National Native Title Tribunal

Registration test decision

Application name	Gingirana
Name of applicant	Billy Atkins, Miriam Atkins, Slim Williams, Anthony Charles-, Kate George, Stan Hill,
NNTT file no.	WC2006/002
Federal Court of Australia file no.	WAD6002/2003
Date application made	9 May 2003
Date application last amended	23 July 2013

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).

On 6 September 2013, I decided that the claim satisfies each of the conditions contained in ss. 190B and C and I accept this claim for registration pursuant to s. 190A(6) of the *Native Title Act 1993* (Cwlth). This is a statement of my reasons for that decision.

Date of decision: 29 October 2013

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Susan Walsh

[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 30 July 2013 and made pursuant to s. 99 of the Act.]

Introduction

[1] This document sets out my reasons, as the Registrar's delegate, for the decision to accept the claim made in the Gingirana application (the claim) for registration pursuant to s. 190A(6) 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

[2] On 23 July 2013, Justice McKerracher gave the applicant leave to amend the claim in the application in the form of a proposed amended application that filed on 7 June 2013.

[3] The Registrar of the Federal Court of Australia gave a copy of the amended Gingirana claimant application (the application) to the Native Title Registrar (the Registrar) on 24 July 2013 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application: see s. 190A(1) of the Act, subject to whether s. 190A(1A) arises. I note that order was not made under s. 87A (Court's power to make a determination for part of an area). Accordingly, s. 190A(1A), which provides that the Registrar need not consider the claim in an amended application where the amendment arises as a result of an order under s. 87A, does not arise.

Timing of consideration of the claim

[4] There is a notice under s. 29 in relation to an act affecting part of the area covered by the application. This has required me to use my best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice: see s. 190A(2). The notification day specified in the notice (Tenement ID: E69/3123) is 8 May 2013, and I have therefore finished my consideration within four months following that day.

Information to be considered

[5] Subsection 190A(3) governs the information that the Registrar must have regard to, namely, the information identified in subsections (a) to (c) and provides also that the Registrar may have regard to such other information as she considers appropriate. The information the Registrar must have regard to comprises:

> (a) information contained in the application and in any other documents provided by the applicant; and
>
> (b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory[1]; and
>
> (c) to the extent that it is reasonably practicable to do so in the circumstances—any information supplied by the Commonwealth, a State or a Territory, that, in the

[1] I note that s. 190A(4) provides that this may include information about current or previous non-native title rights and interests in the area covered by the application.

Registrar's opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim.

[6] I do not have information of the kind identified in s. 190A(3)(b) (searches of registers) and note that this does not prevent the Registrar accepting a claim for registration under s. 190A: see subsection (5). I do not have information of the kind identified in s. 190A(3)(c) (information from Commonwealth or a State/Territory).

[7] I have considered the information contained in the amended application, a copy of which was provided by the Court to the Registrar on 24 July 2013. I have considered the information contained in the amended application filed on 20 February 2006, to verify whether the nature of the amendments fell outside the scope of s. 190A(6A). I have considered the letter received from the Federal Court dated 23 July 2013 providing a copy of the application to the Registrar under s. 64(4). I have considered entries in relation to the claim that are found on the Register of Native Title Claims, the Schedule of Native Title Applications, the Tribunal's geospatial database and a report by the Tribunal's Geospatial Services dated 5 August 2013, which is relevant to the conditions in ss. 190B(2) (identification of area), 190C(3) (no previous overlapping claim groups) and 190C(4) (certification of the application by the representative bodies for the area).

[8] I have also considered information provided by the applicant's legal representative to the Registrar on 12 August 2013 in relation to the conditions in ss. 190B(5), (6) and (7). The details of this information is referred to in my reasons below at s. 190B(5).

[9] The preceding identifies all of the information to which I have had regard.

Procedural fairness

[10] I note that the State of Western Australia (State) was informed that a delegate of the Registrar was considering the claim for registration and was proffered an opportunity to comment in relation to the applicant's additional information by letter from the Tribunal case manager to the State dated 13 August 2013. The State did not avail itself of this opportunity and has provided no information to me: see s. 190A(3)(c). I note also that the Commonwealth has not provided me with any information under s. 190A(3)(c).

Summary of my decision

[11] Section 190A(6) provides that the Registrar must accept the claim for registration if:

(a) either the claim was made in an:

(i) application given to the Registrar under s. 63 or

(ii) amended application given to the Registrar under s. 64(4) and s. 190A(6A) does not apply; and

(b) the claim satisfies all of the conditions in:

(i) s. 190B (which deals mainly with the merits of the claim); and

(ii) s. 190C (which deals with procedural and other matters).

[12] The claim meets the criteria outlined in s. 190A(6) and must therefore be accepted for registration:

(a) it was made in an amended application which was given to the Registrar by the Court under s. 64(4) (the details of this are provided above);

(b) s. 190A(6A) does not apply because the amendments to the claim are of a more substantive kind to that identified in s. 190A(6A)(d) being amendments to the claimed description of the native title claim group, the claimed native title rights and interests and the factual basis for the assertion that the native title rights and interests exist;

(c) for the reasons that follow, I find that the claim satisfies all of the conditions in ss. 190B and C.

Merit conditions: s. 190B

Subsection 190B(2): Identification of area subject to native titl*e*

> 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.

[13] For the reasons that follow, I have reached the view that the claim **satisfies** the condition of s. 190B(2). Attachments B and C respectively of the application contain a written description of the area of land and waters covered by the application and a map of the external boundaries of the area. The claim has not been amended in relation to this information.

