as to when European settlement of the application area occurred, other than a statement that 1851 was 'before white contact' – at p. 10. The birth dates of the apical ancestors appear to range across generations. Outalpa George, the son of apical ancestors Outalpa Dick and Mary Bone is stated as being born near Silverton around 1851, with the implication that his parents would have been born anywhere between 20 and 40 years earlier. The birth date of Jack Taylor is claimed as circa 1857. He is stated as being born at Bimbowrie – p. 7. The eldest granddaughter of apical ancestor Crancey is stated as being almost 80 years old. Based on an approximate 40 years per generation, this suggests Crancey was born circa 1852.

There is nothing within the material pertaining to Crancey's birthplace, and similarly, there is no information pertaining to the date and/or birthplace of the remaining apical ancestor Minnie Williams. Despite this, the material speaks in some detail of Crancey's descendants and their interactions with and activities on the application area. For example, the material asserts that Crancey's daughter, Nancy, married a man named Albert Bates who had a number of daughters. One of those daughters was Alice Bates who married George Dutton. George Dutton is described in the report as one of Elkin's primary informants in the 1930s, sharing information regarding the territorial bounds of Wilyakali country (see p. 5), Wilyakali kinship systems including information about totems, ceremonies, and the differences between the Wilyakali language and other languages of the region.

The material also indicates there is significant overlap between the descendants of Outalpa Dick and Mary Bone, and the descendants of Crancey. Crancey's daughter Nancy was raised up by Taylor Gibson and his wife Tottie Teetalpa at Yancannia, after they collected her from Poolamacca when her mother died. Tottie Teetalpa is the granddaughter of Outalpa Dick and Mary Bone. This information suggests Crancey may have been born at Poolamacca, which is asserted as being within Wilyakali country – see p. 22.

The descendants of Crancey who are currently members of the native title claim group, provide a number of statements within the report at Attachment F indicating they have a physical and spiritual association with the application area that they maintain through visiting and carrying out activities on the application area – see for example p. 10, 17 and 24.

I note that two of the apical ancestors mentioned above were born outside the application area, however these locations are asserted to be within traditional Wilyakali country, and surrounding material indicates that direct descendants of those ancestors defined Wilyakali country (being

that country owned and inhabited by their ancestors) as an area including the application area, and locations such as Broken Hill and Silverton – see p. 4.

While there is nothing indicating the birth place or association of Minnie Williams with the application area, I note that there are a number of assertions within the report that the apical ancestors named at Schedule A are recognised as being those persons who were born on, lived on and owned the Wilyakali application area – see for example statements by claim group members on p. 11. For this reason, I am of the view that the factual basis asserting an association between the apicals described above, their descendants and the application area is sufficient to similarly support an inference that there is an association of the remaining apical ancestor, Minnie Williams, and the application area.

Based on the fact that European settlement is asserted to have occurred prior to 1851, I have formed the view that the factual basis is sufficient to support the assertion that each of the apical ancestors was living around the time of, with some apical ancestors living prior to, European settlement of the application area.

Multiple descendants of these apical persons are referred to within the material, and include persons across a number of generations between the apical ancestors and the present claim group members. The material connects each of these persons to a place within the application area. An example of this is in excerpts from records of Bimbowrie and Outalpa Stations in the period 1912 to 1922, that include references to the grandfather of one of those persons comprising the applicant, and the husband of a great granddaughter of Outalpa Dick, an apical ancestor – see p. 21.

In conclusion, having turned my mind to the above information, I am satisfied that the factual basis material is sufficient to support an assertion that the claim group have, and their predecessors had, an association with the application area. This association can be traced back over the period since European settlement of the area, and is both physical and spiritual in nature. The association of claim group members today with the application area is asserted to be primarily based on an understanding and knowledge of the fact that the claimants' ancestors inhabited and owned traditional Wilyakali country.

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

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

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

Dowsett J's findings in the *Gudjala* decisions of 2007 and 2009, in my view, assist to clarify the nature and type of factual basis material that must be provided to support the assertion at s. 190B(5)(b). In *Gudjala 2007*, His Honour referred to the authority of *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) in determining the nature and content of 'traditional laws and customs' and found that the following asserted factual information may be necessary to support an assertion that there exist traditional laws acknowledged by, and

traditional customs observed by the native title claim group, giving rise to a claim for native title rights and interests:

- that the laws and customs observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content – at [65] and [66]; and
- that explains the link between the apical ancestors and the relevant society – at [66].

This part of the *Gudjala 2007* decision was not criticised by the Full Court on appeal, and hence in my view can still be considered a relevant authority in undertaking the task at s. 190B(5)(b).

Dowsett J again considered the kind of factual information that may be necessary to satisfy the Registrar at s. 190B(5)(b), in *Gudjala 2009*. His Honour's decision suggested that the following factors may guide the Registrar in assessing the asserted factual basis material:

- that the factual basis speaks to the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society – at [37] and [52];
- that if descent from named apical ancestors is the basis of membership of the group, that the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived – at [40];
- that the factual basis contain some explanation as to how the current laws and customs of the claim group can be said to be traditional, and more than merely an assertion that the current laws and customs of the native title claim group are traditional laws and customs – at [52] and [69]; and
- that the factual basis contain some details of the claim groups' acknowledgement and observance of those traditional laws and customs pertaining to the claim area – at [74].

The applicant's factual basis material – s. 190B(5)(b)

As described above, the applicant's factual basis material is primarily contained in the report at Attachment F to Schedule F of the application. I have considered the contents of the report in light of the decisions of Dowsett J in *Gudjala 2007* and *Gudjala 2009*, below.

