National Native Title Tribunal

Registration test decision

Application name	Swan River People #2
Name of applicant	Albert Corunna, Kathy Penny, Clive Davis, Richard Wilkes, Greg Garlett, Victor Warrell and Bella Bropho
NNTT file no.	WC2011/2
Federal Court of Australia file no.	WAD 24/2011
Date application made	1 February 2011
Date application last amended	2 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).

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

For the purposes of s. 190D(3), my opinion is that the claim does satisfy all of the conditions in s. 190B. Nevertheless I cannot accept the claim for registration because the claim does not satisfy all of the conditions in s. 190C.

Date of decision: 11 October 2013

Date of reasons: 25 October 2013

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Renee Wallace

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.

Reasons for decision

Introduction

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

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Swan River People #2 claimant application to the Native Title Registrar (the Registrar) on 3 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 under s. 190A of the Act.

[4] Having considered the amended application, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. The application as amended does not fall within the exceptions specified in s. 190A(1A). Also, the application does not meet the requirements of a later claim which must be accepted by the Registrar pursuant to s. 190A(6A).

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

[6] The Swan River People #2 application was first filed on 1 February 2011. The application was subsequently not accepted for registration on 15 April 2011.

[7] On 17 February 2012 the Court granted leave to amend and the amended application was again referred to the Registrar. The application was not accepted for registration on 29 March 2012.

[8] On 12 April 2012 the applicant applied for a reconsideration of the claim made in the application pursuant to s. 190E(1) of the Act. A member of the tribunal undertook a reconsideration of the claim. On 6 June 2012 the member gave notice to the Registrar that the Registrar should not accept the claim for registration.

[9] On 17 July 2012 the applicant applied to the Federal Court for a review of that decision, pursuant to s. 190F(1). In *Corunna v Native Title Registrar* [2013] FCA 372 Siopis J heard and dismissed the application for review.

[10] The applicant was granted leave to amend by Robertson J on 1 July 2013 and the applicant filed the amended application with the Court on 2 July 2013.

Registration test

[11] Each condition of the registration test must be considered having regard to the law and how it defines that particular requirement, and applying those to the specific facts of the matter. It also follows that where as the Registrar's delegate I am 'not satisfied on *every matter* under each of them [emphasis added]' I have no discretion and I am bound not to accept the claim for registration—*Evans v Native Title Registrar* [2004] FCA 1070 at [46].

[12] 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.

[13] Pursuant to s. 190A(6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C.

Information considered when making the decision

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

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

[16] For the purpose of the registration test, I have had regard to the information contained in the application.

[17] I understand the applicant to request that I also have regard to the following information:

- authorisation-related material, including meeting minutes, meeting attendance list and a copy of a public notice (received by the Registrar on 30 March 2011);
- a DVD recording of an authorisation meeting (two disks received by the Registrar on 6 April 2011);
- an email from Mr Corunna dated 2 February 2003;
- letter from Albert Corunna dated 13 September 2011;
- submission on Yued Boundary (undated);
- affidavit of Albert Corunna dated 13 September 2011
- affidavit of Albert Corunna dated 24 November 2011;
- affidavit of Bella Bropho dated 24 November 2011;
- submission dated 12 April 2012 and signed by Albert Corunna, Richard Wilkes, Victor Warrell and Bella Bropho;
- registration test reasons dated 29 March 2012
- affidavit of Albert Corunna dated 18 April 2012;
- reconsideration reasons dated 6 June 2012.

Decision of the Court in Corunna v Native Title Registrar [2013] FCA 372 (Corunna v NTR) and decisions of the Registrar and Member in relation to the application

[18] Whilst it is appropriate for an administrative decision maker to have regard to decisions of the Court in relation to the same matter (and, of course such decisions are binding upon the Registrar or her delegate, in so far as they pronounce the law), I am mindful that the law mandates a requisite standard of conduct and that '[t]he general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue'— *Cadbury Uk Ltd v Registrar of Trade Marks* [2008] FCA 1126 (*Cadbury*) at [18]. I take this statement to be relevant to the role of a delegate of the Registrar in applying the statutory conditions of the registration test.

[19] It follows that there are certain expectations upon an administrative decision maker, in the course of making a decision and giving weight to findings of a judge. Finklestein J in *Cadbury* made the following pertinent observations:

> Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter—at [19].

[20] In *Corunna v NTR*, the Court considered an application for review (under s. 190F(1)) of the member's decision not to register the application (reconsideration decision). In *Corunna v NTR*, Siopis J considered whether the member erred in his application of the law as it applies to the task at s. 190B(5)(a). His Honour held that there was no error on the part of the member 'in determining that the appropriate test was whether the material provided demonstrated a factual basis sufficient to support the assertion that the native title claim group have, and their predecessors had, an association over the *whole* area of the claim' [my emphasis]. Further, His Honour was of the view that the member's decision was not manifestly unreasonable and that it was open to him 'to find that the quality of that material was not sufficient to demonstrate compliance with s. 190B(5)(a)' — at [31] and [44].

