Registration test decision

Application name	Wiluna #3
Name of applicant	Victor Ashwin and Kelman James Patch
State/territory/region	Western Australia
NNTT file no.	WC12/7
Federal Court of Australia file no.	WAD181/12
Date application made	3 August 2012
Name of delegate	Liam Harding

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

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

For the purposes of s. 190D(3), my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s. 190B because of a failure to satisfy s. 190C.

Date of decision: 27 November 2012

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Liam Harding

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 12 October 2012 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The application was filed in the Federal Court of Australia (the Court) on 3 August 2012 and the Court gave a copy of the application to the Native Title Registrar (the Registrar) on 7 August 2012 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 3 August 2012 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

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

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

The documents that I have considered in reaching my decision are as follows:

- Form 1, filed on 3 August 2012
- Affidavit of Victor Ashwin, dated 31 July 2012
- Affidavit of Kelman James Patch, dated 31 July 2012
- Geospatial Services Unit assessment and overlap analysis, dated 16 August 2012

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].

On 8 August 2012 the Tribunal wrote to Central Desert Native Title Services (CDNTS), the legal representative for the applicant, to advise that the registration test would be applied to the application. CDNTS was advised that if the applicant wished to provide any additional material it should be provided to the Registrar by 7 September 2012. The Registrar has not recieved any additional material from the applicant or their legal representative.

On 8 August 2012 the Tribunal provided a copy of the application and other documents received from the Court to the State of Western Australia (the State). The State was advised that if it wished to make a submission in relation to the registration test, it should be provided to the Registrar by 7 September 2012. The State has not made any submissions to the Registrar in relation to the registration of the claim.

Procedural and other conditions: s. 190C

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

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

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

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

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

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).

I have considered whether the application sets out the native title claim group in the terms required by s. 61(1). I note that if the description of the group in the application indicated that not all persons in the native title claim group were included, or that it was in fact a subgroup of the

native title claim group, then the requirements of s. 61(1) under s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

Schedule A of the claim provides a description of the native title claim group, which is set out below under s. 190B(3). Having regard to this description and the other information in the application, there is nothing on the face of it that causes me to conclude that the requirements of this section are not met, bearing in mind that my consideration of it is limited by the task set in 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 details of the names of the persons who comprise the applicant and their address for service are noted in Part B of the application.

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

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

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

While I must ensure that this information is contained in the application, I do not need to be satisfied of the correctness of that information — *Doepel* at [37] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34]. Thus, I am not required to ascertain whether the description operates 'effectively to describe the claim group', but I do have to consider whether there is the appearance of a description which meets the requirements of the Act —*Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [32].

The application at Schedule A does not name the persons in the native title claim group but contains a description of the persons in the group.

Affidavits in prescribed form: s. 62(1)(a)

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application is accompanied by the affidavit required by s. 62(1)(a).

I note that the affidavits are in the prescribed form and are from each of the persons who jointly comprise the applicant.

It is clear that the affidavits each address the matters required by s. 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).

This information is contained in Schedule B of the application.

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

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

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

A map of the external boundaries of the area is contained in Attachment C of the application.

Searches: s. 62(2)(c)

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

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

The application states no searches have been undertaken, either by the applicant or on their behalf.

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

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

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

The native title rights and interests have been described in Schedule E of the application.

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

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

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

As noted earlier, *Doepel* is clear authority that my task here is to determine if the application contains the requisite details and is not to undertake any merit or qualititative assessment of that information. Schedule F provides a description that does more than recite the particular assertions and in my view meets the requirements of a general description of the factual basis for the assertions identified in this section.

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 describes the activities currently carried out by the native title claim group.

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 provides the details of one application — WAD6164/98 Wilma Freddy & Ors on behalf the the Wiluna Native Title Claim Group v Western Australia & Ors.

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 indicates that the applicant is not aware of any notification under s. 24MD(6B)(c).

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).