The Wilyakali pre-sovereignty society

The report at Attachment F makes a number of general assertions regarding the system of laws and customs acknowledged and observed by the claimants' predecessors, and by the claimants today. It asserts that the basis of membership of the Wilyakali native title claim group is that members are 'direct descendants of those Aboriginal persons who were in occupation of the application area and areas surrounding the application area at the time of sovereignty'. The report also asserts that named Wilyakali ancestors were members of the Wilyakali community within the wider Paakantji language group, bound together by traditional laws and customs, and that claim group members today continue to observe, acknowledge and practice Wilyakali traditional laws and customs – at p. 1.

As discussed in my reasons above at s. 190B(5)(a), there is little information pertaining to the date of European settlement in the application area, but for a statement that 1851 is before white contact. I also note that in that my reasons above, I formed the view that the factual basis was sufficient to support an assertion that the named apical ancestors were living around the time of, with some apical ancestors living prior to, European settlement of the application area. As provided above, the general statements at p. 1 of the report include the assertion that the Wilyakali ancestors were members of the Wilyakali community within the wider regional Paakantji language group, such that I am of the view that the factual basis is sufficient to support an assertion that those apical ancestors were, in fact, members of the society in existence at the time of European settlement in the area.

As to whether this society can be considered to derive from a pre-sovereignty society, I find that there is limited factual basis material before me pertaining to a particular Wilyakali society occupying the application area, bound by their adherence to a specific system of laws and customs in 1788. In addition to the general statements reproduced above, the report describes the way in which the Wilyakali are a distinct language dialect within the wider Paakantji language group. This assertion is also attested to by claimants in statements in the report, for example the following statement by a claim group member:

> Well, we're part of the big Paarkantji tribe and that's a proven fact but we are Wilyakali and the Wilyakali language group is Broken Hill area and over that side see and each part of Paarkantji has got their own groups. There is big Paarkantji overall but in the Paarkantji group there's different language groups – at p. 11.

The report refers to a report by Luise Hercus that it is asserted, 'shows that Paakantji were in full possession of Paakantji country before 1788 by looking at place names and "the network of linguistic interaction and diffusion of linguistic features"' – at p. 7. The report states that Hercus' research has shown that Wilyakali is a dialect of the Paakantji language – at p. 7.

The Wilyakali are asserted to be distinct from the wider Paakantji group in the language spoken by Wilyakali, and in the fact that the Wilyakali inhabited the particular lands and waters of the application area. The factual basis indicates that the claimants and their predecessors had a strong understanding of the boundaries of traditional Wilyakali country – see for example p. 4 and 5.

There are a number of descriptions of Aboriginal people inhabiting the application area and their way of life at the time of European settlement included in the report, taken from records made by early observers in the area. For example, one researcher referred to in the report writes that his informant shared that the Aboriginal persons of Boolcoomatta (within the application area) do not engage in circumcision practices – at p. 2. The report also asserts that in 1926, Mawson and Hossfeld wrote that the Aboriginal persons of the Olary district (part of which is within the application area) were moved to Poolamacca station (also within the application area) around 1892. The report asserts that Mawson and Hossfeld reviewed numerous artefacts and other evidence of Aboriginal occupation of the area, including rock paintings, campsites and remains or sites of ceremonial activity. The report also provides that in 1876 another observer commented on the Aboriginal persons of Outalpa Station, living in camps in the vicinity of the station – see p. 3.

Mawson and Hossfeld's research in 1926 regarding the Olary district is asserted by the report to contain Paakantji language place names. The report also asserts that an examination of place names within and around the application area reveals that the area was owned by Paakantji language speakers – at p. 7.

Another researcher referred to in the report, Berndt, writing in 1944, described certain mythological stories told to him by Jim Mooney, a Wilyakali predecessor born in 1864 at Bimbowrie Station, outside of the application area but within traditional Wilyakali country. The stories shared by Jim Mooney with Berndt are asserted by the report to be those acknowledged and told by claim group members regarding the Wilyakali landscape today – see p. 18 and 19.

I.P. Hall of Boolcoomatta station is asserted by the report to have commented regarding the local Aboriginal people: 'they prefer getting their own living by fishing and hunting and only trouble the stations in the winter' – at p. 22.

I now turn to consider the factual basis material pertaining to the nature and content of the system of traditional laws and customs asserted by the Wilyakali native title claim group.

System of traditional laws and customs

There is various factual basis material pertaining to the nature and content of the system of law and culture asserted by the Wilyakali claim group. The material suggests rights and interests in the application area are derived from an acknowledgement and recognition of an individual's identity as Wilyakali, with specific reference to their descent from certain ancestors who are believed to have owned that land. Descent from those known ancestors can be traced either through an individual's mother or father, and can be by means of biological descent, or descent by adoption.

> [*text removed*]

This statement also demonstrates the way in which language forms the basis for the Wilyakali distinctiveness, as a group within the wider Paakantji group.

The report also contains a general statement explaining those means by which the claimants assert rights and interests in the application area, pursuant to their traditional laws and customs. Rights and interests are asserted as being possessed through:

> a. having traditional, geographical and/or spiritual knowledge of the Application area;
>
> b. having a parent or grandparent who have a connection to the Application area;
>
> c. transmission of knowledge and information to them by their elders;
>
> d. their acknowledgement and observance of specific rules governing access to certain locations within the Application area – at p. 12.

The remaining information within the report goes to supporting these various aspects of the Wilyakali system of laws and customs. For example, the following statement illustrates the way

in which knowledge and cultural information is passed down from elders to the younger generations:

> Our history and stories are still being told today... It was the traditional elders and people of importance who passed down the information so it ensured our culture was carried onto future generations – at p. 12.

And also the following statement:

> [W]e are always learning and encouraging our children to learn the language for future generations – at p. 12.

