



# Registration test decision

Application name	Ngurra Kayanta claimant application
Name of applicant	Helicopter Tjungarrayi, Bartholomew Baadjo, Jane Bieundurry, Sandra Brooking, Darren Farmer, Eugene Laurel, Rita Minga, Frances Nanguri and Richard Yugumbarri
State/territory/region	Western Australia
NNTT file no.	WC2012/013
Federal Court of Australia file no.	WAD410/2012
Date application made	21 December 2012
Name of delegate	Nadja Mack

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

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

Date of decision: 21 February 2013

---

Nadja Mack

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

## Table of contents

<b>Introduction.....</b>	<b>3</b>
Application overview .....	3
Registration test.....	3
Information considered when making the decision.....	3
Procedural fairness steps.....	4
Consideration of the requirements of s. 190A(3) .....	4
<b>Procedural and other conditions: s. 190C.....</b>	<b>6</b>
Subsection 190C(2) Information etc. required by ss. 61 and 62 .....	6
Native title claim group: s. 61(1) .....	6
Name and address for service: s. 61(3).....	7
Native title claim group named/described: s. 61(4).....	7
Affidavits in prescribed form: s. 62(1)(a).....	7
Application contains details required by s. 62(2): s. 62(1)(b) .....	7
Information about the boundaries of the area: s. 62(2)(a) .....	8
Map of external boundaries of the area: s. 62(2)(b) .....	8
Searches: s. 62(2)(c) .....	8
Description of native title rights and interests: s. 62(2)(d) .....	8
Activities: s. 62(2)(f) .....	9
Other applications: s. 62(2)(g) .....	9
Section 24MD(6B)(c) notices: s. 62(2)(ga) .....	9
Section 29 notices: s. 62(2)(h).....	9
Subsection 190C(3) No common claimants in previous overlapping applications.....	9
Subsection 190C(4) Authorisation/certification .....	10
<b>Merit conditions: s. 190B .....</b>	<b>13</b>
Subsection 190B(2) Identification of area subject to native title .....	13
Subsection 190B(3) Identification of the native title claim group.....	14
Subsection 190B(4) Native title rights and interests identifiable.....	16
Subsection 190B(5) Factual basis for claimed native title.....	16
Combined result for s. 190B(5).....	26
Subsection 190B(6) Prima facie case .....	26
Subsection 190B(7) Traditional physical connection .....	30
Subsection 190B(8) No failure to comply with s. 61A .....	31
Reasons for s. 61A(1).....	31
Reasons for s. 61A(2).....	32
Reasons for s. 61A(3).....	32
Subsection 190B(9) No extinguishment etc. of claimed native title.....	32
Reasons for s. 190B(9)(a): .....	33
Reasons for s. 190B(9)(b).....	33
Result for s. 190B(9)(c) .....	33
<b>Attachment A Summary of registration test result .....</b>	<b>34</b>

# Introduction

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

I note that 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 (the court) gave a copy of the application to the Registrar on 21 December 2012 pursuant to s. 63. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A.

Given that the application was made on 21 December 2012 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C. 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 s. 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C.

## Information considered when making the decision

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

- Form 1, including attachments and s. 62(1) affidavits;
- Tribunal's Geospatial Services 'Geospatial Report and Overlap Analysis' (the Geospatial Report), dated 7 January 2013, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent;
- Additional material received directly from the applicant on 1 February 2013, being:

- a) a report titled 'Anthropological Report for Registration Test Matters', dated 24 January 2013, authored by [name of anthropologist deleted], an anthropologist employed by Central Desert (the anthropological report);
- (b) affidavits sworn by:
  - [name of person A deleted] dated 5 October 2012;
  - [name of person B deleted] dated 6 October 2012;
  - [name of person C deleted] dated 7 October 2012; and
  - [name of person D deleted] dated 18 November 2012; and
- (c) legal submissions prepared by Central Desert on behalf of the applicant addressing sections 190B(5), 190B(6) and 190B(7) of the Act (the CDNTS submissions); and
- Geospatial database iSpatialView search results of the application area, dated 21 February 2013.

### **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.

In my view, the applicant is entitled to an opportunity to comment in relation to any submissions made or information provided to the Registrar which is potentially adverse to the application being accepted for registration.

In addition, the State of Western Australia (the State) is a person to whom procedural fairness is owed if it appears that the application may be accepted for registration—see *Western Australia v Native Title Registrar and Belotti* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v Registrar*) at [29], [31]–[38]. The state government's right to procedural fairness is supported by provisions of the Act, particularly s. 190A(3)(c) (which requires the Registrar to have regard to information supplied by the state/territory government to the extent it is reasonably practicable to do so).

On 24 December 2012, the State was provided with a copy of the application and informed by the Tribunal of the proposed decision timeframe and invited to comment in relation to the registration testing of the application. On 7 February 2013 the Tribunal provided to the State additional material received directly from the applicant and was invited to make submissions by 19 February 2013. No submissions were made by the State.

### **Consideration of the requirements of s. 190A(3)**

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 and I *may* have regard to other information, as I consider appropriate.

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

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

# Procedural and other conditions: s. 190C

## *Subsection 190C(2)*

### *Information etc. required by ss. 61 and 62*

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Doepel* at [16] and also at [35]–[39]. 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)—page 3 of the application names the persons authorised to make the application. Schedule A refers to Attachment A of the application which contains a description of the native title claim group.

I have confined my assessment of this requirement to the information contained in the application itself as this assessment does not involve me going beyond the application, nor does it

require me to undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [37] and [39].

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a subgroup of the native title claim group.