Attachment I contains the details of s. 29 notices of which the applicant is aware.

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 **does not satisfy** the condition of s. 190C(3).

The first task is to identify whether there are any previously registered applications of the kind discussed in subparagraphs 190C(3)(b) and (c) overlapping some or all of the area covered by the current application at the time it was made. The second task, if there are any previously registered applications, is to consider whether I am satisfied that there are no claim group members in common.

For the first task, I have a report prepared by the Tribunal's Geospatial Services Unit on 16 August 2012 (the geospatial report) showing that there is an application which overlaps the current application. I have undertaken a search of the Register of Native Title Claims (Register) and see that this application was entered on the Register as a result of having been accepted for registration before the current application was made. The details of the overlap analysis and my searches of the Register appear below:

Overlapping Native Title Determination Application (NTDA)	Register entry (registration test details)	NTDA Area (sq km)	Overlap Area (sq km)	% NTDA overlaps current application	% current application overlaps NTDA
WAD6164/98 - Wiluna	24/09/1999 (accepted for registration)	47595.86	3596.52	7.56	100

The overlapping application thus satisfies all three criteria in ss. 190C(3)(a) to (c) and is a previously registered application to which s. 190C(3) applies. I must therefore embark on the second task and consider whether I am satisfied that there are no claim group members in common with the current application.

I note that the applicant has, by their statement in Schedule O, acknowledged that all of the members of the native claim group for this application are members of the registered WAD6164/98 Wiluna claim. By examining both the information in the application and the register extract for the WAD6164/98 Wiluna claim it is also apparent to me that Victor Ashwin and Kelman James Patch (the persons who comprise the applicant for this application) are named as members of the WAD6164/98 Wiluna claim.

Based on the information before me, I am not 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 any previous application and the requirements of this section are not met.

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> 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 the one representative Aboriginal/Torres Strait Islander body that could certify the application. This is the Central Desert Native Title Services (CDNTS) and a copy of its signed certification is provided in Attachment R of the application.

In my view the certification by the CDNTS complies with the requirements of s. 203BE(4) for the following reasons:

(a) It contains the statements required by s. 203BE(4)(a), namely, it holds the two opinions expressed in s. 203BE(2)(a) and (b).
(b) It briefly sets out the reasons for the body being of those opinions, as required by s. 203BE(4)(b).
(c) The certification states that because the application is wholly overlapped by the WAD6164/98 Wiluna claim and all members of the native title claim group are members of the WAD6164/98 Wiluna claim no attempt has been made to resolve the overlap between the two claims. However, it is my view that this does not invalidate the certification. Section 203BE(3) makes it clear that a failure by the representative body to comply with this does not invalidate a certification.

It is clear that s. 190C(4)(a) does not empower me to 'look behind', or to question the merits of, the representative body's certification—see *Doepel* at [80] to [81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31] to [32]. My task at s. 190C(4)(a) is merely to ensure that the certification meets the requirements for a valid certification under s. 203BE(4); it is not to consider whether I am satisfied that the applicant is, in fact, authorised.

For the reasons above it is my view that the certification in Attachment R complies with s. 203BE(4) and it follows that I am satisfied that the application has been certified under Part 11 by the one representative Aboriginal/Torres Strait Islander body that could certify the application, thereby meeting the requirements of s. 190C(4).

Merit conditions: s. 190B

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

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

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

In Schedule B, Part A. 7 of the application, the area covered is described as follows:

> The boundaries of the application area covers all the land and waters within Pastoral Lease K601976 (known as the Windidda Pastoral Lease)'.

This area is said to fall within the boundaries of the Shire of Wiluna.

Schedule C of the application refers to Attachment C, which contains an A3 map produced by the Tribunal's Geospatial Services Unit on the 25th July 2012, and includes:

- the application area depicted as a bold dark blue line;
- cadastral parcels shown and labelled;
- raster topographic background showing labelled features;
- scalebar, northpoint, legend, coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

Considering the identification of the external boundary location and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described comprehensively, so that the location of it on the earth's surface can be identified with reasonable certainty.