Being born on country and having a geographical and spiritual knowledge of the landscape also appears to give rise to certain rights and interests pursuant to the Wilyakali system of laws and customs. This is seen in the following statement by a Wilyakali predecessor recorded by Elkin in 1930:

> [A] person's country is where he was born, one person is a box tree man born under one or is a certain waterhole man – born there – at p. 10.

The material suggests there is a strong kinship and social structure underpinning the system of laws and customs, the common observance of which binds the Wilyakali. This structure was recorded in 1930 by Elkin, whose primary informant was the grandfather of one of the claimants. This structure is shown to dictate patterns of behaviour and social interactions.

For example, a claim group member states the following:

> My sons and grandsons go hunting all the time. When they come back with kangaroo or emu they take the meat around to certain older members of our family. Young people have to address their elders in certain ways and do chores for them like bringing firewood because that's how they have been taught – at p. 26.

Totems and the restrictions imposed by the observance of totems is also demonstrated in the material. One of the young claimants explains this as follows:

> It is tradition to take after your mother's side... My traditional meat (totem) is the eagle hawk and with it comes cultural beliefs and obligations. It you were to meet someone that was an Eagle hawk you were not allowed to marry into that family as it meant that somewhere along the line they were also part of your family – at p. 17.

Both these statements suggest that the traditional kinship system continues to form the basis of Wilyakali laws and customs as acknowledged and observed today. A statement recorded in language by Elkin in 1930 from one of the Wilyakali ancestors suggests the way in which the totems and kinship structure also underpinned the lives of the claimant's predecessors:

> 'Mina wonga emba?' meaning 'what meat you?' – at p. 16.

The report refers to a spiritual connection with the landscape held by the claimants, based on an understanding that their ancestors occupied and owned the land and waters of the application

area – at p. 10. This spiritual connection is also shown in claimants' understandings of the mythology of the landscape. Again, this is suggested to be an element of Wilyakali laws and customs passed down to the claimants by their predecessors.

[*text removed*]

The report also provides that in 1957, one of the Wilyakali predecessors shared a series of myths relating to the landscape with Beckett, another researcher in the application area – at p. 18. Myths relating to certain animals are suggested to be closely tied to the kinship and moiety/totem systems observed by the Wilyakali – at p. 18.

From this, I have formed the view that the factual basis is sufficient to support the assertion that the following system of laws and customs, is acknowledged and observed by the claim group members:

- a system of laws and customs that is primarily founded on a kinship system unique and exclusive to the Wilyakali that is carried through lines of descent, and that dictates social patterns of behaviour including marriage restrictions and obligations to certain elders;
- a system where rights and interests are vested in an individual as a result of their identity as established through a parent's or grandparent's connection/association to the lands and waters of the application area; and
- a system passed down via the intergenerational transfer of knowledge, including myths and stories relating to totemic beings and the formation of the landscape within the application area.

My consideration

The report contains considerable factual basis pertaining to the lines of descent of, and the moiety and totem structures binding specific Wilyakali predecessors. The material also goes towards the way in which these structures (through descent) dictate the social patterns of behaviour of the claimants today.

[*text removed*]

It is asserted that the Wilyakali identity of claim group members today is still predominantly based on direct descent from known apical ancestors, listed in Schedule A – see for example p. 9. In my view, the material supports an assertion that this descent dictates an individual's moiety, totem and therefore social patterns of behaviour – see for example statements by claim group members at p. 15 and 17.

As discussed in my reasons above, I have already formed the view that the factual basis is sufficient to support an assertion that the apical ancestors named in the application formed part of the society in existence at the time of European settlement in the area. I am also of the view that the factual basis is sufficient to support the fact that those persons occupying the area at that time were bound by a kinship and moiety system unique and specific to the Wilyakali, that is still maintained today.

In my view, the factual basis supports an assertion that the system of laws and customs acknowledged and observed by the claimants today is founded upon and derived from the kinship system which binds the Wilyakali. While there is little material going towards the system of laws and customs of the Wilyakali at the time of European settlement, being satisfied that the factual basis supports an assertion that the current system of laws and customs is founded on a kinship system that also bound the claimants' predecessors, I am subsequently of the view that the factual basis supports an assertion that the laws and customs acknowledged and observed by the claimants' predecessors were of the same nature as those acknowledged and observed today.

In forming this view, I have also turned my mind to the factual basis pertaining to the way in which both the system of laws and customs, and the kinship system on which those laws and customs are founded are passed down. Knowledge of laws and customs, including cultural knowledge, language and mythological stories are asserted to be passed down through the intergenerational transfer of knowledge – see p. 12. The kinship system, is inherently connected to lines of descent, such that the way in which laws and customs are acknowledged and observed will be dictated by an individual's birth to specific parents – see p. 15. Subsequently, the factual basis supports an assertion that these systems are passed down to younger generations verbally in stories and cultural knowledge, and through biological descent.

In relation to whether the system of laws and customs can be said to have its source in a pre-sovereignty society, from the material set out above pertaining to the existence of such a society, I have formed the view that the factual basis is sufficient to support a number of assertions, and that flowing from these assertions, I can be satisfied that the factual basis is sufficient to support an inference that there was at sovereignty, or at least European settlement, a Wilyakali society observing identifiable laws and customs.

Firstly, I am of the view that the factual basis outlined above is sufficient to support an assertion that it was the wider Paakantji language group that occupied the land and waters of the application area prior to and at European settlement of the area. Secondly, I am of the view that the factual basis outlined above is sufficient to support an assertion that the Wilyakali are a distinct language group within the wider Paakantji group, and that the Wilyakali specifically inhabited the area identified by claimants and their predecessors as traditional Wilyakali country (which includes the application area).