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

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

The application **contains** all details and other information required by s. 61(3)—Part B of the application contains the name and address for service of the persons who are the applicant.

**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)—Attachment A of the application contains a description of the persons in the native title claim group.

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

The application must be accompanied by an affidavit sworn by the applicant that:

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

The application is **accompanied** by the affidavit required by s. 62(1)(a). The application is accompanied by affidavits from each of the nine persons who comprise the applicant.

The affidavits are signed by each deponent and are competently witnessed and make all the statements required by this section.

**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) as 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)—Schedule B and Attachment B of the application contain information about the boundaries of the area referred to in ss. 62(2)(a)(i) and (ii).

**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)—Attachment C contains a map of the external boundaries of the area referred to in s. 62(2)(b).

**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 refers to Attachment D of the application which notes that two local government authorities fall within the external boundary of the application and that additional information about non-native title rights and interests is provided at Attachments HA and I.

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

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

The application **contains** all details and other information required by s. 62(2)(d)—Schedule E of the application contains a description of the native title rights and interests claimed.

**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)—Schedule F refers to Attachment F of the application which contains a general description of the factual basis.

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

**Activities: s. 62(2)(f)**

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

The application **contains** all details and other information required by s. 62(2)(f)—Schedule G refers to Attachments F and G of the application which contain details of activities currently being carried out by the native title claim group in relation to the application area.

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

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

The application **contains** all details and other information required by s. 62(2)(g)—Schedule H of the application states that no other applications of native title and no determinations fall within the area of the application.

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

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

The application **contains** all details and other information required by s. 62(2)(ga)—Schedule HA refers to Attachment HA of the application which states that, as of 10 December 2012, the applicant is not aware of notifications 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)—Schedule I refers to Attachment I of the application which lists 16 s. 29 notices of which, as of 10 December 2012, the applicant is aware of having been given in relation to the application area. The relevant notification dates range from 11 August 1999 to 25 January 2012.

## *Subsection 190C(3)*

### *No common claimants in previous overlapping applications*

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied – *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) – at [9]. Section 190C(3) may involve the Registrar addressing information ‘otherwise available’ – *Doepel* at [16].

The Geospatial Report identifies that there are no previously registered applications in relation to the area covered by this application. Therefore the requirements of s. 190C(3)(a) to (c) are not satisfied.

## *Subsection 190C(4)*

### *Authorisation/certification*

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

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

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

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.

This application is purported to have been certified by Central Desert Native Title Services (CDNTS) and it is therefore necessary to consider if the requirements of s. 190C(4)(a) are met.

Section 203BE(4) sets out that a written certification by a representative (or s. 203FE funded) body must:

- 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
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the body has done to meet the requirements of subsection (3).

Section 203BE(2) sets out that a representative (or s. 203FE funded) body must not certify . . . an application for a determination of native title 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 to deal with matters arising in relation to it; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

*Doepel* is authority that the Registrar's consideration under s. 190C(4)(a) is limited to ensuring that:

- the certifying body has power under Part 11 to make the certification; and
- the certification complies with s. 203BE(4) (at [78], [80] and [81]).

Upon being so satisfied, the Registrar is not required to address the condition imposed by s. 190C(4)(b). Section 190C(4)(a) 'does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s. 190C(4)(a) expressly refers, to revisit the certification of the representative body': *Doepel* – at [81]. This was approved by Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 (*Wakaman*) at [32] .

### ***Information before the delegate***

A copy of the certification by CDNTS is referred to at Schedule R and is attached to the application as Attachment R. The certification is dated 20 November 2012 and signed by CDNTS's principal legal officer and chief executive officer.

The Geospatial Report confirms that CDNTS is the only representative or s. 203FE funded body for the application area and as such the only body that can certify the application under s. 203BE.

### ***Consideration***

CDNTS states in the certificate that it is funded under s. 203FE(1) to perform all the functions of a representative body, including the certification function under s. 203BE.

The certification contains the statements and information required by s. 203BE(4):

For the purposes of s. 203BE(4)(a), the certificate includes a statement that the body is satisfied that the provisions of s. 203BE(2)(a) and (b) have been met.

For the purposes of s. 203BE(4)(b), the certificate briefly sets out the body's reasons for being of that opinion:

- Staff at CDNTS, and its predecessor Ngaanyatjarra Council Native Title Unit, have provided legal and anthropological services within the application area since 1996;
- Staff at CDNTS have attended various meetings of native title claim group members and have observed the process of decision-making and taken instructions that have arisen from that process;
- The native title claim group have decision-making processes in accordance with their traditional laws and customs that have been observed at meetings where this application has been discussed. The decision by the native title claim group to authorise the applicant to make the application and to deal with matters arising in relation to it was made in accordance with these decision-making processes; and
- CDNTS is satisfied that the anthropologists who worked with the native title claim group made all reasonable efforts to ascertain and identify all the members of the native title claim group; and

Section 203BE(3) further provides for a representative body's obligations to make all reasonable efforts to reach agreements between overlapping claimant groups and to minimise the number of overlapping applications. If there are overlapping applications, in accordance with s. 203BE(4), the certification must briefly set out what the representative body has done to meet the requirements of subsection (3). The certification states that s. 203BE(4)(c) is not applicable and the Geospatial Report confirms that there are no overlapping applications.

I am satisfied that the application has been certified in accordance with s. 203BE(4) by the only s. 203FE-funded body that could certify it, and the requirements of s. 190C(4)(a) are therefore met.

# Merit conditions: s. 190B

## *Subsection 190B(2)*

### *Identification of area subject to native title*

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

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

#### *Area covered by the application*

Schedule B of the application at paragraph 6 states that the application area is described in Attachment B.