[14] Attachment B is a metes and bounds description, prepared by the Tribunal's Geospatial Services on 31/01/2006, referring to surrounding native title determination and applications, cadastral boundaries, topographic features and geographic coordinate points in decimal degree to six (6) decimal places referenced to the Geocentric Datum of Australia 1994 (GDA94). Notes relating to the source, currency and datum of data used to prepare the description are also included.

[15] Attachment C is a colour photocopy of an A3 map titled "Native Title Determination Application Gingirana" produced by Geospatial Services, NNTT, dated 31/01/2006 and includes:

(a) the application area depicted by a bold blue outline;

(b) surrounding native title determination applications, topographic features and cadastral boundaries shown and labeled and cadastral boundaries colour coded;

(c) a scalebar, north point, coordinate grid, legend and locality diagram; and notes relating to the source, currency and datum of data used to prepare the map

[16] I am of the view that the information within Attachments B and C is sufficiently fulsome to allow the external boundaries of the area of land and/or waters covered by the application to be identified with reasonable certainty. I have relied on the following matters to reach this view:

(a) the map provides a clear delineation of the external boundary and this is supported by a scalebar, northpoint, location diagram and coordinate grid with notes relating to the source, currency and datum of data used to prepare the map;

(b) the written description uses a comprehensive mix of clearly described data, such as the bounds of cadastral parcels and adjacent native title determination application boundaries with geographic coordinates and topographic features (being the centreline of certain identified creeks) also used to locate sections of the boundary on the earth's surface;

(c) the map clearly depicts the features used in Attachment B to describe the boundary and is supported by a coordinate grid;

(d) there is no inconsistency between what is said in Attachment B and that found on the map.

[17] In reaching the view that I have, I rely on my own comparison of the contents of Attachments B and C. I have also taken account of the expert view of the Tribunal's geospatial division (Geospatial) dated 5 August 2013 that the information and map are consistent and identify the application area with reasonable certainty. I note that Geospatial have identified what appears to be a minor typographical error with a coordinate point on pg 1 of the description: Longitude 19.548416 East should read Longitude **1**19.548416 East. In my view a minor error of this nature does not affect overall certainty given the comprehensive materials provided in the application to identify the external boundary on the Earth's surface

[18] Any areas within the external boundaries that are not covered by the application are described in paragraph 2 of Attachment B via the general exclusion of categories of land and waters, covered by acts where native title is extinguished, having regard to the provisions of the Act and applicable state analogue, where the act in question is attributable to the State. It is my view that this provides a sufficiently certain and objective mechanism to identify areas which are not covered by the application.

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.

[19] For the reasons following, I have reached the view that the claim **satisfies** the condition of s. 190B(3). The application does not name the persons in the native title claim group; rather it provides a description in schedule A, such that it is necessary to consider the claim against the requirements of subparagraph (b). The claim has been amended in relation to the description of the persons in the native title claim group, which is found in Attachment A:

The native title claim group comprises those Aboriginal people who hold in common the body of traditional law and culture governing the area the subject of the claim and who:

(a) are descended from the following people, and who, in terms of traditional law and custom, are associated with the area covered by the application:

(i) Jiriji Wallaby Wallace;
(ii) Parnapuru Bluey Atkins;
(iii) Parnapuru Bill Atkins;
(iv) Minmi Clancy;
(v) Yanangara Maude Stumpy Atkins;
(vi) Midjibunku Sandy Clause;

(vii) Yawi (also known as Yalwi);
(viii) Polly Waongi Telfer; and
(ix) Lucy Gibbs; or

(b) have a personal connection to the area covered by the application through their own birth and/or the birth of their ancestors on the area covered by the application or possession of traditional cultural knowledge of the area covered by the application, by which they claim the rights and interests and that claim is recognised by the wider native title claim group according to its traditional decision making processes. Claimants in this category include:
(i) Timmy Patterson;
(ii) Miparrl (Frankie Wongawol);
(iii) Mara Kuja (Norman Thomson); and
(iv) Stan Hill.

[20] Mansfield J said at [37] of *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*NT v Doepel*) that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [sic] any particular person in the identified native title claim group can be ascertained'.

[21] 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): see *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64] (*WA v Registrar*) where Carr J considered the following description of the persons in the native title claim group:

> 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.

[22] Carr J 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, because although a factual inquiry might be necessary to ascertain whether any particular person in is the group, that does not mean that the group has not been described sufficiently:

> 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. <u>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</u>. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55…in relation to definition of areas, apply equally to the issue of sufficient description of the native title group—at [67] (underlining added).

[23] Carr J also referred to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55], which was that:

> The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

[24] The description in Attachment A does appear to require a factual inquiry to ascertain whether a person is a member of the native title claim group. A person's membership depends on descent from the persons named in paragraph (a) of the description and an association, in terms of traditional law and custom. Alternatively, a person's membership depends on having a personal connection to the area covered by the application through their own birth and/or the birth of their ancestors; or on the possession of traditional cultural knowledge of the area covered by the application, by which they claim the rights and interests and that claim is recognised by the wider native title claim group according to its traditional decision making processes. Attachment A names four persons who have acquired membership via this way.

[25] It is my view that the first element of the description is within the bounds of the 'Three Rules' test from *WA v Registrar*—I am provided with a starting point, that is, the names of persons from whom persons in the claim group are descended and an explanation that the operation of traditional law and custom dictates that they must also be associated with the area covered by the application. In my view, it is possible, with a further factual inquiry, to work out who is a member having regard to the information provided.