Thirdly, I am of the view that the factual basis is sufficient to support an assertion that there was, at the time of European settlement, a group of Aboriginal people inhabiting the application area, speaking a local language dialect, living on and surviving off the land and waters of the area. The factual basis material speaks to evidence of rock art, camp sites and ceremony sites, and certain ways of life including particular initiation practices, hunting and fishing and the telling of mythological stories in relation to the landscape of the application area. The factual basis also indicates that those Aboriginal persons inhabiting the area spoke a dialect of Paakantji language and used language place names for sites within the application area. I am of the view (discussed further below) that these activities and ways of living can be related to a commonly held system of law and custom, and that most of these activities and ways of life are similarly reflected in the current system of laws and customs asserted by the factual basis material.

This third assertion, and the factual basis material supporting this assertion, in my view, allows for it to be inferred that those Aboriginal persons inhabiting the application area at the time of European settlement can be identified as Wilyakali, and that these persons together constituted a society living according to a shared system of laws and customs. In relying upon the general statements at p. 1 of the report (referred to above), I am of the view that the factual basis is sufficient to support the fact that the Wilyakali ancestors formed part of this society.

Having formed the view that the factual basis is sufficient to support an assertion that there was in existence, a Wilyakali society living according to a system of laws and customs at the time of European settlement, one which is founded on a distinct kinship system and passed down through biological descent and the transfer of knowledge, I am of the view, when read together with the statements from p. 1 above, that the factual basis is similarly sufficient to support an inference that that system is the same one passed down (through biological descent and transfer of knowledge) to the Wilyakali ancestors by their predecessors who were part of that society.

Consequently, I am of the view that the factual basis is sufficient to support an assertion that the system of laws and customs acknowledged and observed by the claim group members today is one that is rooted in a pre-sovereignty society, and one that is traditional in nature.

I am therefore satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

The application meets the requirement of 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).

The decision of Dowsett J in *Gudjala 2007* considered the type of factual basis that may be required specifically in relation to the assertion at s. 190B(5)(c). His honour held that the assertion 'implies the continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty' – at [82].

In *Gudjala 2007,* Dowsett J also had regard to the decision of the High Court in *Yorta Yorta*, regarding the definition of the term 'traditional laws and customs'. In summary, the High Court found that traditional laws and customs comprised of two distinct elements. Firstly, that the laws and customs were those rooted in 'the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown' – at [46]. Secondly, that the acknowledgement and observance of those laws and customs has 'continued substantially uninterrupted since sovereignty' – at [87]. In my view, the assertion at subsection (c) of s. 190B(5) is closely linked to this latter second element.

The applicant's factual basis material – s. 190B(5)(c)

In my consideration of whether the factual basis is sufficient to support the assertion at s. 190B(5)(c), I have focussed on two distinct elements of the current Wilyakali system of laws and customs asserted as examples of how the factual basis might support an assertion that the wider

system of laws and customs has continued 'substantially uninterrupted' since sovereignty, or European settlement.

The first element of Wilyakali laws and customs asserted within the factual basis to which I have turned my mind is the restrictions on marriage imposed as a result of moiety and totem kinship structures underlying the Wilyakali system of laws and customs.

The factual basis supports the fact that such restrictions are adhered to and observed today.

[*text removed*]

These kinship-based laws and customs were passed to the claim group member by his grandmother.

[*text removed*]

As well as the observance of such restrictions today, the material also speaks to the adherence by claim group members' predecessors with these marriage restrictions, and the underlying kinship system. The report speaks of a specific predecessor of the claim group, George Dutton, who shared information with Beckett regarding his own marriage.

[*text removed*]

As explained in my reasons above at s. 190B(5)(b), I have formed the view that the factual basis is sufficient to support the existence of a system of laws and customs predominantly founded on this kinship system, and passed down to the claim group members today through means of biological descent and the intergenerational transfer of cultural knowledge. For that reason, when read with the general statements at p. 1 of the report regarding descent from known named ancestors, I was similarly satisfied that the factual basis supported an assertion that the laws and customs observed by claim group members today was the same system of laws and customs acknowledged and observed (passed down by means of descent and the transfer of knowledge) by the apical ancestors occupying the area at the time of European settlement.

The material speaks to the observance of laws and customs relating to marriage by the claim group members, and by a number of their predecessors, back to 1930. In my view, the relatively close generational link between those predecessors and the apical ancestors named at Schedule A, allows me to consider that the factual basis is sufficient to give rise to an inference that the marriage restrictions and kinship-based laws and customs were passed directly and without change to these predecessors by the Wilyakali society, including the apical ancestors, in existence at the time of European settlement.

The second element of the Wilyakali laws and customs to which I have turned my mind is the Wilyakali language dialect. The report speaks extensively of the language and the ways in which it has continued over a period asserted to be since prior to sovereignty – see for example p. 7. The material asserts that the Wilyakali dialect was spoken by the husband of the daughter of Jack Tyler, a Wilyakali apical ancestor, as recorded in 1957 by Beckett – at p. 7.

[*text removed*]

Another young claim group member, eighth generation descended from apical ancestor couple Outalpa Dick and Mary Bone, and fifth generation descended from apical ancestor Crancey, states in relation to the maintenance of Wilyakali language:

> Aboriginal people were used of [*sic*] living in tribes, speaking their own traditional languages and living off the land. After the white man came there were a number of changes and laws that were put in place... They were stopped from speaking their traditional languages as it [was] against the law and to do so they would be punished... Our history and stories are still being told today... It was the traditional elders and people of importance who passed down the information so it ensured our culture was carried on to the future generations – at p. 12.

One of the applicant persons similarly states:

> [W]e are always learning and encouraging our children to learn the language for future generations – at p. 12.

I am of the view that together, this factual basis material is sufficient to support an assertion that the Wilyakali language was practised, in accordance with Wilyakali laws and customs, by the predecessors of the claim group, across the generations back to the apical ancestors at European settlement, and that it was passed down through these generations by elders and knowledge holders, in the same way that claim group members today pass this knowledge and language to their children. I note that the general statements at p. 1 of the report include the assertion that:

> The Wilyakali language is a dialect of Paakantji language it is no longer spoken fluently within the community, however, Wilyakali people today continue to acknowledge their identity through the use of Wilyakali words in their everyday speech – at p. 1.