Attachment B of the application is titled 'Identification of boundaries'. It describes the application area by metes and bounds referencing native title determinations and land parcels.

The Geospatial Report concludes that the description in Attachment B and map provided in Attachment C to the application are consistent and identify the application area with reasonable certainty.

Having had regard to Attachments B and C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

#### *Areas not covered by the application — internal boundaries*

Schedule B of the application lists at paragraph 9 general exclusions to the land and waters covered by the application.

The use of a general formulaic approach was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*), in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour noted the difficulty in reconciling the need for detail as specified by s. 62(a)(i) and (ii), the requirements of the registration test at s. 190B(2) and the 'state of knowledge of the parties at different stages of the application', but formed the view that consideration of these issues was necessary in order to assess the application against these requirements—at [30] to [38].

In undertaking this consideration, I have had regard to the fact that this is a new application. I have also had regard to information within the application that points to the state of knowledge of the applicant. For instance, Schedule B of the application at paragraph 8(b) contains the statement that 'a significant portion of vacant Crown land' *may* be subject to s. 47B.

It is in my view appropriate, given the above particularities, that the written description contain general exclusions of the kind at Schedule B. In my view, the written exclusions in Schedule B adequately reflect the state of knowledge of the applicant at this time and they are sufficient to

offer an objective mechanism by which to identify those areas of the application that fall within the categories described.

Accordingly, it is my view 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 the native title rights and interests are claimed in relation to particular land or waters.

## *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).

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains this description in Schedule A:

*The names (including Aboriginal names) of the persons (the native title claim group) on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is one of those persons.*

36. The native title claim group comprises those persons who hold native title rights and interests in the application area according to traditional laws and customs through:

- (a) birth on the application area;
- (b) birth of an ancestor on the application area;
- (c) having religious, sacred, ritual, practical and/or historical knowledge of the application area;
- (d) having one's conception site on the application area;
- (e) having burial sites of ancestors on the application area;
- (f) long association with and/or generation or time-depth of identification with the application area through occupation or use by one's self and/or relevant kin; and
- (g) asserting connection with the application area and having that assertion accepted by others.

37. The persons referred to in paragraph 36 above include:

- (a) those people who are the descendants of:
  - (i) Tjuulnga Tjapaltjarri;
  - (ii) Tjinapilpa Tjapaltjarri;
  - (iii) Mantjarlin Tjapaltjarri;
  - (iv) Mamutja Tjapanangka;
  - (v) Tjipumaru Tjupurrula and Napanangka;
  - (vi) Winmaru Tjakamarra;
  - (vii) Walaypayi Tjangala;
  - (viii) Ikupani and Wayula;
  - (ix) Kutukutu;
  - (x) Kurrungaiya;
  - (xi) Ningi Ningi;
  - (xii) Tjukul and Wartiya;

- (xiii) Tjukun;
  - (xiv) Piki Piki;
  - (xv) Ikikati and Piinyuka;
  - (xvi) Tjarrpayi;
  - (xvii) Tjarparli and Tjantuji;
  - (xviii) Peter Gogo;
  - (xix) Tatatja;
  - (xx) Jimmy;
  - (xxi) Kutitji;
  - (xxii) Nganyurti Tjungarrayi;
  - (xxiii) Comet;
  - (xxiv) Charlie Wirmin;
  - (xxv) Maudi/Barindjia;
  - (xxvi) Loa Loa and Tjajipa;
  - (xxvii) Johnny Atkins;
  - (xxviii) Gerry Thompson;
  - (xxix) Wintun and Ngartu;
  - (xxx) Tjipi;
  - (xxxi) Wankirri and Yawurru;
  - (xxxii) Karlparrku;
  - (xxxiii) Kikitarr and Kiwili;
  - (xxxiv) Brandy/Brand;
- (b) these people and their descendents:
- (i) Spider Snell;
  - (ii) David Downs;
  - (iii) Robert Lee;
  - (iv) Tjintayi;
  - (v) John Lee;
  - (vi) Carol Lee;
  - (vii) Jago;
  - (viii) Ned Cox;
  - (ix) Sandy Cox;
  - (x) Jalmiya Samuel;
  - (xi) Ross McLarty;
  - (xii) Joan Wilberforce;
- (c) the following people:
- (i) Walimpirri Tjapaltjarri;
  - (ii) Muuki Taylor; and
  - (iii) Wakka Taylor.

Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

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

Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that:

[i]t 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—at [67].

In my view, describing the claim group as the ‘descendants’ of certain named persons or by certain characteristics such as the characteristics set out in paragraph 36 of Attachment A provide a sufficiently reliable and objective means by which to ascertain a person’s membership of the group. It may be that some factual inquiry may be required to ascertain how members of the claim group are descended from the named ancestors or whether the listed characteristics are met, but that would not mean that the group had not been sufficiently described.

I am therefore of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that 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 the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. The description must be in a clear and easily understood manner—*Doepel* at [91], [92], [95], [98] to [101] and [123]. An assessment of whether the rights and interests can be established, *prima facie*, as ‘native title rights and interests,’ as defined in s. 223, will be made under s. 190B(6) below.

The native title rights and interests claimed appear at Schedule E of the application as follows:

12. The nature and extent of the native title rights and interests held by the native title claim group in the whole of the application area (including any areas where extinguishment must be disregarded pursuant to sections 47, 47A and 47B of the NTA) is the right to possess, occupy, use and enjoy the land and waters of the application area to the exclusion of all others.

13. The native title rights and interests are:

- a) exercisable in accordance with the traditional laws and customs of the native title claim group; and
- b) subject to the valid laws of the State of Western Australia and the Commonwealth of Australia, including the common law.