Schedule B, Part C. 10 of the application describes a number of general exclusions. This description uses references to areas where, for example, various categories of past or intermediate period acts (as those terms are defined in the Act) have occurred, or areas where native title has been extinguished.[1] The effect of the use of these references is to create a formula for identifying areas which are not covered by the application. The certainty of this approach relies on the fact that while the tenure information may not be known by the applicant at the time the application is made, it is a source of information which when known can be applied to definitively identify the area. I note that the use of such an approach may be considered sufficient for the purposes of s. 190B(2) in circumstances where the applicant does not have the tenure information required to otherwise describe areas to be excluded—see *Daniel v Western Australia* [1999] FCA 686. On the basis of the information in Schedule B, I am satisfied that it is appropriate to consider the general description as sufficient.

[1] The applicant has however sought the benefit of the provisions in s. 47 in relation to the claim area — Schedule B, Part B. 9.

The geospatial report provides an assessment that the description and map are consistent and identify the application area with reasonable certainty. For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters, and the requirements of s. 190B(2) are therefore met.

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

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

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

The description in Schedule A does not name all the members of the claim group, so the task before me is to ascertain if that description satisfies the condition of s. 190B(3)(b). This task is a relatively narrow one which does not involve determining whether the description is correct or not. As Dowsett J explained in *Gudjala 2007*, 'subs 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification'—at [33].

The claim group is described in Schedule A as follows:

> The Native Title Holders are persons who are:
> (a) the descendants of the union of the following people;
> (i) Milpuntu/Jack Abbott and Puku/Amy Abbott;
> (ii) Warilki Anderson and Tjungtawa/Skinny Fannie/Bunnie Stevens;
> (iii) Maitungkata/Paddy Anderson and Kiliya/Amy Anderson;
> (iv) Yingkali Manara/Mickey Ingle and Kurutjuli/Miriam;
> (v) Peter Gogo and Lady Gogo;
> (vi) Ngalama/Old Paul Morgan and Wangu;
> (vii) Lenny Morrison and Fannie Jones/Stevens;
> (viii) Anthony Jones and Mau Jones;
> (ix) Charlie Riley and Biddy Riley;
> (x) Muddy Patch and Marlala Nanji;
> (xi) Kurril/Scotty/Ted/Packhorse Rennie Tullock and Daisy Garland;
> (xii) Piparntjukurr and Kiri/Keri Muru;
> (xiii) Wuli/Jimmy Wongawol and Lily Munda;
> (xiv) Nyarraur/Cutline/Ben Brown and Amy Jackman/Brown;
> (xv) Nanyi-Nanyi/Mr P/Billy Patch and Rosalie Anderson/Patterson; and
> (xvi) Wukukutjara and Yayangarta.
>
> (b) the descendents of the following people:
> (i) Cyril Bingham;
> (ii) Munga/Margaret Long;
> (iii) Tauwi/Miriam Stewart;
> (iv) Mimpu/Willy Williams;
> (v) Ningara Martin;

(vi) Mirta-Mirta/Andy Campbell;
(vii) Kutulan/Hitler Richards;
(viii) Lorna Redman/Stewart;
(ix) Nyunyi/Maudie Jackman;
(x) Ngalyakarnpal/Barbara Anderson;
(xi) Rosy Grant;
(xii) Alfie Ashwin;
(xiii) Gladys Bingham;
(xiv) Christine Bingham;
(xv) James Harris;
(xvi) Winya/Minnie;
(xvii) Yungkutjuru/Kitty Hill;
(xviii) Tulkiwa/Jeanie Elliott;
(xix) Molly Long;
(xx) Mitjipung/Sandy/Santa Clause;
(xxi) Kanturangu/Frank Narrier;
(xxii) Yarltat/Joe Finch;
(xxiii) Pangka Wongawol/Riley;
(xxiv) Saxon/Jackson Stevens;
(xxv) Yupun;
(xxvi) Tjiriltjukul;
(xxvii) Yutunga/Udunga Kianga;
(xxviii) Yinyiyapa/Ruby Jackson/Parker;
(xxix) Wungkajtu/George Wongajoe;
(xxx) Molly Anderson;
(xxxi) Eddieman/Edmund/Eddie Redman; and
(xxxii) Minnie Wongawol.