In my view, when read with the material above, this statement supports the continued practice of the Wilyakali language dialect in accordance with Wilyakali laws and customs by the claim group, as passed down through the generations from the claimants' predecessors back to European settlement.

Having considered these two elements of the Wilyakali system of laws and customs, I have formed the view that the continued practice of both provide examples of the way in which the factual basis is sufficient to support the assertion that the system of Wilyakali laws and customs is one that has continued 'substantially uninterrupted' since at least European settlement, and subsequently that the native title claim group have continued to hold the native title claimed in accordance with those laws and customs.

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

Subsection 190B(6)
Prima facie case

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

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

The task at s. 190B(6) has been found by the Court to involve 'some measure of the material available in support of the claim', and the imposition of a more onerous test than that of s. 190B(5) to the individual rights and interests claimed – *Doepel* at [126], [127] and [132]. While that test is to be applied to all of the rights and interests claimed, I note that it is not a requirement that all are,

prima facie, established, and even where some are not, the application may still meet the condition at s. 190B(6) – *Doepel* at [126].

I am also of the view that the task at s. 190B(6) requires me to turn my mind to the definition of the phrase 'native title rights and interests' at s. 223(1), and consider whether those rights and interests claimed are:

i) possessed under traditional laws and customs acknowledged and observed;

ii) rights and interests in relation to land and waters; and

iii) able to be recognised by the common law, that is, have not been extinguished over the whole of the application area.

Of relevance to this third element, I note that the rights and interests claimed at Attachment E of the application are done so pursuant to certain qualifications, namely that the rights and interests are subject to:

- the valid laws of the State of South Australia and the Commonwealth of Australia; and
- the rights (past or present) conferred upon persons pusuant to the laws of the Commonwealth and the laws of the State of South Australia.

In addition to this, the claim to an exclusive right of possession is only claimed where exclusive possession can be recognised. Subsequently, I am satisfied that the rights and interests claimed are able to be recognised by the common law. The application area has been described so as to exclude any areas in which native title rights and interests have been extinguished – see Attachment B1 at [6].

Exclusive rights

The Wilyakali native title claim group claim, over those areas where it can be recognised, the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world. I note that where there is sufficient factual basis material to support an assertion that this right exists, a right to exclusive possession can be established – see for example *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) at [51].

In considering the nature and content of a right to exclusive possession, the High Court in *Ward HC* held that:

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

Similarly in *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*), the Court held that:

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

In my consideration of the material pertaining to an asserted right of exclusive possession, I note that the focus of this consideration is not on whether the right claimed can be identified as a usufructary or proprietary right, but rather what the evidence discloses about the content of that

right under traditional law and custom – *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [71].

Attachment F contains relatively little material that speaks directly to a right to exclusive possession as possessed under the traditional laws and customs of the Wilyakali. The material asserts that Wilyakali ancestors are recognised as 'owning' country, and there is also an indication by a claim group member that the Wilyakali speak specifically for the part of the mythological story about the Bronzewing Pigeon that concerns the land within their boundaries – see p. 9, and p. 17 to 18.

While I note that the Wilyakali identify as being part of the wider Paakantji language group, in my view there is nothing within the material that suggests that the Wilyakali exercised distinct and exclusive rights to possession of the application area as separate to the Paarkantji. There is one statement by a claim group member that speaks of the need for non-Wilyakali to seek permission to access the land and waters of the application area, however in my view it does not show how the group may effectively 'exclude from their country people not of their community', nor does it show that the claimants act as 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – see *Griffiths* at [127]. There is nothing indicating the Wilyakali have any authority to impose sanctions or penalties where a non-Wilyakali person fails to seek permission to access the application area. The statement on its own, in my view, is insufficient in describing the content of the right pursuant to traditional law and custom.

For these reasons, I consider that the right to exclusive possession is not, prima facie, established.

Non-exclusive rights

<u>Right to access and move about the application area</u>

There is various material that speaks to the claimants and their predecessors accessing and moving about the application area. This is described in records made by early settlers in the area who observed the natural course of Indigenous migration within the area, as shown by cave drawings, camp fire remains and other signs of occupation – see p. 3. I note that these persons are asserted by the report to be the predecessors of the Wilyakali claim group, living according to Wilyakali traditional laws and customs – see p. 1.

In addition to this information, there are also statements made by claimants indicating that access to and travel across the application area is frequently undertaken, and mirrors patterns of occupation of the claim group's predecessors. The following statement is an example:

> Every school holidays, Dad would come pick us boys up from Broken Hill and take us shearing with him. My job was to open the fences. He worked all along those stations, around Mannahill, Olary, Yunta all the way down to Orroroo – at p. 24.

A number of other statements within the report by claim group members indicate that it was common for their predecessors to take them camping at locations within the application area, and that visiting the application area continues to be an important aspect of maintaining claimants' spiritual connection to their country – see for example p. 10 to 11, 22 and 24.

I am therefore of the view that a right to access and move about the application area is, prima facie established, and is a right held pursuant to Wilyakali traditional laws and customs.

<u>Right to hunt on the application area</u>

Material pertaining to a right possessed by the Wilyakali native title claim group to hunt on the application area includes statements made by claim group members regarding the way in which they hunt today that indicate that this mirrors the ways in which their predecessors taught them and passed down to them. Subsequently, the right to hunt on the application area is suggested to be in accordance with Wilyakali traditional law and custom. An example of such a statement is:

> We still live traditional ways as well. We can go out and hunt and gather and get our own food and cook the traditional way. We still cook... we still hunt in the traditional way for emu, goanna, porcupine and kangaroos, witchetty grub and snakes... my fridge is full of kangaroo and emu... we cook damper, johnny cakes... cook in the traditional way in the ground and in the ashes – at p. 25.