[26] I am also satisfied that the second element of the description meets the requirements of s. 190B(3)(b). In my view, the information provided allows a factual inquiry of the kind discussed above by Carr J. Such an inquiry may not be easy, but that is not to say it cannot be done based on the information provided. The starting point for such an inquiry is that this category of persons must have a personal connection to the area of the claim via their own birth and/or the birth of their ancestors or via the possession of traditional cultural knowledge of the claim area by which they claim rights and that claim is recognised by the wider native title claim group according to its traditional decision making process. These are 'not alien concepts to Aboriginal traditional law and custom and the description provided does, in my view, allow the making of the factual inquiry discussed by Carr J. Finally, I note that the description goes on to identify certain persons by name who have acquired membership by these processes. The means by which such persons acquired membership could well inform any factual inquiry about other persons claiming membership on such a basis.

[27] To conclude, I am satisfied that this second element of the description also fits within Carr J's 'Three Rules' test and that with a further, reasonable, factual inquiry, such members of the claim group could be established.

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.

[28] For the reasons that follow, I have reached the view that the claim **satisfies** the condition of s. 190B(4). My view is that for a description to meet the requirements of this section, it must describe what is claimed in a clear and easily understood manner: see *Doepel* at [91] to [92], [95], and [98] to [101], [123]. Any assessment of whether the rights can be prima facie established as 'native title rights and interests', as that phrase is defined in s. 223, will be discussed in relation to the requirement in s. 190B(6).

[29] Schedule E contains the following description of the claimed native title rights and interests:

> 8. In relation to the lands and waters of the area covered by the application, except for the areas where native title has been partially extinguished and including any areas where extinguishment must be disregarded pursuant to section 47B of the Act, the native title rights and interests are the right to possess, occupy, use and enjoy the land and waters of the application area to the exclusion of all others.
> 9. In relation to land and waters of the area covered by the application, except for areas where native title is wholly recognised, the native title rights and interests are the right to:
> (a) access, remain in and to use that part for any purpose;
> (b) access resources and to take for any purpose resources in that part;
> (c) engage in spiritual and cultural activities on that part;
> (d) maintain and protect areas, places and objects of significance in or on that part;
> (e) protect resources and the habitat of living resources in that part;
> (f) make decisions about the use and enjoyment of land and waters; and
> (g) receive a portion of any resources taken by others from the land and waters.
> 10. The native title rights and interests are:
> (a) exercisable in accordance with the traditional laws and customs of the native title claim group;
> (b) subject to the valid laws of the State of Western Australia and the Commonwealth of Australia, including the common law.

[30] I find this description clear and understandable and it follows, in my view, that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

[31] For the reasons above, I have reached the view that the claim **satisfies** the condition of s. 190B(4).

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

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

[32] For the reasons that follow, I have reached the view that the claim **satisfies** the condition of s. 190B(5).

General principles

[33] The leading case on the ambit of the Registrar's task at s. 190B(5) is the decision by Mansfield J in *NT v Doepel*:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17] (Underlining added).

[34] This was approved by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157at [83] (*Gudjala 2008*), who also had this to say about the requirements of s. 62(2)(e) (which calls for the applicant to provide a general description of the factual basis within the Form 1 application) and how this feeds into what will amount to a sufficient factual basis under s. 190B(5):

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92]. (Underlining added)

[35] The Full Court indicated at [93] of *Gudjala 2008* that it would be wrong for the Registrar to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim'.

[36] Nonetheless, it is my view that, for the purposes of the merit condition of s. 190B(5), the general description of the factual basis must amount to more than mere restatements of the claim. This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*):

> … it would not be sufficient for an applicant 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, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

[37] The Full Court in *Gudjala 2008* considers the analysis by Dowsett J in *Gudjala 2007* of the elements a sufficient factual basis must address to meet the particular assertions in s. 190B(5)[2]. There is nothing to indicate that the Full Court considered Dowsett J to have erred in this analysis. It appears that Dowsett J, although mindful of the Full Court's direction on how to treat the factual basis materials, applied the same principles when he again considered, at [18] to [77] of *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*), what a sufficient factual basis must address. In my view, the principles enunciated in *Gudjala 2009* are similarly relevant to the Registrar when undertaking the task at s. 190B(5).

[38] In my view, the approach by Dowsett J in relation to each of the particular assertions did not differ markedly to the approach which he took in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), with the possible exception of a less stringent approach to the first assertion in s. 190B(5)(a), found to be met on the material before his Honour when considering the application a second time—*Gudjala 2009* at [79] and [80].

[39] In *Gudjala* 2007, Dowsett J found 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)'—at [39]. However, it is my view that these comments need to be considered in the overall context of what else has been said on the nature of the Registrar's task and the requirements of s. 190B(5):

(a) the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala 2008* at [92];

(b) the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala 2008* at [92];

(c) the Registrar's function under s 190A is to determine whether the requirements of ss. 190B and 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application, including inconsistencies with information from other documents or proceedings—*NT v Doepel* at [47];

(d) 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—*NT v Doepel* at [17].

[40] Mansfield J found at [132] of *NT v Doepel* that the Registrar did not err in his consideration of the application against the condition of s. 190B(5) by focussing on the factual basis provided for the particular assertions within paragraphs 190B(5)(a) to (c) because, '[i]f any of the particular requirements were not met, then the general requirement would not be met.'

[41] It is with these general principles in mind that I turn to a consideration of whether the factual basis is sufficient to support the particular assertions of subparagraphs (a), (b) and (c).

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[2] At [68] to [72], [77] and [90] to [96].