[21] The application, prior to this amendment, has also been the subject of a decision of the Registrar's delegate on 29 March 2012 and the member's reconsideration decision on 6 June 2012. The applicant has requested that I consider those decisions in relation to the registration testing of the amended application.

[22] Whilst in my view it is appropriate that I have regard to those decisions, I do not consider that I am bound by the decisions. Nor do I consider that the applicant is entitled to rely on past decisions or practices of the Registrar—see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*) at [16].

[23] I note that the obvious result of any amendment to such an application is a change to the information contained in the application. Thus, in at least some respects the information before me will be different to that which was previously considered.

Information not considered

[24] 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.

[25] Also, I have *not* considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[26] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31].

[27] The statutory provisions in this instance which may be said to primarily inform or elicit the necessary obligations and response in relation to the power I am exercising are those contained within s. 190A of the Act. If the Registrar is given a copy of a claimant application (under certain provisions), she 'must, in accordance with this section, consider the claim made in the application'—s. 190A(1).

[28] In relation to the procedural fairness process that I have undertaken I have had regard to those provisions and formed an understanding of what processes may be explicitly required or necessarily inferred from such. I have also had regard to any relevant case law.

[29] In relation to the applicant, I consider that these provisions reasonably elicit that they be entitled to put information before the Registrar in support of the claim made in the application and that they have the opportunity to address information which may be considered adverse.

[30] The requirement that, where reasonably practicable, I have regard to any information supplied by a relevant government which is relevant to one or more of the conditions of registration (s. 190A(3)(c), in my view reasonably elicits the general obligation to engage the relevant government body in the procedural fairness process. That is, I understand that where the State supplies information to the Registrar the obligation upon the Registrar is to have regard to that information to the extent that it is reasonably practicable and to the extent that I consider it to be relevant information —see also *Western Australia v Native Title Registrar* [1999] FCA 1591 at [34].

[31] On 4 July 2013, the tribunal case manager for this matter wrote to both the applicant and the State of Western Australia (the State) informing them of the receipt of the amended application. The letters informed both the applicant and the State of the proposed decision date. The letter to the applicant asked that any information additional to the application be provided by 19 July 2013.

[32] Both the applicant and the State were subsequently updated of a revised decision date on 17 September 2013.

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.

[33] 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.

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

[35] 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.

[36] 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)

[37] Section 61(1) requires that the application be made by persons who are authorised by the native title claim group, being 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed…'— see s. 61(1).

The requirements of s. 61(1) and the Registrar's task at s. 190C(2)

[38] In relation to the requirements of s. 61(1), it is well established that the Act does not permit the making of a native title determination application by a subgroup of the real native title group,

nor can the grant of native title be given to a subgroup of the real group—see *Dieri People v South Australia* [2003] FCA 187 (*Dieri People*) at [55] and *Edward Landers v South Australia* [2003] FCA 264 (*Landers*) at [33] following *Ward v State of Western Australia* (1998) 159 ALR 483 at 541, *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60], *Tilmouth v Northern Territory of Australia* [2001] FCA 820.

[39] Given, however, the Registrar's task at s. 190C(2) discussed above, the law elicits the limited ambit of this consideration, being that which is confined to the information contained in the application itself. Thus, this assessment does not involve the Registrar going beyond the application, nor does it require any form of merit assessment of the material to determine whether 'in reality' the native title claim group described is the correct native title group— *Doepel* at [37] and [39].

[40] Nonetheless, whilst s. 190C(2) may be framed in a way that 'directs attention to the contents of the application' and its purpose is to ensure that the application contains all the details and information required by ss. 61 and 62, if those contents are found to be lacking, this necessarily signifies problems. Thus, at the outset it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all the persons of the native title claim group'— *Doepel* at [35].

The information in the application

[41] The application names Albert Corunna, Kathy Penny, Clive Davis, Richard Wilkes, Greg Garlett, Victor Warrell and Bella Bropho as the persons who jointly comprise the applicant for this matter. The application contains the statement that '[t]he applicants [sic] are entitled to make this application as people authorised by the native title claim group.'

[42] Schedule A of the application contains a description of the native title claim group.

[43] In my view, the application sets out the persons authorised to make the application and the native title claim group in the terms required by s. 61(1).

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

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

[45] The application must contain the name and address for service of the person who is, or persons who are, the applicant — s. 61(3).

[46] Part B of the application contains the name and address for service of the persons who are the applicant.

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

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

[48] Section 61(4) requires that the native title claim group be either named or described in the application.

[49] I refer to my reasons above in relation to s.61(1). The nature of the task at s. 61(4) is similarly confined.

[50] Schedule A of the application contains a description of the native title claim group. It follows that the provisions of s. 61(4)(b) apply and that the application must contain the details/information that 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.

[51] I am satisfied that within the application at Schedule A there is a description which appears to meet the requirements of the Act.

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

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

[53] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form. This requires the inclusion of prescribed statements in the affidavit/s.

[54] In *Drury v Western Australia* [2000] FCA 132 (*Drury*) French J (as his Honour then was) discussed the issue of whether with the filing of an amended application there was any necessity for the applicant to file fresh affidavits. His Honour held that s. 62 'insofar as it deals with accompanying affidavits in subs 62(1), is dealing with the position at the point of filing of the application.' Accordingly, it was inferred that s. 62 was not intended to cover amendment of applications and did not either expressly or by implication 'convey a requirement that fresh affidavits have to be filed on the occasion of every amendment — at [11].