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

## *Subsection 190B(5)*

### *Factual basis for claimed native title*

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **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.

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

The Court has established clear principles which must guide the Registrar when assessing the sufficiency of an application's factual basis material:

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

Justice Dowsett in *Gudjala People # 2 v Native title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) gave specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC* did not criticise the approach taken by Dowsett J (*Gudjala FC* at [90] to [96]). His Honour, in my view, took a consonant approach in *Gudjala 2009*. I set out the relevant elements of s. 190B(5), as interpreted by Dowsett J, in my assessment below.

Dowsett J also held that 'it was necessary that the alleged facts support the claim that the *identified claim group* [emphasis added] (and not some other group) held the identified rights and interests (and not some other rights and interests)' – *Gudjala 2007* at [39]. This, in my view, confirms the need for adequate specificity within the claimants' factual basis material in order to satisfy the delegate of its sufficiency for the purpose of s. 190B(5).

#### *Information considered*

The applicant has provided the following material in support of the factual basis for the claim made in the application:

- Attachments F and M to the application;
- the anthropological report;

- the claimant affidavits;
- the CDNTS submissions.

Before addressing the three elements of s. 190B(5), I note the following statements contained in the anthropological report regarding the location and environment of the claim area which provide a very useful context for the applicant's factual basis information:

- The claim area is located in the eastern portion of the Great Sandy Desert. The environment is harsh, with high summer temperatures and unpredictable rainfall. High sand dunes, some of which stand up to fifty feet in height, run in an east-west formation across the desert in this region – at [5.1];
- Access to portions of the claim area is difficult due to its remoteness and the rugged country. The nearest community to the claim area is that of Mulan, which is located approximately 130 kilometers to the northeast. There is one dirt track that travels from Mulan to the outstation at *Jalyirr*, which is located in the northern portion of the claim area. This track can be treacherous with occasional washouts and sections of deep sand making driving perilous – at [5.6] and [5.10];
- Aside from the outstations of *Jalyirr*, established in the late 1970's – early 1980's [according to Attachment M to the application the outstation was used as a base for mustering cattle in the late 1970's and early 1980's and today is still used as a semi-permanent camp by claim group members] and *Yurumarral*, established at approximately the same time and located in the eastern portion of the claim area, there are no communities or townships within the claim boundaries. To the north, the closest communities are those of Mulan, Balgo and Billiluna where a number of claimants currently reside. Kiwirrkurra community is the closest community to the southern border of the claim area – at [5.10];
- To reach the site of *Kurtal*, the Lady Edith Lagoon in the north of the claim area, claimants are required to travel from Billiluna, south down the Canning Stock route to Well 42, a distance of approximately 370 kilometers and then head east for approximately 85 kilometers, making for a 900 kilometer round trip – at [5.7]; and
- The claim area is completely encompassed by 5 areas where native title has been determined to exist on the basis that each of the claim groups form part of the Western Desert Cultural Bloc (the WDCB) system:
  - Tjurabalan to the north (WAD160/1997);
  - Ngurrurpa to the east (WAD357/2006);
  - Kiwirrkurra to the south (WAD6019/1998);
  - Martu to the southwest (WAD6110/1998); and
  - Ngurrara to the east-northeast (WAD6077/1998).

***Reasons for section 190B(5)(a) – that the native title claim group have, and the predecessors of those persons had, an association with the area***

*The Law*

In my consideration of the applicant's factual basis material for the purposes of the assertion at s. 190B(5)(a), I am of the view that where that material discloses only an association with particular parts of the claim area, this may not be sufficient to meet the requirements of the condition – *Martin* at [26]. Similarly, the material may be insufficient where it fails to particularise the type of association asserted (it could be physical or spiritual) and contains only broad statements with no geographical particularity – *Martin* at [26].

The Court discussed the requirements of the factual basis material at s. 190B(5)(a) in *Gudjala 2007*, where it held that the following kind of information may be necessary to support the assertion:

- 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 had an association at all times; and
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52] (emphasis added).

I note that in *Gudjala 2007*, Dowsett J commented in relation to the above, that 'even if it be accepted that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, that says nothing about the history of such association since that time. Some members of the claim group and their predecessors may be, or may have been, so associated, but that does not lead to the conclusion that the claim group as a whole, and their predecessors, were similarly associated' – at [51].

*The claimants factual basis material in support of the assertion at s. 190B(5)(a)*

Attachment F sets out the following information in relation to the Ngurra Kayanta claimants' past and present association with the claim area:

- the native title claim group members have a close connection or association with the claim area including through their own birth or conception, or the birth or conception of their ancestors, through *Tjukurrpa* (dreaming) totems [some of which are listed at paragraph 46 of Attachment F] and status within the customary Law and through realisation of personal responsibilities to country – at [43].
- This connection involved and, at all relevant times has continued to involve, the following elements:

#### Spiritual

- the beliefs of the members of the claim group (as people of the WDCB, the society of which the Ngurra Kayanta are part of) that the *Tjukurrpa* are responsible for the existence and form of the landscape, and continue to be a presence or influence in the claim area and associated with it;
- the ceremonial and ritual life of the claim group members in relation to the *Tjukurrpa*;
- the responsibility of the claim group members to protect places within the claim area associated with the *Tjukurrpa*;
- the responsibility of the claim group members to prevent the improper disclosure of beliefs and practices which relate to places associated with the claim area – at p45].