Information considered

[42] The application contains a general description of the factual basis for the assertion that the claimed native title rights and interests exist and for each of the particular assertions in subsections (a) to (c) in Attachment F of the application. The applicant has also provided the following additional information directly to the Registrar in relation to the factual basis:

(a) Written submissions by Central Desert Native Title Services (CDNTS) DATED 12 August 2013 concerning the conditions of ss. 190B(5) (factual basis for claimed native title), 190B(6) (prima facie case) and 190B(7) (physical connection)

(b) Affidavits of [Name deleted], [Name deleted] and [Name deleted] dated 21 and 23 April 2013 respectively.

(c) Affidavits of [Name deleted] (now deceased) dated 7 February 2006 and [Name deleted] dated 7 February 2006

Consideration of the factual basis for the assertion of 190B(5)(a)

[43] It is my view that the factual basis on which it is asserted that the native title claim group have, and the predecessors of those persons, had an association with the area is sufficient to support that assertion.

[44] Attachment F states that the members of the native title claim group 'have a close connection or association with the application area, including through their own birth or conception, or the birth or conception of their ancestors, through *Tjukurrpa* (dreaming) totems and status with the (customary) Law, and through realisation of personal responsibilities to country' [3]. It is asserted that the connection of the native title claim group with the application area has involved and continues to involve spiritual, physical, historical, customary/legal, economic and social elements—at [3], the details of which are found in [4] to [11] of Attachment F.

[45] The details provided of the spiritual, physical, historical, customary/legal, economic and social elements of the connection of the native title claim group and their predecessors with the application area are said to arise in the following way:

- The spiritual element comprises: their 'beliefs as people of the Western Desert Cultural Bloc (WDCB) that the *Tjukurrpa* are responsible for the existence and form of the landscape, and continue to be a presence or influence in the area, and at places associated with the application area'; from the 'ceremonial and ritual life of the members of the native title claim group in relation to the *Tjukurrpa* associated with the application area'; from the 'responsibility of the members of the native title claim group to protect the places on the application area associated with the *Tjukurrpa*; and 'responsibility to prevent the improper disclosure of beliefs and practices, which relate to places associated with the application area—at [4] of Attachment F. Attachment F [5] states that a number of *Tjukurrpa* are associated with the application area: the Karalaya (Emu), Wati Jutjurra (two goanna men), Marlu (kangaroo) and Kurukundi
- The physical element comprises: 'physical presence', 'use of the resources of the application area' and 'actions … to protect and maintain places on the application area' by the members of the native title claim group and their predecessors'; and the 'continued transmission of

knowledge about the land and waters covered by the application area from senior/elder members … to younger members of the native title claim group, including children'—Attachment F [6]. It is also asserted that some members of the native title claim group lived on the application area for varying lengths of time and members have a traditional physical connection by virtue of the conduct of a range of activities (such as hunting, gathering, using, including in trade and exchange of natural resources, conducting ceremonies and other rituals, protecting sites[3]) on the application area—Attachment F [7];

- The historical element is said to comprise 'the considerable time depth of the spiritual, physical, (customary) legal, economic and social elements of the connection maintained by the native title claim group members and their predecessors within the application area'—Attachment F [8]
- The customary element is 'the status which the members of the native title claim group have in respect of the application area and the relationship they have with it as those who, under the traditional laws and customs acknowledged and observed by them, are the "proper" people in relation to important and significant sites in the application area, the spiritual features of the application area and more generally the land and the waters of the application area' —Attachment F [9]
- The economic element involves the native title claim group 'visiting and utilising the resources of the land and waters covered by the application area without any limitation under traditional law and custom and including for sustenance, trade and exchange and otherwise to their benefit in pursuance of their entitlements under the traditional laws acknowledged and customs observed by them'—Attachment F [10], and
- The social element is a reflection under the traditional laws acknowledged and customs observed by the native title claim group of the relationship between people and people (kinship), of the relationships between people and 'country', and through intrinsic associations of both people and 'country' with *Tjukurrpa* —Attachment F [11]

[46] This general description of the factual basis is, in my view, well fleshed out in the affidavits provided by the applicant as additional information in relation to the condition of s. 190B(5) and in the written submissions by CDNTS dated 12 August 2013 (CDNTS submissions). The material provides, in my view, significant and detailed information to support an assertion that:

- The Gingirana application area falls within the bounds of the WDCB
- The members of the native title claim group are peoples of the Western Desert and their association with the application area and that of their predecessors stretches back over time to pre-sovereignty, and
- This association relates to the application area as a whole and is more than a transient or intermittent association with some areas in some of the period after sovereignty. In my view, the factual basis provided shows that the claimed association is of an enduring, inter-generational nature in relation to the totality of the area covered by the application and is derived from their belief in and practice of law and custom deriving from the *Tjukurrpa* and a complex web of relationships with each other, with the WDCB and with the application area itself

[3] These activities are described in Attachment G of the application.

[47] I will have cause to illustrate how the material supports these matters in more detail when considering it against the assertions of ss. 190B(5)(b) and (c).

Consideration of the factual basis for the assertion of s 190B(5)(b)

[48] For the reasons that follow, I am satisfied that the factual basis 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.

General principles

[49] I understand that the assertion in s. 190B(5)(b), and that found in s. 190B(5)(c), needs to be understood in light of the definition of *'native title'* and *'native title rights and interests'* in s. 223(1) of the Act, and particularly the elements of that definition in subparagraph (a):

> (1) The expression native title or native title rights and interests means the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

[50] The usage in ss. 190B(5)(b) and (c) of terminology similar to that found in s. 223(1)(a) in turn requires a consideration of the decision by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) of what is meant by the term 'traditional' in the context of s. 223(1)(a). The High Court held that:

> "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

[51] The High Court also had this to say about the meaning of the term 'traditional laws and customs' in s. 223(1)(a):

> First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title (emphasis in original)—at [46]–[47].