[55] His Honour's reasons refer to the express provisions of s. 64(5), which at the time required the filing of a new affidavit if an application was amended to replace the applicant. That affidavit from the new applicant pursuant to s. 64(5) was required only to swear to the issue of authorisation. This requirement, His Honour held was a powerful influence against the contention that any amendment to an application required the filing of fresh affidavits. Section 64(5), however, has now been repealed. His Honour also refers to the circumstances and nature of the amendments to the application, being primarily to reduce the geographical boundaries of the claim area to eliminate an overlap with another claimant application (the amendments were to Schedule B, C and also to Schedule H of the application). In His Honour's view the nature of the amendments (which his Honour described as a simple 'contraction of the geographical area') was also significant to his conclusion that to require the filing of new affidavits would 'be a pointless bureaucratic imposition.' All of this, however, does not signify 'that the Court may not direct affidavit evidence in support of amendments to be filed in an appropriate case' — *Drury* at [5], [9], [13] and [14].

[56] The amended application filed with the Court on 2 July 2013 was not accompanied by any affidavits. At the point of first filing on 1 February 2011 the application was accompanied by affidavits of each of the persons who comprise the applicant, being Albert Corunna, Kathy Penny, Clive Davis, Richard Wilkes, Greg Garlett, Victor Warrell and Bella Bropho.

[57] This is not the first time the application has been amended since filing on 1 February 2011. The application was amended on 25 November 2011 and I understand that the amended application at that time was also not accompanied by any affidavits — registration test decision dated 29 March 2012.

[58] It is not obvious that the circumstances here necessarily correspond to those which were the subject of the Court's decision in *Drury*. The amendments made to the application on 2 July 2013

whilst similar in that essentially they amount to the contraction of the geographic area covered, here the application has undergone a number of amendments on separate occasions where the application has not been accompanied by affidavits pursuant to s. 62.

[59] However, I understand French J in *Drury* to infer that the requirement to file new affidavits with an amended application is essentially to be at the discretion of the Court. I have before me a copy of the order of Robertson J dated 1 July 2013 granting the applicant leave to amend the application. The order does not refer to any requirement upon the applicant to file new affidavits.

[60] It may also reasonably be assumed that the applicant continues to rely upon the affidavits that were filed with the application at the original point of filing the applicant on 1 February 2011 even though they do not accompany the amended application. This assumption, I consider, is reasonable given that the persons who comprise the applicant has not changed since the application was made on 1 February 2011 and that the applicant pursuant to s. 251B is given authority to make the application and to deal with matters arising in relation to it.

[61] Given that, I have considered the affidavits filed with the application on 1 February 2011. There are seven affidavits from each of the persons who together comprise the applicant.

[62] I note that in *Doolan Native Title Registrar* [2007] FCA 192 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The 'applicant' in s 62(1)(a), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at [67].

[63] Thus, I understand that I can consider the affidavits of each of the individual persons in concert for the purpose of s. 62(1)(a). Each of the affidavits are in the same form and in my view contain the required statements set out in s. 62(1)(a)(i) – (v).

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

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

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

[66] 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)

[67] The application must contain details and other information which describes the boundaries of the application area referred to in s. 62(2)(a)(i) and (ii). These are the area covered by the application (s. 62(2)(a)(i)) and any areas within those boundaries that are not covered (s. 62(2)(a)(ii)).

[68] Schedule B of the application contains all details and other information required by s. 62(2)(a).

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

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

[70] Section 62(2)(b) requires the application to contain a map of the application area.

[71] Attachment C of the application contains a map of the external boundaries of the area.

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

Searches: s. 62(2)(c)

[73] Section 62(2)(c) requires details and results of any 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 application area.

[74] Schedule D contains '[t]he results of the most recent searches, that the Applicants [sic] are aware of, that were carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the Application.'

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

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

[76] Section 62(2)(d) requires that the application contain a description of the native title rights and interests claimed. This description must not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

[77] Schedule E of the application contains a description of the native title rights and interests claimed as required by s. 62(2)(d).

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

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

[79] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s. 62(2)(e)(i), (ii) and (iii).

[80] I note that in relation to this requirement, it is my understanding that I only consider whether the information regarding the claimant's factual basis contained in the application 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 purpose of s. 190B(5) — *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

[81] Schedule F of the application refers to Attachment F and F1 as containing information in relation to the general description of the factual basis. I have considered that general description, and in my view it speaks in a general way to each of the matters outlined in s. 62(2)(e)(i), (ii) and (iii).

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

Activities: s. 62(2)(f)

[83] The application must contain details relating to any activities carried out by the native title claim group in relation to the land or waters.

[84] Schedule G of the application contains details of the activities carried out by the native title claim group in relation to the area covered by the application.

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

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

[86] The application must contain details in relation to any other applications, of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application.

[87] Schedule H of the application contains details of other applications of which the applicant is aware that have been made in relation to the whole or part of the area covered by the application.