#### Physical

Claim group members and their predecessors:

- had and continue to have a presence on the claim area (some senior members were living a wholly traditional lifestyle within the claim area up to the 1950's and some members

have lived for varying lengths of time on the application area up to and including the present);

- used and continue to use the resources of the claim area;
- protected and maintained and continue to protect and maintain places on the claim area;
- transmitted and continue to transmit knowledge about the land and waters in the claim area from senior/elder members to younger members, including children – at [47] and [48].

Claim group members carry out the activities set out in Attachment G at paragraph 69.

#### Historical

The ‘considerable time depth of the spiritual, physical, (customary) legal, economic and social elements of connection maintained by the claim group members and their predecessors’ within the claim area – at [49].

#### Customary legal

The status which the claim group members have in respect to the claim area and their relationship with it as the ‘proper’ people in relation to important and significant sites in the claim area, the spiritual features of the claim area and more generally the claimed land and waters – at [50].

#### Economic

Claim group members are entitled by their law and custom to visit and utilise the resources of the claimed land and waters without any limitation, including for sustenance, trade and exchange and otherwise for their benefit – at [51].

#### Social

The relationship between people and people (kinship), people and ‘country’ and through intrinsic associations of both people and ‘country’ with *Tjukurrpa* – at [52].

The CDNTS submissions and the anthropological report provide further information and examples in relation to the claim group members’ current association with the claim area, noting that despite no longer residing within the claim area, claim group members continue to make forays into the claim area including for the purposes of hunting and visiting sites of significance.

In relation to the association of the claim group’s predecessors at sovereignty (being 1829 in Western Australia) the CDNTS submissions state at [16] – [26] that

- due to its remoteness and its harsh environment, the claim area has never been the subject of European settlement;
- first European contact in the claim area may have occurred in 1873 or 1874 when Colonel Warburton may have travelled through the claim area on his journey from Adelaide to Roebourne; his journals do not record any information about any encounter with Aboriginal people in the claim area; in 1896-97 explorer David Carnegie conducted an expedition through the claim area; based on his journal and oral evidence he received assistance from Aboriginal people; accordingly at least one direct ancestor (a man named [name of ancestor

deleted]) of one of the living claim group members (name of person A deleted) was in occupation of the claim area at the time of first recorded European contact; and

- according to some of the claimant affidavits (details of which are reproduced in the CDNTS submissions), some of the ancestors of claim group members were physically associated with the claim area in the period between the first recorded European contact and the period in which senior claim group members were born within the claim area.

The CDNST submissions further state at [22] that the association of the predecessors of the Ngurra Kayanta with the claim area in the period between sovereignty and first European contact can be inferred for the following reasons:

- based on research conducted to date, there are no written records in relation to the claim area for the period between sovereignty and when Colonel Warburton is believed to have traversed the claim area in 1873-74;
- the first recorded contact between explorer Carnegie and an ancestor of the claim group occurred in 1896-97;
- there is no evidence which suggests that the predecessors of the claim group were not associated with the claim area at sovereignty or in the period between sovereignty and first recorded European contact.

The claimant affidavits and the anthropological report (including by quoting from the affidavits) provide numerous references to places within the claim area to which current claim group members have, and their predecessors had, an association with, such as *Kurtal*, a waterhole with the non-indigenous name Helena Springs in the middle of the claim area, *Jalyirr*, the Lady Edith Lagoon in the north of the claim area and the outstation with the same name, *Winpipulpa*, located in the southeast corner of the claim area and *Mulyuwarkul* (Forebank Hills), located in the western portion of the claim area. In addition, the anthropological report at [5.17] reproduces a map drawn by claimant [name of person B deleted] which details the name and physical location of each of the waterholes he followed when walking around the central portion of the claim area as a small boy.

### *Consideration*

The above quoted material possesses sufficient geographical particularity to support an assertion of an association held by the claim group members and their predecessors with locations within this claim area

The material demonstrates that the association had, and continues to have, both a physical and spiritual aspect as well as other elements.

The material further demonstrates that at least some of the ancestors listed in Schedule A were associated with the claim area around the time of first recorded European contact. The information before me, in my view, allows me to make the inference that the situation at first recorded European contact was the same as that at sovereignty. On that basis, I am of the view that the material supports the assertion that at least some of the ancestors had an association with the claim area around the time of European settlement.

I am further of the view that the material before me is sufficient to support an assertion of an association between the whole group by providing some tangible examples, originating from some members of the claim group, of how the whole group and its predecessors have been associated with the area over the period since sovereignty.

***Reasons for 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***

*The Law*

Similar terminology is used in the assertion at s. 190B(5)(b), and in the definition of 'native title rights and interests' at s. 223(1), namely that native title rights and interests must be 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the relevant native title claim group. I am of the view that my consideration at s. 190B(5)(b) is, therefore, to be informed by that definition. I am also of the view that my consideration at s. 190B(5)(b) is to be informed by the leading authority on that definition, the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

The following principles enunciated in that case, particularly with regard to the meaning and content of 'traditional' laws and customs, in my view, are to guide my assessment of the factual basis material for the purposes of s. 190B(5)(b):

- the origins of the content of the laws and customs are to be found in the normative rules of the relevant pre-sovereignty society – at [46];
- the rights and interests subject of the claim are to be rights and interests rooted in pre-sovereignty traditional laws and customs – at [79];
- 'traditional' is to be understood as referring to the body of laws and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty – at [86].