[52] In light of the above, I am of the view that the factual basis for s. 190B(5)(b) must describe how the laws acknowledged and customs observed by the native title claim group are rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application. I note my view here that the second element of what is meant by the term 'traditional laws acknowledged, and the traditional customs observed' in s. 223(1)(a) discussed at [47] of Yorta Yorta refers to the assertion in s. 190B(5)(c), namely, that the factual basis must support an assertion that the group have continued to hold the native title in accordance with those traditional laws and customs.

[53] That the factual basis for the assertion in s. 190B(5)(b) must identify the society that is asserted to have existed at least at the time of European settlement, and from which the group's current traditional laws and customs are derived, is supported by Gudjala 2008 at [96] where the Full Court commented that there was material in the Gudjala application which 'contained several statements which, together, would have provided material upon which a decision–maker could be satisfied that there was, in 1850–1860, an indigenous society in the claim area observing identifiable laws and customs'. The Court held at [96] that 'this question and others' are ones 'that s. 190B requires must be addressed'.

Consideration

[54] I have paid particular attention to the assertions in Attachment F at paragraphs [12] to [20] and to the affidavits from the following members of the claim group, provided to me by the applicant:

- [Name deleted] dated 21 April 2013

[Name deleted] was born on the Canning Stock Route sometime in the 1940s and grew up there for some years and also on Granite Peak pastoral station. The language for her country is *Putijarra* and her grandparents ([*Names deleted*]) were Putijarra People and this makes [Name deleted] Putijarra too. [Name deleted] also talks about being a Martu person, a word that includes lots of people from the western desert, including Putijarra, Mandiljarra and Kartujarra.

It is being Putijarra and being from that country that gives [Name deleted] her right to talk for the claim area; it is all Putijarra country and this keeps going out of the claim area over to Katjarra [the Carnavon Ranges] in the Birriliburu determination.

[Name deleted's] mother would walk between Well 6 and Katjarra [the Carnavon Ranges] back and forward through her country; she did this with her family, across to the rabbit proof fence and to Beyondie, in the claim area.

[Name deleted's] mother's brother is one of the ancestors named in the application from which current members of the claim group descend, Midjibungu/Santa Clause, and he too travelled up and down through that country. The connection of [Name deleted's] family to the claim area because they used to walk through their country, up and down. [Name deleted] spend her childhood visiting Three Rivers station [in the claim area] and spent time with other old Putijarra people, including [Names deleted]. The old people would talk about *jukurrpa* with [Name deleted] and take her out on country, camping, hunting and telling her stories. She would hear the old people singing for country. [Name deleted] learned to understand and speak some

Putijarra from her grandmother, and also learned Martu wangka, whilst at the mission living there with other kids from the desert and from other languages, e.g. Mandiljala.

[Name deleted] says that the laws of her people and country come from the dreamtime or the *jukurrpa*. Her people, the Putijarra are like other western desert peoples e.g. the Ngaanyatjarra and the Mandiljarra. They are all Martu people and all have the same law, including same way of marrying, same way of conducting funerals and sorry business, same way of hunting and the same *jukurrpa* stories running through and between their countries. These rules were taught to [Name deleted] by her grandmother, who taught her about her skin name, her familial connections and other rules about skin, e.g. who to marry, how she related to and was connected to others and where to sit at law time and funerals.

[Name deleted] describes the toughness of Martu law, there are consequences if you break it. Wrong way marriages are not approved, as are disobeying the rules of where to sit at funerals. [Name deleted] says that the ladies of the desert have the same job at law time, they travel along, look after the boys who are being initiated and then sit at camp while they go off. Law time happens every summer.

[Name deleted] still goes out to the claim area; she hunts there with others, for goanna and emu eggs. She learned where to find food from her old people and how to cook food the right way. She teaches these things to her kids.

[Name deleted] says that when you are the owner for country, you have got the right to walk around it and to hunt there, to talk about the jukurrpa and to for your country. You cannot go into someone else's country and talk for it. You must get permission before going onto the country of others; no trespassing is the law. In the old days, the law was very strict, but now they are a bit freer with hunting and gathering; if travelling through Martu country that belongs to someone else, it might be all right to take game but you cannot change the country; you have to have the right people for country to make decisions about country. Things like survey or if you want to go to a special place, require the right people there; to break this means deep trouble in Martu law. So you can't burn other people's country and you can't talk for it

So as Putijarra, [Name deleted] can't go to Kartujarra country and talk for it. All Martu people must follow this law, but sometimes people don't. People who break the rule will be told and there might be fights. Owning country brings with it the responsibility of looking out after it, which in turn includes taking your offspring there and showing them it and how to care for it. It is part of your job to hand that knowledge on and to try and make sure that your ngurra (country) is protected.

- [Name deleted] dated 21 April 2013

[Name deleted] was born on the rabbit proof fence on Mary Mia Station right on the claim area. He was a little kid during WWII. He was born near to where the broken-down old school bus sits near Meekatharra School now. His mother and father, they were going out and travelling through the country up and down the rabbit proof fence; they were travelling with a big mob, including his ancestor [Name deleted], to Jigalong from Wiluna through Putijarra country for law business when he was born. Other times his mob would travel for law business through Granit Peak station across to Katjarra [Carnavon Ranges] and then over to the rabbit proof fence and on to Beyondie. [Name deleted's] mother was [Name deleted], one of the group's ancestors, and his

father was [Name deleted]. The way of [Name deleted's] birth did not make him Putijarra. His mother was Kiajarra, next door to Putijarra. The rabbit proof fence was not the country (ngurra) of his parents but as he was born there, this made it his ngurra. [Name deleted] got the dreamtime story (jukurrpa) for that country and he has to look after it. The desert mob has got the same law for looking after country.