Similarly, the records summarised within the report relating to observations made by early settlers at cattle stations within the application area indicate that the Indigenous groups living in the area at the time tended to rely on traditional methods of hunting and fishing to source the food they needed. For example, I. P. Hall of Boolcoomatta station wrote in 1858:

> [T]hey prefer getting their own living by fishing and hunting and only trouble the stations in the winter – at p. 22.

In my view this material is sufficient in allowing me to consider that, prima facie, the right to hunt can be established.

<u>Right to fish on the application area</u>

I note that there is little information pertaining to the claimants and their predecessors possessing under their traditional laws and customs a right to fish on the application area. While the owner of Boolcoomatta station made an observation that the Indigenous occupants of the application area relied on fishing as a food source (see excerpt above from p. 22), there is nothing else informing the nature of this right pursuant to traditional Wilyakali law and custom.

Despite this, having formed the view that a right to hunt on the application area, and a right to gather and use the natural resources of the area (see below) are, prima facie, established, I do not consider that the right to fish is of any particularly distinct or different character to these rights so as to prevent me from reaching the same view that the material indirectly supports that such a right exists under Wilyakali traditional law and custom. The application area clearly includes waterways by which the predecessors of the claimants are recorded as having lived and camped – see for example p. 3. In my view it is therefore able to be inferred that they relied on the food resources available in those waterways for sustenance.

Subsequently, I consider that the right to fish is prima facie, established.

<u>Right to gather and use the natural resources of the application area</u>

Material pertaining to a right to gather and use the natural resources of the application area includes statements by claim group members demonstrating the way in which knowledge regarding the collection of such native products has been passed down to them, and also information from records of station owners in early European settlement times where the Indigenous persons of the area are observed to rely on such products in order to support their diet.

An example of the former, a statement by an elderly claimant, is as follows:

> My father used to tell me what plants I could collect and what plants I should stay away from. He would say "don't eat it, it will make you sick. We used to collect wild oranges, wild bananas and quandongs out in the bush and eat them. We still go out and pick them. The wild onions are found in the creek beds. When we were kids and we still do that today – at p. 23.

An example of a latter statement is by I. P. Hall of Boolcoomatta station:

> They had been right away from the white fellows and living on seeds and vegetables. Their traditional hunting grounds are scarce – at p. 21.

In my view, this material is sufficient in establishing, prima facie, that the right to gather and use the natural resources of the application area exists, and that it is a right pursuant to the traditional laws and customs of the Wilyakali, as held by the claimants' predecessors.

<u>Right to use the natural water resources on the application area</u>

The report fails to speak specifically to a right currently exercised by the claimants, to use the natural water resources of the application area, despite the inclusion of the right within the list at Attachment E.

I note, however, that there are various references throughout the report that speak to or indicate that the right exists under traditional Wilyakali laws and customs. For example, p. 3 of the report discusses research undertaken by Mawson and Hossfield in 1926 who found that 'the geographic features of the granite hills area provided sufficient water resources through semi-permanent springs and rockholes' which they assert would have supported ongoing Aboriginal occupation. Similarly, the Darling River is referred to as a key feature of the landscape of the application area – see for example p. 6. The material demonstrates that predecessors of the claimants interviewed by early researchers in the area used creeks and waterholes as landmarks by which their territory could be identified – see for example p. 5. Waterholes and creeks were also given Wilyakali names – see p. 8.

Having considered that the right to fish, and the right to use the natural resources of the area are both, prima facie, established, I am of the view that the nature of the current right is not of any significant dissimilarity so that it cannot be inferred from the above information that the claimants possess a right to use the natural water resources of the application area, pursuant to their traditional laws and customs.

I am therefore of the view that the right is, prima facie, established.

<u>Right to live, to camp and to erect shelters on the application area</u>

A number of statements within the application speak to claim group members spending considerable amounts of time camping with their parents, grandparents and other family members on the application area. The following statement is an example of this:

> We used to go out camping all the time, that's where we mainly grew up, on country. My mother showed me how to cook out there. I had five brothers, two are still living, and they used to go out with my father. They killed kangaroos, emus and would bring them back for us – at p. 24.

While the material does not speak specifically to claimants erecting structures on the application area, I have formed the view that the material infers that such activity would have occurred to protect those persons from the elements.

The report also contains records made by early settlers of the claimants' predecessors camping on and occupying the application area – see for example p. 2 to 5. Having considered that a right to access and move about the application area is, prima facie, established, I am of the view that the right to live, camp and to erect shelters on the application area is of a similar nature, and that the material is sufficient to support an assertion that this right exists.

The material indicating that the claimants' predecessors at the time of European settlement also occupied the application area in this way, in my view suggests that it is a right held pursuant to Wilyakali traditional law and custom.

<u>Right to cook on the application area and to light fires for all purposes other than the clearance of vegetation</u>

There is various information within the material pertaining to a right held by the Wilyakali to cook on the application area, and to light fires. The traditional method of cooking is spoken of a number of times, including in the following statement by an elderly claim group member:

> When I was a young girl we cooked on camp fires and I have seen my father and brothers cooking in the ground in the coals. They used to feed a big family. The men used to go out and get the wood. My mum and sisters would prepare the vegetables. They would cook the vegetables inside the kangaroo all together. We still do it now in the way my dad did it. My children and grandchildren go out hunting mainly kangaroo and emu. We used to get porcupine as well – at p. 25.

Additionally, a researcher working in the area in the 1980s stated: 'Ground ovens are used to cook emu or kangaroo for large groups in exactly the same way as described by early ethnographers' – at p. 26.