The meaning applied to the term 'traditional laws and customs' by the High Court in *Yorta Yorta* was discussed in detail by Dowsett J in *Gudjala 2007*, and again in *Gudjala 2009*. The following findings of Dowsett J in *Gudjala 2007* were not criticised on appeal to the Full Federal Court. In each of the cases, his Honour confirmed that the laws and customs asserted must have their source in a pre-sovereignty society (*Gudjala 2007* at [63]), and indicated that the following kind of information may be necessary to support the assertion at s. 190B(5)(b):

- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content – *Gudjala 2007* at [65];
- an explanation of the link between the claim group and the area covered by the application, which may also require an identification of the link between the apical ancestors and any society existing at sovereignty – *Gudjala 2007* at [66];
- an explanation as to how current laws and customs can be said to be traditional, beyond a mere assertion that they are the same laws and customs observed by the pre-sovereignty society – *Gudjala 2009* at [52] and [55];
- information containing details of the group's acknowledgement and observance of the traditional laws and customs pertaining to the land and waters of the claim area – *Gudjala 2009* at [74].

*The claimants factual basis material in support of the assertion at s. 190B(5)(b)*

Attachment F at [53] describes the normative society of which the claim group are said to be a part of as the WDCB.

As noted above, the claim area is completely encompassed by 5 areas where native title has been determined to exist on the basis that the Native Title holding groups form part of the WDCB system. The anthropological report at [2.9] states in this regard that '[i]t is both ethnographically consistent and anthropologically inconceivable that the Ngurra Kayanta claim area is located outside the WDCB'.

Attachment F further states that

- as members of the WDCB the claim group are governed by a functioning set of laws, rules, customs, practices and beliefs that allow the claim group members to live their daily lives according to shared physical, social and cultural norms – at [53].
- the fundamental belief system of the people of the WDCB is that of the *Tjukurrpa* which, relevantly, provides a moral, social and judicial guide to everyday life and lays down the rules or principles by which members of the claim group relate to and conduct themselves in relation to the claimed land and waters – at [54].

The traditional laws and customs acknowledged and observed by the people of the WDCB, including by the claim group members, are said to

- be given normative force by widespread commitment to the *Tjukurrpa* and the high value placed upon the sacred amongst the people of the WDCB and a fear of being ostracised or otherwise punished (including socially and/or physically) for breach of the laws and customs – at [56];
- include rules and principles for the recognition of a person as holding rights and interests in relation to an area and as to the nature and extent of the rights and interests held by a person – at [58].

The nature and extent of rights and interests exercisable by a person in relation to an area and the seniority and authority of the person relative to other persons in relation to such rights and interests is said at [59] and [60] to depend upon the following:

- having one's birth, conception or initiation site on the claim area;
- having a birth or burial site of an ancestor on the claim area;
- having religious, sacred, ritual, practical and/or historical knowledge of the claim area (including by taking responsibility for the area, passing on sacred knowledge about the area and places in it under approved circumstances and looking after sacred objects relating to places within the claim area, being present at ritual engagements relating to places within the claim area; and accepting and asserting the roles of cultural heritage protection, landscape management and site custodianship);
- length of association with and/or generation or time depth of identification with the claim area through occupation or use by one's self and/or relevant kin; and
- asserting connection with the claim area and having that assertion accepted by others.

The CDNTS submissions further state at [29] in relation to the specific laws and customs which give rise to native title rights and interests, the WDCB is characterised by the 'multiple pathways'

model of connection to country. This model is said to have been recognised by French J (as he then was) in *Billy Patch & Ors on behalf of the Birriliburu People v State of Western Australia* [2008] FCA 994. In relation to the Birriliburu People, also members of the WDCB, His Honour stated at [20] that

[t]he association of individuals and groups with particular areas of country comes about through a variety of mechanisms. These include conception, birth, growing up or initiation on the country, acquisition of knowledge through long residence or descent from a person who has had such a connection. Landholding groups are not patrilineally-patrilocally structured. The members of the groups are landholding through their shared association with and to the land. The groups are open and inclusive so people have potential access to a number of areas through the mechanisms mentioned above.

At [34] the CDNTS submissions stress that

[s]ignificantly, the pathways to connection (and therefore native title rights and interests) do not require those who currently hold native title to be biologically descended from those who occupied the claim area at sovereignty. The members of the Ngurra Kayanta claim group place an emphasis upon birth within the claim area, either of oneself or of one's ancestor, as a means of acquiring connection, however, the emphasis upon this particular pathway does not mean that the other pathways to connection which arise under the traditional law and custom of the WDCB do not still hold meaning and are not still observed.

Research is said to have identified a number of claim group members who acquired native title rights and interests to the claim area through non-descent-based pathways, specifically through the possession of ritual knowledge and/or authority – at [36].

At [61] Attachment F sets out other elements of the traditional laws and customs acknowledged and observed by the people of the WDCB in relation to:

- the imposition of sanctions for wrongful presence on or use of country by strangers and for wrongful presence on a site by any person in breach of cultural restrictions applicable to the site or for breach of other cultural restrictions and requirements;
- the requirement to respect and care for spiritual features of the claimed landscape;
- the requirements and other restrictions relating to religious and ritual objects, designs, songs, knowledge and practice;
- the social organisation (including kinship, marriage rules, avoidance and incest taboos);
- the identification of, and acknowledgement of and respect for senior and knowledgeable people and their authority;
- ceremonies and rituals (restricted and unrestricted);
- life stages (from conception to death and the avoidance of the name of the deceased person);
- the foraging for and preparation and distribution of food, medical and other resources and the knowledge associated with these matters; and
- beliefs in the harmful effect of sorcery and in the corrective counter-measures of wellbeing.