[Name deleted's] jarring (totem) is the sugar bag dreaming; it is inside the wood of the trees, like honey left behind by the bees. Whilst his mother was pregnant, the old people saw a bunch of them, with bees and flies going in and out. [Name deleted] has a birthmark to show for that. His old people told him that story. He can't eat sugarbag because it is his totem.

[Name deleted] has a skin name, as is part of the Law and this governs how to marry, which he did right way. Marriage rules are still followed, although consequences for breach are not so harsh. [Name deleted] provides extensive details about the connections between he and others within the claim group, revealing that there are complex relations and connections between its members that have stretched over the generations.

He describes his travels over country with his old people and his initiation [going through the Law] out at Beyondie Lake and learning the story of that place. He learned to hunt and find tucker while travelling through the country with his old people. He was taught to use a spear, to make a wooden dish for carrying water, where to get water [from rockholes].

When [Name deleted] went through the law he learnt the stories for his country. He describes those stories [Jukurrpa]. Knowing the jukurrpa means he has jobs to do for country; he has to look after it as a kanugurra. [Name deleted] clearly has an intimate and enduring knowledge of his country, its special places and jukurrpa from what is said in his affidavit. He passes stories to the younger people and takes them there to show its special places, including [Name deleted], [Name deleted] and [name deleted]. They are the right people for him to tell the stories to because they are some of the right people for that country, [Name deleted] and [Name deleted] mob.

[Name deleted] says that if other Martu people want to go to that country they got to ask the right Putijarra people and if they get permission, Putijarra people with ngurra for that county will go with them. Big decisions about country are made by the Putijarra people with the right to talk for that country. It is for the older people with the ngurra to make decisions.

- [Name deleted] dated 23 April 2013

[Name deleted] is a younger member of the claim group, born in [year deleted]. His mother was married to Parnapuru Bluey Atkins [an ancestor for the claim group] and then his father. [Name deleted] was grown up by his nanna from a little boy, a Putijarra lady born at Beyondie in the claim area. Although born Pintupi through his father, he grew up Putijarra way, because that was his grandmother's way. Because his grandmother was born at Beyondie, that is [Name deleted's] ngurra, as dictated by Martu Law.

[Name deleted] provides cogent information about his life-long membership of the claim group and also of his connection to the country of his grandmother and its laws and customs, including his totem [dingo] learning the Law, its stories, songs and places, how to hunt and gather food and the intricate web of skin relations that connect people to each other and to their country/jukurrpa. [Name deleted] says that as younger member of the group, he has to let the old people talk out

front, as they control the law and the land. At law business time, it gets decided when the Elders will pass their knowledge [e.g. songlines, country] on to the younger people. [Name deleted] says that it is for Putijarra people to decide to tell, and what to tell, other Martu people about the jukurrpa for that Putijarra country, if they are asked.

[55] It is clear from all of the information provided in Attachment F and in the supporting affidavits described above that the Gingirana claim relies on the laws and customs of the Western Desert Cultural Bloc (WDCB). In this case, CDNTS assert at [41]–[43] of their written submissions dated 12 August 2013, that the specific laws and customs which give rise to native title rights and interests, is based on the 'multiple pathways' model of connection to country, discussed by O'Loughlin J in *De Rose* and by French J when making the adjoining Birriliburu determination including, country of birth, long-term physical association, ancestral connections or possession of geographical or religious knowledge of country.

[56] The information I have had regard to indicates an emphasis upon birth within the claim area, either of one's self or one's ancestors but that there are other means, such as [Name deleted's] case of the acquisition of ritual knowledge: at [9] of his affidavit he tells how he got the dreamtime story (Jukurrpa) for the country. The affidavits from the members of the claim group provide cogent and eloquent expression of how members of the claim group as a whole acknowledge and observe the traditional laws and customs of the WDCB which connect them to the claim area via the multiple pathways system, via means other than descent.

[57] In my view, the information referred to above comprehensively describes the current existence of traditional laws and customs acknowledged and observed by the members of the native title claim group over the period since settlement until recent times. The deponents tell of their life-long connection with the country of their Putijarra people, which fits within a wider system of the WDCB, which they call Martu. They tell of their Martu heritage and their relationships and connections with other Martu people.

[58] In my view, this information provides strong links between the traditional laws and customs described by the deponents and the relevant normative system operating in the area, identified as the WDCB. The information about the group being part of the wider Western Desert is consistent with that described in the affidavits, including the references to language, pathways to ownership of country and how people have remained connected to country and to the laws and customs of the WDCB.

Consideration of the factual basis for the assertion of s 190B(5)(c)

[59] For the reasons that follow, I am satisfied that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

General principles

[60] In my view, the issue at s. 190B(5)(c) is whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold their 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 being the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta* at [47] and also at [87].

[61] The affidavits I reviewed above in relation to the requirements of subparagraph (b) are replete with information about the continuity of the observance of traditional laws and customs.

[62] All of the deponents depose:

- That they were born into the society of the Martu or Western Desert peoples
- That they acknowledge the importance of and respect the rules laid down by the *jukurrpa* and provide specific and detailed information about their knowledge of the *jukurrpa* as it relates to the area covered by the application
- That they acknowledge and observe customary rules regulating conduct on country, at ceremony (e.g. funerals), marriage and skin relations, hunting and food gathering protocols and the regulation of permission when visiting the country of others
- How their native title rights and interests were transmitted via birth on country or other means, in accordance with the laws regulating them and the Western Desert peoples more generally, and
- How these laws and customs were passed to them by their old people and the measures they are taking to teach the younger members of the native title claim group these things.