(c) the following people and the descendants of their union with the listed deceased partner:
(i) Jimmy Patch (deceased) and Maxine Warren;
(ii) Yalyalyi/Jack Stevens (deceased) and Tilly Gogo/Stevens;
(iii) Tjupi-Tjupi/Peter Stewart (deceased) and Tjilpi/Greta Long; and
(iv) Yatjuwunga/Peter (deceased) and Katjipil/Daisy Kaddabil.

(d) the following people and their descendants:
(i) Firestick/Barry Abbott;
(ii) Nyapala Morgan;
(iii) Wendy Redman/Abbott;
(iv) Nyulkul-Nyulkul/Dusty Stevens;
(v) Creamy Allison; and
(vi) Monty Allison.

(e) the following people:
(i) Matuwa/Norman Thompson.

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3). In *State of Western Australia v Native Title Registrar* at [64], Carr J considered a claim group described as:

1. the biological descendants of the unions between certain named people;

2. persons adopted by the named people and by the biological descendants of the named people; and

3. the biological descendants of the adopted people referred to in paragraph 2 above.

His Honour referred to this method of identification as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. **It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently.** It is more likely to result from the effects of the passage of time and the movement of people from one place to another —at [67] (emphasis added)

I note that in paragraphs (c)-(e) of Schedule A some members of the claim group are specifically named, and that in paragraphs (a)-(e) membership of the claim group is described by reference to the fact of descent from named persons. The description of members of the native title claim group, by reference to their descent from specified ancestors, will necessitate a further factual inquiry to establish if any particular person is in the group. It is however my view that such a description is clearly within the bounds of the 'Three Rules' test discussed above.

It follows that I am satisfied that the description of the native title claim group is sufficiently clear so that it can be ascertained whether any particular person is in the group.

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

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

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

Section 190B(4) requires me to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition only the description contained in the application can be considered—*Doepel* at [16].

The description referred to in s. 190B(4) must be:

> [A] description of the native title rights and interests claimed in relation to particular land or 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: s. 62(2)(d).

For a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be established prima facie as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act. For my consideration of the claim against s. 190B(4), I am focusing only on whether the rights and interests as claimed are 'readily identifiable' in the sense of being intelligible and able to be understood.

The claimed native title rights and interests are set out in Schedule E of the application.

It is my view that the description of the claimed native title rights and interests is clear, understandable and makes sense. I am therefore satisfied that the requirements of this section are met.

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

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

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

The Registrar's task at s. 190B(5)

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

The Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) agreed with this assessment—at [83], and also held that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. The Full Court did say however that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala FC* at [92].

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

- The applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92].
- The nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92].

- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- The Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at ss. 190B(5)(a) to (c)—*Doepel* at [17].

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

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

The information considered

The general description of the factual basis is found at Schedules F, G and M. In my view, these schedules consist of largely general assertions in relation to the application area and the statements made in them do not appear to contain any information of any specificity to the native title claim group. I note in Schedule F the following assertions of fact are made:

(a) The native title claim group and their ancestors have, since the assertion of British sovereignty, possessed, occupied, used and enjoyed the area covered by this application;