The anthropological report at [2.14] states that '[t]he evidence is strong that the Ngurra Kayanta claim group members continue to observe the traditional normative laws and customs of the

WDCB ... and continue to pass on their knowledge about these laws and customs to younger generations'. Numerous probative examples in support of this statement (some quoting the claimant affidavits) are given. For example reference is made at [5.32] to [5.35] to the cleaning out of waterholes as part of 'caring for country' activities. The report compares current practices with the historical account of the practice recorded by explorer Carnegie in 1896-97 and concludes that the claimants continue to exercise their responsibilities to sites of cultural significance and more generally to the country that they claim connection to – at [5.58].

Further probative examples are set out in the CDNTS submissions and the claimant affidavits.

#### *Consideration*

The above factual basis material identifies the relevant pre-sovereignty society, the WDCB, as the society of people living according to a system of identifiable laws and customs, having a normative content from whom it is asserted the claim group's laws and customs derive. The claim group forms part of this society. The material contains detailed information regarding the claim group members' acknowledgement and observance of the traditional laws and customs pertaining to the land and waters of the claim area

The factual basis material further explains the link between the claim group and the claim area by reference to the 'multiple pathways' model.

The material describes the laws observed and customs acknowledged by current members of the group. The material suggests that these laws and customs are traditional as they have been taught to the members of the claim group by their parents and other family members and in turn were taught by previous generations.

For the above reasons I am of view that the factual basis material is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

***Reasons for s 190B(5)(c) – that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.***

#### *The Law*

Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs as giving rise to claimed native title rights and interests; see *Yorta Yorta* at [47] and also at [87].

#### *The claimants factual basis material in support of the assertion at s. 190B(5)(c)*

The factual basis material contains sufficient information in support of the assertion that the native title claim group has continued to hold the claimed native title in accordance with the traditional laws and customs of the WDCB. I refer to my summary above at s. 190B(5)(a) and (b).

As noted above, the material includes numerous probative examples of factual information said to support that the Ngurra Kayanta claim group members have continued to hold their native title in accordance with their traditional laws and customs.

In addition, the anthropological report at [4.1] to [5.56] details further evidence of the observance and acknowledgement of traditional law and custom and the exercise of native title rights and interests. This evidence is set out under the following headings:

- the observance of the subsection kinship and the skin system
- clearing rockholes and burning country
- ownership of country and the requirement to obtain permission
- ‘mundane’ activities: caring for country, hunting and gathering
- ‘religious’ purpose.

### *Consideration*

From the material I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors or predecessors by traditional modes of oral transmission, teaching and common practice. This continues today amongst claim group members. There are numerous examples in the factual basis material about the transmission of knowledge.

Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

### **Combined result for s. 190B(5)**

The application **does satisfy** 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 above.

## *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).

To meet the requirements of s. 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register – see s. 186(1)(g) and the note to s. 190B(6).

In relation to the consideration of an application under s. 190B(6) I note Mansfield J’s comment in *Doepel*:

Section 190B(6) requires some measure of the material available in support of the claim—at [126].

On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].

Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

The definition of ‘native title rights and interests’ in s. 223(1) guides my consideration of whether, *prima facie*, an individual right and interest can be established. In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s. 190B(5) above) in relation to what it means for rights and interests to be possessed under the *traditional* laws acknowledged and the *traditional* customs observed by the native title claim group; and
- The High Court’s decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a ‘native title right and interest’ must be ‘in relation to land or waters’.

I also need to consider the case law relating to extinguishment when examining each individual right and interest claimed.

Any rights that clearly fall *prima facie* outside the scope of the definition of ‘native title rights and interests’ in s. 223(1) cannot be established.

The registration test is an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is also not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, *prima facie*.

In summary, s. 190B(6) requires me to carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, *prima facie*, that they:

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

#### *The claimed native title rights and interests*

The native title rights and interests claimed appear at Schedule E of the application as follows:

12. The nature and extent of the native title rights and interests held by the native title claim group in the whole of the application area (including any areas where extinguishment must be disregarded pursuant to sections 47, 47A and 47B of the NTA) is the right to possess, occupy, use and enjoy the land and waters of the application area to the exclusion of all others.

13. The native title rights and interests are:

- a) exercisable in accordance with the traditional laws and customs of the native title claim group; and

b) subject to the valid laws of the State of Western Australia and the Commonwealth of Australia, including the common law.

Attachment F at [42] notes that

As outlined in **Error! Reference source not found.** above, the native title claim group claim the right to possess, occupy, use and enjoy the land and waters of the area covered by the application to the exclusion of all others. This right includes, but is not limited to, the right to:

- a) access, remain in and use the area of the application for any purpose;
- b) make decisions about the use and enjoyment of the application area;
- c) control the access of others to the application area;
- d) take for any purpose and use resources from the application area, including trading and exchanging the natural resources of the area;
- e) control others' use and enjoyment of resources of the application area;
- f) maintain and protect places, sites and objects of significance in the application area;
- g) teach and pass on knowledge of the native title claim group's traditional laws and customs pertaining to the application area, and knowledge of places and sites within the area; and
- h) learn about, and acquire, knowledge concerning the native title claim group's traditional laws and customs pertaining to the application area, and knowledge of places in the application area.

Schedule B at [8] states that

**Part B. Applicability of sections 61A(4), s47, 47A and s47B**

For the purposes of the application of sections 61A(4), 47, 47A and 47B of the NTA, the application covers the following areas:

- a) part of Reserve 26399 for the purpose of "Use and Benefit of Aboriginal Inhabitants" vested pursuant to section 33 of the *Land Act 1933* (WA) in the Aboriginal Lands Trust on 15 June 1973, which is subject to section 47A;
- b) a significant portion of vacant Crown land which may be subject to s 47B of the NTA; and
- c) any other areas to which the non-extinguishment principle as defined in section 228 of the NTA applies.