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

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

[89] Section 62(2)(ga) requires details of any notifications under s. 24MD(6B)(c), which relate to the whole or part of the application area and which the applicant is aware of.

[90] Schedule HA of the application contains the statement that '[t]he applicants [sic] are not aware of any notifications under paragraph 24MD(6B)(c) of the Act that have been given and that relate to the whole or part of the area.'

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

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

[92] Section 62(2)(h) requires details of any notifications under s.29 (or under a corresponding law), which relate to the application area and which the applicant is aware.

[93] Schedule I of the application contains details of such notices of which the applicant is aware.

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

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 task at s. 190C(3)

[95] The requirement here is that the Registrar 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. This requirement, however, is only triggered if the previous application meets all of the criteria in s. 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[96] Those criteria are that the previous application covered the whole or part of the area covered by the current application (s. 190C(3)(a)), that there is an entry on the Register of Native Title Claims for the previous application when the current application is made (s. 190C(3)(b)) and that the entry was made (or not removed) as a result of consideration of the previous application under s. 190A (s. 190C(3)(c)).

[97] The task at s. 190C(3) is not confined to only considering the information contained in the application — *Doepel* at [16].

The applicant's submissions and other material in relation to s. 190C(3)

[98] In a letter to the Registrar dated 12 August 2013, the applicant states that on 13 September 2011 a letter, a submission and an affidavit in relation to the overlap were provided to the Registrar. However, the applicant asserts that this was overlooked by the Registrar's delegate in previously considering the application for registration and also by the member who conducted the reconsideration of the claim. The applicant requests that these documents be considered in relation to s. 190C(3).

[99] The letter to the Registrar dated 13 September 2011 is brief and refers to two enclosures, being a submission in relation to the northern boundary of the application area which overlaps the Yued application area (WAD 6192 of 1998) and an affidavit sworn by Albert Corunna dated 12 September 2011.

[100] The document titled 'submission on the Yued boundary' is a two page submission referring to historical sources which are 'given in support [of] the claim area description of native title application WAD 24 of 2011 (The Swan River People #2 application) which overlaps native title application WAD 6192 of 1998 (the Yued application).' The submission contains references to various historical sources that refer to various places, which I understand to be within the northern boundary of the application area.

[101] In the affidavit of Albert Corunna dated 13 September 2011, Mr Corunna provides information in relation to the boundaries of the application areas for the current application and the Yued application. Although the boundaries of the current application area have since changed, I understand the applicant to assert that the information remains relevant. The information includes that:

10. The Swan River People No. 2 claim was lodged in the Federal Court in February 2011. The boundaries of this claim were determined according to traditional law.

....

17. Alice Taylor was the wife of Tommy Nettles and she was born in a bush camp near Gingin. [Text deleted for cultural reasons].

18. The Nettles and Wilkes families are not connected with the Moore River but currently the Yued Native Title Claim lists Tommy Nettles, Alice Taylor, Teddy Wilkes and Cecelia Munderan as apical ancestors. This is not correct.

19. The people at SWALSC have not done their research properly or consulted with the people who have traditional knowledge.

20. If the boundaries were drawn correctly according to our Traditional Law and the apical ancestors were fixed up then these problems would be solved.

21. The current "straight line" boundary along the south of the Yued claim will be impossible to justify under Traditional Law. The difficulty will be hard to overcome if Yued ever want to go for a Native Title determination. The Yued Claim will be stronger if its boundaries can be explained through Traditional Law and Culture.

[102] Of the above (including the information contained in the submission and affidavit), I generally understand the applicant to dispute the correctness of the boundaries and the inclusion of some ancestors within the native title claim group for the Yued application .

[103] The Explanatory Memorandum to the Native Title Amendment Bill 1997 (EM) discusses what became s. 190C(3) and gives some context to the statutory intention of the provision as follows:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application or amended application is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test [***subsection 190C(3)***] [original emphasis].
>
> 35.38 The bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application [emphasis added] — Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth).

[104] There has been some judicial consideration of the purpose of s. 190C(3). In *Edward Landers v South Australia* [2003] FCA 264, in deciding a strike out application under s. 84C(1), Mansfield J referred to the requirements of s. 190C(3). In that instance, the application His Honour was considering was made by a 'smaller' group referred to as 'the Edward Landers group.' Most of the members of the Edward Landers group were also members of the native title group in another application made over the whole or part of the same area, being 'the Dieri People.' His Honour noted that s. 190C(3)(a) was not intended to prevent registration of applications made by competing and different native title claim groups. Rather, it is to prevent registration in circumstances where applications were made over the same area (or partly the same area) by or

on behalf of the same native title claim group or a similar but smaller native title claim group — at [38].

[105] The matters raised by the applicant in the submission and affidavit are not issues that I understand to be relevant to my deciding whether I can be satisfied of the condition at s. 190C(3). Any dispute about the boundaries of an area the subject of a claim made in a native title determination application and who actually holds native title over that area will ultimately be decided by the Court. I have no power to consider and weigh the arguments of the applicant on these issues for the purpose of s. 190C(3).