(b) Such possession, occupation, use and enjoyment has been pursuant to and possessed under the traditional laws and customs of the native title claim group including traditional laws and customs of rights and interests in land and water vesting in members of the native title claim group on the basis of:
  (i) Descent from ancestors;
  (ii) Conception in the area;
  (iii) Birth in the area;
  (iv) Traditional religious knowledge of the area covered by this application;
  (v) Traditional knowledge of the geography of the area covered by this application;
  (vi) Traditional knowledge of the resources of the area covered by this application;
  (vii) Knowledge of traditional ceremonies of the area covered by this application;

(c) Such traditional laws and customs have been passed by traditional teaching through the generations preceding the present generations to the present generations of persons comprising the native title claim group;

(d) The native title claim group continues to acknowledge and observe those traditional laws and customs;

(e) The native title claim group by those laws and customs have a connection with the area covered by this application; and

(f) The rights and interests are capable of being recognised by the common law of Australia.

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

Schedule G provides a general list of activities carried out by the native title claim group. Schedule M provides some general information to the effect that many members of the native title claim group live permanently in communities located on the area covered by the application and regularly hunt in, travel through, camp and live on this area.

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

On this aspect of the factual basis, not criticised by the Full Court in *Gudjala FC*, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala [2007]* at [52] and *Gudjala FC* at [90] to [96].

The material states that the claimants and their ancestors have, since the assertion of sovereignty, possessed, occupied, used and enjoyed the application area and that their right to use the land in these ways arises from the traditional laws and customs of the native title claim group. It is claimed that the particular activities identified in Schedule G flow from the day to day conduct of the lives of claim group members.

At best, the above statements and assertions provide a very limited factual basis in support of the assertion that the group's predecessors had an association with the area. For instance, it provides no details or facts in relation to those predecessors, other than the inferential assertion that the ancestors of the group enjoyed rights in relation to the land both before and following British sovereignty.

Schedule G of the application outlines a number of activities that are currently being carried out by the claim group, including camping, hunting, and caring for the land and waters. While that material provides some of the factual basis pertaining to the assertion that the native title claim group have an association with the area, it is, in my view, insufficient for the purpose of s. 190B(5)(a).

In *Martin v Native Title Registrar* [2001] FCA 16, French J (as his Honour was then) held, in regard to the requirement at s. 190B(5)(a), that the delegate was not obliged to accept 'very broad statements' that did not demonstrate an association with the entire application area and which lacked any 'geographical particularity'—at [26].

It is my view that the material within the application provides no information of any specificity pertaining to the claim group's continuing association with the application area since sovereignty.

I am not satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(a).

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

In *Gudjala [2007]*, Dowsett J recognised the importance of understanding the meaning attributed to 'native title' pursuant to s. 223 of the Act, in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c))—*Gudjala [2007]* at [26], where Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta*

Yorta Aboriginal Community v Victoria (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*). Again, this aspect of the decision of Dowsett J was not criticised by the Full Court—see *Gudjala FC* at [90] to [96].

Dowsett J's examination of *Yorta Yorta* led him to form the view that a necessary element of this aspect of the factual basis is the identification of the relevant Indigenous society at the time of sovereignty or, at the very least, the time of first contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary to provide a factual basis sufficient to support an assertion that the 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty' can be demonstrated—*Gudjala [2007]* at [26], [66] and [81].

The claimant's factual basis in support of this assertion, in my view, is limited to references to laws and customs that are asserted to be traditional in nature and provide a basis upon which rights and interests are said to vest in members of the native title claim group. This material does not include a factual basis that identifies the relevant pre-sovereignty Indigenous society, nor does it provide a factual basis pertaining to laws and customs of the claim group at sovereignty or how such laws and customs have been acknowledged and observed by the native title claim group. The assertion is that the laws and customs identified are traditional in nature, however, no factual basis is provided in support of this assertion.

In that regard, Dowsett J in *Gudjala [2009]* considered that the applicant must, at least, provide an outline of the facts pertaining to the traditional laws and customs of the native title claim group. Further, to assert that 'the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society from which the claim group also claims to be descended', in the absence of any factual details relevant to that assertion, is insufficient as it simply restates the claim—at [29].