[63] The information evidences a strong and ongoing connection between the observance of the asserted traditional laws and customs and the area covered by the application and points to the continued holding of the claimed native title by the continued acknowledgement and the observance of the traditional laws and customs of the society into which they were born.

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.

[64] I have reached the view that the claim **satisfies** the condition of s. 190B(6). I consider that, prima facie, some of the claimed native title rights and interests can be established. The rights established on a prima facie basis are the following:

> 8.In relation to the lands and waters of the area covered by the application, except for the areas where native title has been partially extinguished and including any areas where extinguishment must be disregarded pursuant to section 47B of the Act, the native title rights and interests are the right to possess, occupy, use and enjoy the land and waters of the application area to the exclusion of all others.
>
> 9.In relation to land and waters of the area covered by the application, except for areas where native title is wholly recognised, the native title rights and interests are the right to:
>
> (a) access, remain in and to use that part for any purpose;
>
> (b) access resources and to take for any purpose resources in that part;
>
> (c) engage in spiritual and cultural activities on that part;
>
> (d) maintain and protect areas, places and objects of significance in or on that part;
>
> (e) protect resources and the habitat of living resources in that part;
>
> The native title rights and interests are:

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

The exclusive right at [8]

[65] In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the 'expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over the land'—at [89] and [93].

[66] More recently, the Full Court reviewed the case law in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> [T]he question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (Underlining added).

[67] *Griffiths FC* indicates at [127] that what is required to prove an exclusive right is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may 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'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

[68] I am of the view that there is material which supports the existence of this right in the foregoing affidavits. As an example, I refer to the following:

[Name deleted] 'When you are the owner for country, you got the right to walk around it. You got the right to hunt, and know what food there is in that area. You got the right to talk about jukurrpa. You got to talk for your own country. You can't go in to someone else's country and talk for that country and talk for that country … Because I am Putijarra, I can't go to Kartujarra country and talk for their country – claim their country—at [36]

'All Martu people should follow that law about not talking for other people's country, but sometimes people don't. People who break the rule they will be told – you should know, where your country is. They might be growled at, it will cause fights'—at [37]

'You got to get the okay before going on to other people's country – no trespassing, that's our law. In the olden days, if someone was travelling from one side, and they crossed over, they might get speared, or killed. I heard the old people talking about it. People don't get speared now for going in the wrong country, but the owners for country will grow at them'—at [42]

'… You have to have the right people for country to make decisions about country. Things like surveys, or if you want to go to a special place, you have to have the right people with you and get the okay, or you're in deep trouble, Martu law way'—at [43]

[Name deleted] 'We take the law on from Cardawon Hill, Jibbingoona Hill, Yunana, Gingirana Claypan … and then to Three Rivers. We also got law for Beyondie Lake. I got the law all through that country, all from the claim area, until it gets mixed up with Miparri's mob on the … [eastern] side new Matuwa, in the Wiluna claim, and I hand it over. Miparri's mob, the Wongawols, they pick up the law at Matuwa and they look after it from there, all through Carnegie station, Earaheedy, heading over to Cosmo community'—at [36].

'If other Martu people want to go to country in the claim area, they got to ask the right Putijarra people. Got to get permission, and then we go with them. They got to ask the families for that country. You got to get the okay from the families who got that ngurra'—at [46]

[Name deleted] 'In can go any time into Putijarra country to go hunting, take wood, gather tucker, burn the country. I can do this because it is my country. I could go set up a camping spot anywhere in my country. No one can tell me what to do in my country. If you haven't been through the law, you can't do that, you have to check first. I can do it, because I have been through Martu law …'—at [22]

'Martu people know the right families for country through the western desert … People learn this from their old people, and they got to listen to them. The songlines the old people know say whose land it is, whose song is it, who live there, who owns the land. If Kartujarra come in, or other Martu people from another country, come in and try to claim Putijarra country, they have no right, and they'll get punished. The land will punish them, and maparn mob too. They might get sick'—at [23]

… It would be alright if they took a Putijarra elder with them, then it would be okay. That way, they won't go anywhere stupid, they explain to them where to go'—at [24].

[69] In finding that the exclusive right is prima facie established, I am of the view that the information within the affidavits by [Name deleted], [Name deleted] and [Name deleted], which provides cogent and compelling evidence about the existence of this right under the traditional laws and customs of the native title claim group. As I have reasoned above at s. 190B(5), the totality of this material amounts to a sufficient factual basis for the assertion that the claimed native title rights and interests exist in relation to the application area. The material points to the current acknowledgement and observance by

the native title claim group of the traditional laws and customs of a pre-sovereignty society that has had a continued vibrancy since contact with white settlement.

The non-exclusive rights

[70] It follows in my view, from a consideration of the same information that the following non-exclusive rights are also prima facie established:

(a) access, remain in and to use that part for any purpose;
(b) access resources and to take for any purpose resources in that part;
(c) engage in spiritual and cultural activities on that part;
(d) maintain and protect areas, places and objects of significance in or on that part;
(e) protect resources and the habitat of living resources in that part;

[71] I consider that the following rights are not established prima facie:

9. In relation to land and waters of the area covered by the application, except for areas where native title is wholly recognised, the native title rights and interests are the right to:
(f) make decisions about the use and enjoyment of land and waters; and
(g) receive a portion of any resources taken by others from the land and waters.