[106] The intended purpose of s. 190C(3), if there is a previous application, is clearly to prevent the registration of multiple applications over the whole or part of an area where there are members in common between those applications.

Is there a previous application?

[107] The Tribunal's Geospatial Services prepared a geospatial assessment and overlap analysis dated 11 July 2013 (geospatial assessment)[1]. This identifies eight (8) applications which fall within the area covered by the claim in the current application before me. Three (3) of those applications are compensation applications, and in my view those applications could not meet the requirements of being a 'previous application' described by s. 190C(3). That is because a previous application, as referred to in s. 190C(3), is an application which has an entry on the Register of Native Title Claims (Register). A compensation application cannot have an entry on the Register of Native Title Claims.

[108] There are five (5) claimant applications that are identified in the geospatial assessment as overlapping the area covered by the claim in the current application before me. These are:

Name	Tribunal Number/Court Number	Date entered onto Register
Yued	WC1997/071;WAD6192/1998	22 August 1997
Gnaala Karla Booja	WC1998/058;WAD6274/1998	17 September 1998
Ballardong People	WC2000/007;WAD6181/1998	3 July 2008
Single Noongar Claim (Area 1)	WC2003/006;WAD6006/2003	Not currently entered on the Register
Whadjak People	WC2011/009;WAD242/2011	12 October 2011

[109] I consider that these applications meet the criterion of s. 190C(3)(a), being applications which covered the whole or part of the area covered by the current application.

[110] For the purpose of s. 190C(3)(b), the current application that I am considering was made on 1 February 2011. That is because an application is 'made' for the purpose of s. 190C(3)(b) on the

[1] Note that I have undertaken a more recent search of the Tribunal's mapping database to confirm that this information remains current — see overlap analysis report dated 10 October 2013.

date at which it was first filed in the Federal Court — *Strickland v Native Title Registrar* [1999] FCA 1530 at [35].

[111] The Single Noongar Claim (Area 1) application is not currently entered on the Register. The information kept by the Registrar in relation to the Register also includes information in relation to the history of a claim's registration status. The information that I have considered indicates that this claim was not on the Register at the time the current application was made. Thus, the application does not meet the criterion of s. 190C(3)(b).

[112] In relation to the Whadjak People application, the details of the claim were entered on the Register on 12 October 2011, being after the current application was made. Thus, the application does not meet the criterion of s. 190C(3)(b).

[113] The details of the Yued, Gnaala Karla Booja and Ballardong People applications are all currently on the Register. I have considered the history of the registration status of these applications. The information that I have considered suggests that the details of the claims made in these applications were on the Register when the current application was made.

[114] The details of the claim made in the Yued application were first entered on the Register on 22 August 1997. It was considered for registration pursuant to s. 190A on 21 July 1999 and the entry on the Register was not removed as a result of that consideration. It has remained on the Register since that date. Thus, I am satisfied that the Yued application is a previous application as described in s. 190C(3).

[115] The details of the claim made in the Gnaala Karla Booja application were first entered on the Register on 17 September 1998. It was considered for registration pursuant to s. 190A on 3 March 1999 and the entry on the Register was not removed as a result of that consideration. It has remained on the Register since that date. Thus, I am satisfied that the Gnaala Karla Booja application is a previous application as described in s. 190C(3).

[116] The details of the claim made in the Ballardong People application were first entered on the Register on 3 July 2008 after consideration for registration pursuant to s. 190A. The entry has remained on the Register since that date. Thus, I am satisfied that the Ballardong People application is a previous application as described in s. 190C(3).

[117] It follows that I must now be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the Yued, Gnaala Karla Booja or Ballardong People applications.

Common claimants

[118] The current application contains a statement at Schedule O that there are no members of the claim group who are also members of another native title claim group that has been made in an application over all or part of the application area.

[119] I have considered information from the Register in relation to the native title claim group descriptions for each application. In my view, there does not appear to be any common claimants between the current application and the Gnaala Karla Booja and Ballardong applications.

[120] The issue of common claimants between the current application and the Yued application has previously been the subject of some consideration by the Registrar, including in the decision

of the Registrar's delegate dated 29 March 2012, and also the Tribunal member's reconsideration decision dated 6 June 2012. Both of these decisions refer to the common membership between the native title claim group for the current application and the native title claim group for the Yued application. The description of the native title claim group in Schedule A of the current application has not been amended.

[121] The Register extract for the Yued application contains the following description of the native title claim group:

> The native title claim group comprises all those persons who are:
>
> 1.biological or adopted descendants of any of the following persons:
>
> - Fanny Shaw (Jubitch), daughter of Boolabung; Balumara; Jury Wongan, mother of Ricardo Wallowallo; or
>
> 2.biological or adopted descendants of the unions between any of the following couples:
>
> - James Stack and Mary Taylor; Alfred Taylor and Sara IIbichan; Utonga and Yuroba; Paul Jetta and Mary Theresa Warbuk; George Shaw and Mary Ann Bailapon; John Calinga and Upona; Mindemurra and Menberan; Edward Wilkes and Cecelia Munderan; Madeegro (William Worrel) and Sarah; Mary Ellen/Helen Tainan and Patrick Yappo of Culham; Sarah Bundaran of Wyenning and white settler John Ryder; Alice Taylor and Tommy Nettle; Edith Jarrahah and George Anderson; Mary Wirbina and Joannes Macpherson; Henry Indich and Elizabeth Tjulbian; Jindinyer and Mongal/Mingal; Johnny Narrioll/Narriel/Narrier and Emma Breasly;
>
> 3....
>
> 4....