Clearly, the use of ground ovens and coals indicates that claimants light fires for this purpose. There is also an indication that camp fires, such as for warmth and light, were also used by the claimants predecessors - see for example p. 3.

I am of the view that this information is sufficient factual basis to allow me to consider that the right held by the Wilyakali to cook on the application area, and to light fires for all purposes other than vegetation clearance is, prima facie, established.

<u>Right to share or exchange subsistence resources or other traditional resources obtained from the application area</u>

The material contains various references to the claimants sharing certain resources obtained from the application area with their family members and wider community. An example of such a statement by a claim group member is as follows:

> My sons and grandsons go hunting all the time. When they come back with kangaroo or emu they take the meat around to certain older members of our family. Young people have to address their elders in certain ways and do chores for them like bringing firewood because that's how they've been taught – at p. 26.

This statement suggests that sharing resources is connected to the relationships between claim group members. One of the researchers in the area referenced in the report described the way in which these obligations are tied to the kinship system underlying the Wilyakali traditional laws and customs.

[*text removed*]

From this information, I have formed the view that the right to share and exchange resources from the application area is, prima facie, established, and that it is a right held pursuant to the kinship system under the traditional laws and customs of the Wilyakali.

<u>Right to engage and participate in cultural activities and conduct traditional pursuits on the application area</u>

The material within the report presented specifically for the purposes of supporting this right includes information relating to the practice (pursuant to Wilyakali traditional laws and customs), of senior Wilyakali persons passing on knowledge of country to younger Wilyakali generations. As explained below, I am of the view that this specific right to teach on the application area the physical and spiritual attributes of places within the application is, prima facie, established.

I do not, however, find that there is any material within any part of the application that speaks to a right beyond this, to engage and participate in cultural activities and conduct traditional pursuits on the application area. There is no information regarding the nature and character of such cultural activities or traditional pursuits pursuant to Wilyakali laws and customs, such that I am unable to consider that a right to undertake such activities is, prima facie, established.

The right is not therefore, prima facie, established.

<u>Right to teach on the application area the physical and spiritual attributes of locations and sites within the application area</u>

I note that in my reasons at s. 190B(5)(b), I was able to be satisfied that the factual basis was sufficient to support a system of law and custom that involved a clear element of the intergenerational transfer of knowledge. The relevant material pertained to claim group members having memories of their predecessors passing such knowledge regarding country and the use of resources on country onto them. Claimants also stated that they continue to pass this knowledge on to their children and children's children – see for example p. 28.

[*text removed*]

Statements within the report (such as at p. 12) indicate that the passing on of knowledge about country is an accepted and common practice, and even understood by some claimants as an obligation under their laws and customs.

In my view, this material is sufficient in establishing, prima facie, that such a right exists pursuant to Wilyakali traditional law and custom.

<u>Right to maintain and protect sites and places of significance under traditional laws and customs on the application area</u>

The material pertaining specifically to this right is relatively brief, and includes a statement by a claim group member regarding important places within the application area that have restrictions associated with visiting or using such places. The claim group member states:

> We have a lot of important areas. Some of those areas are only for men and some only for women. You don't need to be told where you can and cannot go, you feel it... – at p. 29.

Adherence to these restrictions is asserted as coming not only from knowledge of their existence, but also an inner spiritual understanding that claimants should not be visiting these locations – at p. 29.

In addition to this, the report at Attachment F also speaks of the attempts by the Paakantji people in the mid 1990s to have the Pinnacles site, near Broken Hill, protected – see p. 18. While I note that this site is not specifically within the application area, it is asserted to be within the wider Wilyakali traditional country (see for example p. 1) and in my view, demonstrates that claimants have previously asserted a right to protect places considered important pursuant to their traditional laws and customs.

In turning my mind to the above information, I am of the view that such material supports an assertion that the Wilyakali seek to have protected those sites and places considered significant under their traditional laws and customs.

Subsequently, I am of the view that the right to maintain and protect sites and places of significance under traditional laws and customs is prima facie, established.

Right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice

There is no material that speaks specifically to any activity or practice conducted by the claimants or their predecessors for the purposes of protecting the features of the landscape of the application area described in the right above. Similarly there is nothing before me that suggests or allows for an inference to be made, that the claimants or their predecessors have sought to maintain and protect such features at any time, or that this conduct is in accordance with Wilyakali traditional law and custom.

As a result, I do not consider that a right as described above is prima facie, established.

Right to be accompanied on to the application area by non-members of the claim group

The right as framed in Attachment E is followed by a further description of those non-members of the claim group considered to be covered by the recognition of this right. The description at Attachment E provides that such persons may be:

i) spouses of the native title claim group;

ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the application area;

iii) people required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.

There is no material within the application that directly speaks to the right of claim group members to be accompanied onto the application area by non-members, or that speaks specifically of the categories of persons referred to above coming onto the application area. While there is some indication that intermarriage between Wilyakali and other groups has occurred, suggesting that non-members do in fact access and visit the application area with their spouses, in my view, the material before me is insufficient.

I therefore do not consider that the right to be accompanied onto the application area by non-members of the claim group is, prima facie, established, nor do I consider that it is a right held pursuant to traditional Wilyakali law and custom.

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).

In consideration of the task at s. 190B(7), Dowsett J in *Gudjala 2007* (not criticised by the Full Court on appeal) commented:

> The delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant physical connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta... – at [89].

In the case of *Yorta Yorta*, the High Court suggested that actual presence on the land and waters of the application area may be necessary to meet the requirement of a 'traditional physical connection' – at [184]. Similarly, the Explanatory Memorandum to the *Native Title Amendment Bill 1997* described the connection in s. 190B(7) as 'more than a transitory access or intermittent non-native title access'.