[72] In my view, a right to make decisions seeks to exert a degree of control which has been extinguished in the area over which it is claimed in this application, such that it cannot be prima facie established over such areas where the exclusive right cannot be recognised.

[73] In my view, a right to receive a portion of any resources taken by others is not a right in relation to lands or waters, such that it does not meet the first element of the definition of the term 'native title rights and interests' found within s. 223(1) of the Act: *Yarmirr v Northern Territory* (1998).[4]

[74] To conclude as I consider that some of the claimed rights are prima facie established, the claim meets the condition of s 190B(6).

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
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.

[75] The claim **satisfies** the condition of s. 190B(7) for the reasons that follow. I have taken the phrase 'traditional physical connection' to mean a physical connection in

[4] 156 ALR at [118] per Olney J.

accordance with the particular traditional laws and customs relevant to the claim group—'traditional' in the Yorta Yorta sense. I note also that at [29.19] of the explanatory memorandum to the Native Title Amendment Act 1998, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

[76] In my view, the information from [Name deleted], [Name deleted] and [Name deleted], recounted in my reasons at s. 190B(5), provides satisfactory evidence of the requisite traditional physical connection. These persons all clearly belong to the native title claim group. They describe their life-long connection with Putijarra country and their traditional affiliations with the wider Martu or Western Desert society, their Putijarra rules and customs and with the jukurrpa, as it relates specifically to the claim area. They know the Dreamings for their country and its special places. They have walked all over the land with their old people. They practice law business and conduct ceremonies. They hunt and gather from their land. They are clearly part of an inter-generational system whereby these things have passed to them by their old people and they have taught these things to their young ones.

[77] On the basis of this material, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a 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.

[78] The claim **satisfies** the condition of s. 190B(8) for the reasons that follow.

[79] 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 The application meets the requirement under s. 61A(1) as there are no approved determinations of native title over the application area.

[80] Under s. 61A(2), the application must not cover any area in relation to which:

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

[81] Under s. 61A(4), s. 61A(2) does not apply if:

> (a) the only previous 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.

[82] The application meets the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see statements to this effect in Schedule B.

[83] Under s. 61A(3), the 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) 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.

[84] The application meets the requirement under s. 61A(3), as limited by s. 61A(4). Schedule E is clearly drafted such that any claim of exclusive possession, occupation, use and enjoyment is only made over areas where there has been no extinguishment or where any extinguishment is to be disregarded because of ss. 47, 47A or 47B (refer to my reasons for s. 190B(4) above).

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.

[85] The claim **satisfies** the condition of s. 190B(9) for the following reasons:

- Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown, thus meeting s. 190B(9)(a).
- The area covered by the claim is located well inland and does not extend to offshore places, thus meeting s. 190B(9)(b).
- The application does not disclose, nor is there any information before me to indicate, that the claimed native title rights and interests have been otherwise extinguished, thus meeting s. 190B(9)(c).

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.

[86] 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 ***Table*** below.

[87] 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)— *NT v Doepel* at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

[88] In relation to the requirements of ss 61(1) and (4), I am of the view that *NT v Doepel* is authority that I am not required to look beyond the application nor am I entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group—at [35] to [37], [39] and [47]. That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*NT v Doepel* at [35] to [37].

Table: *Identifying location of details/information/accompanying documents required by ss 61 and 62*

What is required under ss 61 & 62	**Location within Form 1 or other document**
s 61(1) – Persons who may make application	Form 1 pg 3
s 61(3) - Name and address for service	Form 1 pgs 3 & 10
s 61(4) - Native title claim group named/described	Attachment A
s 62(1)(a) - Affidavits in prescribed form	Affidavits provided with original Form 1 filed 10/03/2006
What is required under ss 61 & 62	**Location within Form 1 or other document**
s 62(2)(a) - Information about the boundaries of the area	Attachment B
s 62(2)(b) - Map of external boundaries of the area	Attachment C
s 62(2)(c) - Searches	Attachment D
s 62(2)(d) - Description of native title rights and	Schedule E

interests	
s 62(2)(e) - Description of factual basis	Attachment F
s 62(2)(f) - Activities	Schedule G
s 62(2)(g) - Other applications	Schedule H
s 62(2)(ga) - Section 24MD(6B)(c) notices	Schedule HA
s 62(2)(h) - Section 29 notices	Attachment I

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.

[89] The claim satisfies the condition of s. 190C(3). I have considered an analysis of the application area by the Tribunal's Geospatial section dated 5 August 2013 (Geospatial report), against the Register of Native Title Claims, to identify whether or not there are any previously registered applications affecting that area at the time the current application was made. The Geospatial report indicates that there are no overlapping applications, registered or otherwise over the area, thus a consideration of members in common under this condition does not arise.

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.

[90] 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 two representative bodies that could certify the application, as set out in the reasons that now follow.

[91] Attachment R of the application contains the signed certification of the application by Central Desert Native Title Services (CDNTS) and Yamatji Marlpa Aboriginal Corporation (YMAC).

[92] For the certifications to satisfy the requirements of s. 190C(4)(a) they must comply with the provisions of s. 203BE(4)(a) to (c).

[93] It is my view that the certifications comply with s. 203BE(4)(a) as they each make the statements required by that section, namely, all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that 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.

[94] It is my view that the certifications comply with s. 203BE(4)(b) as they each briefly sets out the reasons for being of the above opinion.

[95] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)'. I refer to my reasons at s. 190C(3) above which establishes that there are no overlapping applications, hence this requirement is not applicable.