Schedule L at [23] to [26] further notes that

**Any area leased, held or reserved for the benefit of Aboriginal people**

23. A portion of Aboriginal Reserve 26399 for the purpose of "Use and Benefit of Aboriginal Inhabitants", vested pursuant to section 33 of the *Land Act 1933* (WA) in the Aboriginal Lands Trust on 15 June 1973, is located in the north-east of the application area and is occupied by members of the native title claim group. The portion of the reserve covering part of the application area is clearly identified in the map at **Error! Reference source not found.**

**Any vacant Crown land**

24. There is a significant portion of vacant Crown land in the application area, which is occupied by the members of the native title claim group. This area is clearly identified in the map at **Error! Reference source not found.**

**Any area over which extinguishment is required to be disregarded**

25. The area referred to in paragraph 0 above is an area over which, by virtue of section 47A of the NTA, any extinguishment of native title is required to be disregarded.
26. The area referred to in paragraph 0 above is an area over which, by virtue of section 47B of the NTA, any extinguishment of native title is required to be disregarded.

*The Law*

*Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act.

The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – at [127].

*The applicant's factual basis material and consideration*

The CDNTS submissions at [50], under the heading 'Access, use, control and decision-making – the basis of exclusive possession, use and occupation', state that for members of the WDCB, including the Ngurra Kayanta claimants, the right to receive or give permission to access country is a fundamental aspect of the acknowledgement of land ownership. The CDNTS submissions quote from the claimant affidavits, giving probative examples, in support of this assertion.

Further, the anthropological report, under the heading 'Ownership of country and the requirements to request permission' at [4.14] to [4.30], sets out further relevant information and examples in support of the existence of the claimed right in the claim area, including:

- statements set out in the claimant affidavits such as a statement made by claimant [name of person B deleted] in his affidavit of 6 October 2012:

If someone from another place like Wyndam, wants to go to Jalyirr or Kurtal, they can't just go. They have to ask the elder. I can't just go to Kiwirrkurra country either. I got to ask, or get in trouble, it is another country. You not the big boss, you make him mad, he sing you. You got to stay in your country, that's the rules. No easy blackfella way, not like kartiya [white people] walking anywhere. Our rule – don't go over the boundary! Stay in your country, or they kill you or sing you, make you mad – at [4.18];
- statements made by claim group members to the author of the report during field work on country – at [4.19] – [4.21] ;
- related research in relation to other groups which form part of the WDCB in relation to ownership of country and associated requirements – at [4.24] and [4.25].

The anthropological report at [4.23] concludes that '[i]t is apparent that claimants continue the practice of asking for and receiving of permission to enter another's country, and continue to expect that visitors to their country will receive permission from the claimants.

With the advancement of technology... telephones are now the preferred medium rather than smoke [signals], as an evolution of the traditional system’.

The CDNTS submissions also state at [55] that the claim group members exercise their right to control the use of resources by others.

Based on the information before me I understand that the claim area is not subject to previous extinguishment of native title (either because there were no extinguishing acts or because extinguishment is to be disregarded as a result of the Act due to the tenure of the claim area).

On the basis of the information before me I am of the view *prima facie*, that the claim group members exercise the exclusive right of possession, occupation, use and enjoyment in relation to the application area.

Outcome: established, *prima facie*

## *Subsection 190B(7)*

### *Traditional physical connection*

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

I also understand that the term ‘traditional,’ as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta – Gudjala 2007* at [89]. In interpreting connection in the ‘traditional’ sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

Attachments F and M and the other factual basis material before me contain many examples of claimants having a traditional physical connection with the application area. I refer to my reasons at ss. 190B(5) and (6) above.

I am therefore satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

## *Subsection 190B(8)*

### *No failure to comply with s. 61A*

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

Section 61A provides:

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

(2) If :

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

The Geospatial Report states that no determinations of native title fall within the external boundaries of this application area. I agree with this assessment.

I have also undertaken a more recent Geospatial database iSpatialView search of the Tribunal's mapping database to confirm the accuracy of this information.

### **Reasons for s. 61A(2)**

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

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

Schedule B of the application contains a number of general exclusions. In my view these exclusions encompass any areas covered by a previous exclusive possession act, other than in the circumstances described in subparagraph (4).

### **Reasons for s. 61A(3)**

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

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

Schedule B of the application states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State, unless the circumstances in s. 61A(4) apply.

## *Subsection 190B(9)*

### *No extinguishment etc. of claimed native title*

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

Schedule Q of the application states that no claim is being made over minerals, petroleum or gas that are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia.

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

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

Schedule P of the application states that no offshore places comprise part of the application area.

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

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

Schedule B of the application provides for a number of categories of areas of land and waters to be excluded from the application area, namely those where native title rights and interests have been extinguished.

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

[End of reasons]

# Attachment A

## Summary of registration test result

Application name	Ngurra Kayanta
NNTT file no.	WC2012/013
Federal Court of Australia file no.	WAD410/2012
Date of registration test decision	21 February 2013

### 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)		N/A

### Section 190B conditions

Test condition	Subcondition/requirement		Result
s. 190B(2)			Met
s. 190B(3)			Overall result: Met
	s. 190B(3)(a)		Met
	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

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
	<b>re s. 61A(1)</b>	<b>met</b>
	<b>re ss. 61A(2) and (4)</b>	<b>met</b>
	<b>re ss. 61A(3) and (4)</b>	<b>met</b>
<b>s. 190B(9)</b>		<b>Aggregate result: met</b>
	<b>re s. 190B(9)(a)</b>	<b>met</b>
	<b>re s. 190B(9)(b)</b>	<b>met</b>
	<b>re s. 190B(9)(c)</b>	<b>met</b>