[122] The native title claim group for the current application in Schedule A is described in reference to persons who are descendant from named ancestors. Those ancestors include:

a) Noombat (b1820s-d1872), recorded by Francis Armstrong in April and May 1837 at the Mount Eliza ration station, as well as in the Police Gazette, the Inquirer newspaper, the Perth Gazette and New Norcias records, father of Juana Wilak (aka Jane Onions) (b1840-d1875), who was the mother of Edward Thomas Wilkes;
b) Fanny of Guildford (b1830s-d1905) of Midgegooroo's family, recorded in New Norcia records and Guildford ration depot records, mother of Munderan (aka Cecelia Wilkes) (b1864-d1905), who was the wife of Edward Thomas Wilkes;
c) Goongar (aka Moke) (b1829-d1900s), recorded by Francis Armstrong on 9 occasions between 1836 and 1837 at the Mount Eliza ration station, was listed in the censuses of Francis Armstrong and Charles Symmons, and on 6 occasions was recorded as attending Mr Smithies' Sunday school in 1842, also recorded by Daisy Bates, the Police Gazette , husband of Cundee;
d) Cundee (aka Kander) (b1830s) recorded in the genealogies of Daisy Bates, wife to Goongar (Moke) and mother to Birijan (aka Alice Taylor) (b1860's-d1932), recorded at New Norcia and Guildford ration depot, who married Nyeetler (aka Tommy Nettle or Junmal) (b1860's-1921) recorded in the Police Gazette as living near Guildford;

e) Annie (1830's -), mother of Fanny Yurleen Bennell (b1864) who married William Garlett — schedule A of the application.

[123] An analysis of the above descriptions reveals common claimants. Noombat, a named ancestor in the native title claim group description for the current application, is the grandfather of Edward Wilkes. Fanny of Guildford is the mother of Cecelia Wilkes, who was the wife of Edward Wilkes. The descendants of the union between Cecilia Wilkes and Edward Wilkes are members of the claim group for the Yued application. By descent from Noombat or Fanny of Guildford, those persons would also be members of the claim group for the current application. Cundee, a named ancestor in the native title description of the current application, is the mother of Alice Taylor who married Tommy Nettle. The descendants of the union between Alice Taylor and Tommy Nettle are members of the claim group for the Yued application. By descent from Cundee, those persons would also be members of the claim group for the current application.

[124] Given the above, I cannot be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for a previous application.

[125] The application **does not satisfy** the condition of s. 190C(3).

Subsection 190C(4) Authorisation/certification

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

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

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

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

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

[126] 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.

[127] The application is not certified and thus the requirements of s. 190C(4)(a) are not relevant to the application. Thus, it follows that I must be satisfied of the matters in s. 190C(4)(b).

[128] I must first decide whether the application contains the information required by s. 190C(5)(a) and (b). Following that, I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application by all the other persons in the native title claim group. Section 190C(4)(b) contains a note that the word 'authorise' is defined in s. 251B.

S. 190C(5)

The information required by s. 190C(5)

[129] The information required by s. 190C(5) is straightforward and must be contained in the application. This information is a statement that the requirements set out in s. 190C(4)(b) have been met (s. 190C(5)(a)) and the brief grounds on which the Registrar should be satisfied that it has been met (s. 190C(5)(b)).

[130] In relation to the above, Schedule R of the application contains a statement that the requirements in s. 190C(4)(b) have been met and also includes the following information:

> The grounds on which the Native Title Registrar should be satisfied that the above statement is correct are:
>
> 1. The persons who constitute the applicant are all able to provide sworn evidence, government records and anthropological, historical and genealogical evidence to support the conditions of the membership criteria in Schedule A; and
>
> 2. A native title authorisation meeting was advertised in the West Australian and on Noongar Radio with two weeks notice. Heads of families were also notified by telephone or by post where contact details were available.
>
> 2.1 The persons in the native title claim group (the members), at a meeting held at Guildford Park on 1 October 2012 [sic], decided that under their traditional laws and customs there is no process of decision making that must be complied with in authorising a person or persons to make a native title determination application or things of that kind;
>
> 2.2 The members, at the same meeting, then agreed to and adopted a process of decision-making in relation to authorising the making of an application to determination of native title and dealing with matters arising in relation to it;
>
> 2.3 The process of decision-making so agreed to and adopted was that:
>
> 2.3.1 a proposal to so authorise a person or persons could be made at the meeting by any member;
>
> 2.3.2 the members could discuss such proposal;
>
> 2.3.3 the members would try to achieve complete agreement or consensus on such proposal;
>
> 2.3.4 if they succeeded, the proposal was adopted;
>
> 2.3.5 if not, there would be a show of hands;
>
> 2.3.6 if 75% or more of members present supported the proposal, it was adopted, otherwise it was not.