The factual basis, in my view, must also demonstrate how the traditional laws and customs of the group give rise to the claimed native title rights and interests—*Gudjala [2007]* at [39]. Of course, this need only be in a general sense, as it is the task at s. 190B(6) that requires the weighing of the factual material in support of each right or interest—*Doepel* at [126] and [127]. That said, I must be satisfied that there is a 'proper factual basis' on which it is asserted that the native title rights and interests exist—*Doepel* at [128]. The material within the application does not demonstrate how the asserted traditional laws and customs in Schedule F give rise to the claim for native title rights and interests.

I am not satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(b).

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

I take the view that the assertion in subparagraph s. 190B(5)(c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta* and in Full Court cases thereafter, that the native title claim group has continued to hold its native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—*Yorta Yorta* at [47] and [87].

Gudjala [2007] indicates that this particular assertion may require the following kinds of information:

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

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

Given my conclusion above and observations on the inadequate nature of the claimant's factual basis, it must follow, in my view, that the factual basis is not sufficient to support the assertion in s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

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

Subsection 190B(7)
Traditional physical connection

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

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

It is stated in Schedule M that many members of the native title claim group live permanently in communities located on the area covered by the application. It confirms that activities, such as some of those identified in Schedule G, are carried out by members of the group.

In my view, the information in Schedule M (and elsewhere within the application) lacks the specificity required under this section. For instance, there is no information describing who, within the native title claim group, is said to have or to have previously had a traditional physical connection with the area or any part of it. Mansfield J commented in *Doepel* that 'the focus is upon the relationship of at least one member . . . with some part of the claim area' and requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration'—at [18]. I take this to mean that there must be some specific information which goes to the relevant traditional physical connection of a particular member of the group with the area, as opposed to the very general statements in Schedule M on this topic.

The information within this application does not allow any assessment of whether any particular member of the native title claim group has, or previously had, a requisite traditional physical connection, given there is simply no material included that goes specifically to this issue.

I am also of the view that the phrase 'traditional physical connection' means a physical connection in accordance with the particular traditional laws and customs relevant to the native title claim group, with 'traditional' having the meaning discussed in *Yorta Yorta*.

Dowsett J indicated in *Gudjala [2007]* that an application which fails to satisfy the requirements for a sufficient factual basis under s. 190B(5) will likewise fail this condition due to the requirement for material showing a 'traditional' physical connection. This aspect of the decision was not overturned on appeal by the Full Court. I refer also to these comments by Dowsett J in *Gudjala [2009]* that:

> As to s 190B(7), much may depend upon the meaning of the term "traditional physical connection". I have not been referred to any authority on the point. It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs. For the reasons which I have given, the requirements of that subsection are not satisfied—at [84].

It follows, in my view, that the application must also fail this condition as a result of my decision above at s. 190B(5) that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

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

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

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If :
(a) a previous exclusive possession act (see s. 23B) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
(4) However, subsection(2) and (3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

There are no approved determinations of native title over 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).

Any areas over which there is a previous exclusive possession act and in respect of which s. 47 does not allow extinguishment to be disregarded, have been excluded from the application area: see statements to this effect in Part C. 10 (c) and (d) and Part B. 9 of the application.

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).

The claimed right to exclusive possession is expressed to be subject to the laws of the State and the Commonwealth, including the common law. The right, as it is expressed, does not offend the provisions of s. 61A(3).

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.

The application satisfies s. 190B(9)(a) as Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

The application satisfies s. 190B(9)(b) as it does not extend to offshore places.

The application satisfies s. 190B(9)(c). I have no information to indicate that the native title rights and interests claimed have otherwise been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Wiluna #3**
NNTT file no.	**WC12/7**
Federal Court of Australia file no.	**WAD181/2012**
Date of registration test decision	**27 November 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)			Not met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	s. 190C(4)(b)		N/A

Section 190B conditions

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

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

[End of document}