Mansfield J in *Doepel* also examined the delegate's role at s. 190B(7), finding that the focus was confined and did not require any consideration as to whether the asserted traditional laws and customs by which the connection is held in fact exist. His Honour found that the condition required 'some measure of substantive (as distinct from procedural) quality control upon the application' – at [18].

The applicant's factual basis material – s. 190B(7)

Schedule M of the application refers to Attachment F as containing information pertaining to the traditional physical connection held by at least one claim group member to the land and waters of the application area.

In my consideration of this material, I have focussed on the information pertaining to one claim group member in particular, as the minimum requirement of the test at s. 190B(7).

[*Name removed*] is approximately 80 years of age and is the eldest granddaughter of apical ancestor Crancey. There are a number of statements made by [*name removed*] throughout the material that pertain to her connection to the land and waters of the application area, and the ways in which such a connection could be considered to be in accordance with the traditional laws and customs of the Wilyakali (discussed in full in my reasons above at s. 190B(5)(b)).

These statements include the following:

> [*text removed*]
>
> We used to go out camping all the time, that's where we mainly grew up, on country. My mother showed me how to cook out there. I had five brothers, two are still living, and they used to go out there with my father. They killed kangaroos, emus and would bring them back for us – at p. 24.

And also:

> When I was a young girl we cooked on camp fires and I have seen my father and brothers cooking in the ground in the coals. They used to feed a big family. The men used to go out and get the wood. My mum and sisters would prepare the vegetables. They would cook the vegetables inside the kangaroo all together. We still do it now in the way my mum and dad did it. My children and grandchildren go out hunting mainly kangaroo and emu. We used to get porcupine as well – at p. 25.

And finally:

> My father used to tell me what plants I could collect and what plants I should stay away from. He would say "don't eat it, it will make you sick. We used to collect wild oranges, wild bananas and quandongs out in the bush and eat them. We still go out and pick them. The wild onions are found in the creek beds. When we were kids and we still do that today – at p. 23.

In my view, these statements go towards a physical connection held by the claim group member with the land and waters of the application area. [*Name removed*] clearly spent a considerable amount of time on the application area camping as a child, and continues to access and spend time on the application area, carrying out similar activities to those she undertook as a young child with her parents. These activities include gathering natural resources such as native flora, preparing and cooking animals hunted by her family members in underground coal ovens on the application area, and painting stories regarding the spiritual relationship between the Wilyakali people and their country.

Here I refer to my reasons at s. 190B(6) above, where I was of the view that the following native title rights and interests were prima facie established in the material before me:

- The right to access and move about the application area;
- The right to hunt on the application area;
- The right to gather and use the natural resources of the application area;
- The right to live, to camp and to erect shelters on the application area;
- The right to cook on the application area and light fires for all other purposes other than the clearance of vegetation; and
- The right to teach on the application area the physical and spiritual attributes of locations within the application area.

I note that in reaching this view at s. 190B(6), as discussed in my reasons at that condition, it flows that I was able to consider that these rights and interests were prima facie established as native

title rights and interests with reference to the definition of that term at s. 223(1), and subsequently that they were rights and interests possessed under the traditional laws and customs acknowledged and observed by the native title claim group.

Similarly, in my reasons at s. 190B(5)(b) examining the nature of the system of traditional laws and customs of the Wilyakali, I note that there were a number of key elements of that system asserted by the material. These elements include the fact that it is a system transferred to younger generations verbally, by the transfer of knowledge, and that it is a system founded on a strong kinship system, passed through means of biological descent. The factual basis also asserted that claimants had a spiritual connection to the application area due to a recognition that their ancestors occupied and owned the lands and waters of the application area. Wilyakali identity is asserted in the factual basis as being inherently tied to a recognition of an individual's descent from known named apical ancestors – see for example p. 9.

In light of these assertions, regarding whether the claim group member's connection with the application area as asserted is traditional, it is clear that [*name removed*] was taught various cultural knowledge relating to the application area by older generations as a child, and that she continues to pass this knowledge on. It is also clear that [*name removed*] has an understanding of the landscape that is spiritual in nature and that she seeks to express this through artwork. The above statements indicate that [*name removed*] has, and continues to gather natural products from the application area, in accordance with methods and techniques taught to her by her father. Similarly, the material indicates that [*name removed*] continues to prepare and cook food on the application area in the way that she was shown by her parents as a child. In my view, these activities are all carried out pursuant to and in accordance with the system of traditional laws and customs referred to above and in my reasons at s. 190B(5)(b).

For this reason, I am satisfied that the physical connection of the claim group member with the application area asserted in the material is traditional in character, held in accordance with the traditional laws and customs of the Wilyakali.

The application meets the condition at s. 190B(7).

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If :
> (a) a previous exclusive possession act (see s. 23B) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment provides that there are no determinations of native title that fall within the external boundary of the application area.

Reasons for s. 61A(2)

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

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

Attachment B1 of the application contains a list of general exclusion clauses, that is, areas not covered by the application. Paragraph [1] states that the application area does not include any land or waters that is or has been covered by various tenure leases and interests, including 'a "previous exclusive possession act" as defined in s. 23B of the *Native Title Act 1993* (Cwlth)'.

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).

Also contained within the list of exclusions referred to above, is the following statement: 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State of South Australia'.

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

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

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

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

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

Schedule Q of the application states that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

Schedule P of the application provides that the claim group does not claim exclusive possession over all or part of waters in an offshore place within the application area.

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

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

Attachment B1 of the application, which lists those areas within the boundaries of the application area that are excluded from the application, includes at paragraph [6], land or waters where the native title rights and interests have been otherwise extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	Wilyakali
NNTT file no.	SC12/1
Federal Court of Australia file no.	SAD33/2012
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)		Met
	s. 190C(4)(b)		NA

Section 190B conditions

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

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

[End of document]