[131] In my view, the application contains the statement and information that is required by s. 190C(5).

S. 190C(4)

The nature of the task at s. 190C(4)(b)

[132] Pursuant to s. 190C(4)(b) I must be satisfied as to the 'fact of authorisation' (*Doepel* at [78]). The Registrar's task at s. 190C(4)(b) is distinct from that at s. 190C(4)(a) and clearly 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' — *Doepel* at [78].

[133] As to that inquiry through the material available to the Registrar, whilst the law considers the interaction between the information required by s. 190C(5) and the task at s. 190C(4), to be informative[2] (see s. 190C(5) and *Doepel* at [78]), ultimately what is required to satisfy the Registrar must be 'understood in the particular circumstances and as taking its colour from those circumstances' (*Evans v Native Title Registrar* [2004] FCA 1070 at [42] (*Evans*)).

[134] Further, in undertaking an inquiry of the material in relation to authorisation and being satisfied at s. 190C(4)(b), part of that inquiry will require the Registrar to consider issues of the kind that have 'been identified judicially as relevant to an issue of authorisation'—*Evans* at [42]. This may reasonably involve the Registrar considering issues that arise under s. 251B, such as whether all of the persons in the 'native title claim group' were afforded a reasonable opportunity to participate in authorising the applicant to make the application.

[135] There are essentially two issues of which the Registrar must be satisfied for the purpose of s. 190C(4)(b), namely that the applicant is a member of the native title claim group and further that the applicant was 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.

The information before me in relation to authorisation of the applicant

[136] There may be a range of information that is relevant to whether the applicant is authorised to make the application by all the other persons in the native title claim group—see *Strickland v Native Title Registrar* [1999] FCA 1530 at [57], confirmed by the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33 at [78]; see also *Doepel* at [16]; *Evans* and *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [23].

[137] In relation to the information to which I have had regard for this statutory condition, I have generally considered the particular circumstances of the matter and whether it is information that is or may be relevant to the issues that arise for consideration by the Registrar in being satisfied of s. 190C(4)(b).

[138] The information contained in the application that I consider is relevant to the issues I must decide in relation to s. 190C(4)(b) is extracted above in these reasons (that information is contained in Schedule R of the application).

[139] I have also considered information contained in the affidavits of each of the persons comprising the applicants, which were filed with the application when it was first made on 1 February 2011. Each of the affidavits contain similar information to that which is set out in

[2] See s. 190C(5)—'the Registrar cannot be satisfied that the condition is subsection (4) has been satisfied unless the application' contains the information required by subsection (5);

Schedule R of the application. That information includes details of a meeting of the native title claim group held on 21 October 2010, where it is said that members of the claim group in attendance agreed to and adopted a decision-making process which involved a number of steps [as detailed in Schedule R]. Accordingly, it is stated in the affidavits that the process was followed 'with the result that by complete agreement the members authorised Albert Corunna, Bella Bropho, Kathy Penny, Clive Davis, Richard Wilkes, Greg Garlett, Victor Warrell and [Name deleted], as long as they are willing and able and want to be applicants, to make the native title determination application and to deal with matters arising in relation to it.'

[140] The applicant also requested that I consider other information in relation to authorisation. That information includes:

- a DVD recording of the authorisation meeting;
- a copy of the meeting minutes taken at the authorisation meeting on 21 October 2010;
- a copy of the attendance list taken at the authorisation meeting on 21 October 2010; and
- a copy of the public notice placed in 'The West Australian' newspaper on 8 October 2010 inviting members of the native title claim group to attend the meeting on 21 October 2010.

First limb of s. 190C(4)(b)– is the applicant a member of the native title claim group?

[141] The first part of s. 190C(4)(b) requires that I be satisfied that the applicant is a member of the native title claim group.

[142] Schedule R of the application contains the statement that the persons who constitute the applicant are all members of the native title claim group as they meet each criterion of membership in Schedule A. Schedule R of the application also contains the statement that the persons who constitute the applicant are able to provide evidence to support the conditions of membership to the native title claim group. Each of the persons comprising the applicant also swears to the truth of these statements.

[143] I am satisfied that the applicant is a member of the native title claim group.

Second limb of s. 190C(4)(b) – is the applicant authorised by all the other persons in the native title claim group to make the application and to deal with matters arising in relation to it?

The authorisation that is required by s. 251B

[144] The word authorise, for the purpose of a native title determination application, is defined in s. 251B of the Act.

[145] Section 251B of the Act requires that the authority to make a native title determination application flow from the 'native title claim group'. That expression also has a clear and defined meaning within the Act. It is given its meaning by s. 61(1) (see s. 253, which defines the term by reference to s. 61(1)). Accordingly, the native title claim group must comprise 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'—s. 61(1). It is these persons from whom authority must be sought and gained in the making of a native title determination application.

The law has clearly defined the relationship between these specific provisions of the Act, and the Registrar in being satisfied of authorisation is bound to consider that relationship.

[146] The relationship between s. 61(1) and s. 190C(4)(b) is a unique one that has been distinguished from other parts of the registration test. Under s. 190C(2) I considered whether the application 'appears' to identify a native title claim group that comes within the s. 61(1) definition of that term. That is all I may do for that part of the registration test given that the task there is a confined one, limited to considering only what appears on the face of an application—see, for instance, *Doepel* at [16]. However, the requirements of s. 190C(4)(b) are distinct, as was explained by the Court in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*), where Collier J set out the following in order to reflect the different nature of the Registrar's consideration at s. 190C(4)(b) :

> In my view the applicant's argument confuses the terms of ss. 190C(2) and 190C(4)(b). While there is an obvious intersection between ss. 190C(2) and (4), the matters of which the Registrar is required to be satisfied by each are, in my view, quite different. In relation to s. 190C(2), the Registrar must be satisfied as to the contents of the application and that it contains information required by ss. 61 and 62...whereas in relation to section 190C(4) the Registrar must be satisfied as to the identity of the claimed native title holders including the applicant (emphasis in original)—at [29].

[147] In undertaking this consideration, however, I am of the view that for the purpose of the registration test, there is no need for an exact or literal identification of each and every member of the claim group (see, for instance *Risk* at [47]). The correct identification of the persons in a native title claim group is a difficult and cumbersome exercise, and it is not the role of the Registrar to adjudicate and to decide upon who are each of the actual holders of native title for an application area—*Wiri People* at [25]. The task is not intended to be a final determination of the identity of the claimed native title holders.

[148] Rather there must at least be clear and cogent material before the Registrar upon which she can reach a reasonable state of satisfaction of the matters under s. 190C(4). In that regard, the relevant law does firmly suggest that the task at s. 190C(4)(b) envisages that the Registrar have a clear understanding of the 'identity' of the claimed native title holders before proceeding to consider whether those persons authorised the applicant to make the application. This understanding is not simply verified or confirmed by having regard to the way in which the applicant chooses to define the claim group —*Risk* at [34] to [35]; *Wiri People* at [12] and [26] to [36]. Whilst the meaning of 'native tile claim group' for the purpose of the Act is clear, its identification in any particular matter will depend upon the facts before the Registrar. The understanding of the composition of a native title claim group must be informed having regard to those facts. Albeit, any consideration of those facts must be approached within the bounds of the Registrar's task at s. 190A and within the ambit of practicality.

[149] Having considered the material before me, I am satisfied that it contains clear information in relation to the identity of the native title claim group. This information is contained in various parts of the application, including the factual basis material which identifies each of the ancestors of the native title claim group whom appear in the native title claim group description at Schedule A. It also describes the traditional laws and customs which give rise to the criteria of

membership to the native title claim group. Primarily, this relates to descent from a person connected with the area (being those ancestors listed in Schedule A of the application).

[150] Of equal importance to the task of the Registrar at s.190C(4)(b) is whether the authority to the applicant flowed from the native title claim group in compliance 'with either of the processes for which the legislature has allowed', being those set out in s. 251B(a) or (b). That is, the information must show compliance with a decision making process mandated by the traditional laws and customs of the native title claim group or (where there is no such process) a decision making process agreed to and adopted by the persons in the native title claim group.—*Evans v Native Title Registrar* [2004] FCA 1070 at [53].

Consideration of the applicant's authorisation and compliance with s. 251B

[151] As s. 251B specifies that *all the persons* in the native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b), any consideration of the applicant's authorisation to make this claimant application must flow from an understanding of which process it is asserted that the applicant is authorised in accordance with.

[152] The material before me asserts that at a meeting on 21 October 2010 the applicant was authorised to make the application pursuant to a decision-making process which was agreed to and adopted by the members of the claim group present at the meeting (see, for instance, the affidavits of the persons comprising the applicant). Thus, the focus of my consideration of the applicant's authorisation will be the process set out in s. 251B(b).

[153] However, before proceeding to examine what may be required to satisfy the requirements of s. 251B(b), I must first be satisfied that there is no traditional decision-making process mandated under s. 251B(a). The information before me (including in the DVD recording and meeting minutes of the authorisation meeting) suggests that a discussion occurred between those members of the native title claim group present at the authorisation meeting as to whether there was a relevant traditional decision-making process. After some considerable discussion, it was ultimately agreed that there was no traditional process relevant to such decision-making. I am satisfied that there is no process of decision-making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with.

[154] I now proceed to consider whether the applicant is authorised pursuant to s. 251B(b).

[155] Whilst for the purpose of s. 251B, I must be satisfied that the applicant is authorised to make this application 'by **all** [emphasis added] the other persons in the native title claim group', it is well settled in law that the word 'all' in the context of authorisation pursuant to s. 251B, has 'a more limited meaning than it might otherwise have.' In relation to s. 251B(b) it may not be necessary for each and every member of the native title claim group to authorise the making of an application, but rather it may be 'sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'— see *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25], where Stone J considered s. 251B in the context of an application pursuant to s. 66B.

[156] A reasonable opportunity to participate may be reflected in material demonstrating that an authorisation meeting was well-attended and appropriately advertised or communicated to all members of the native title claim group—*Lawson* at [27]. What is a reasonable opportunity, in my view, will also manifest from the particular circumstances of the matter.

[157] In the context of s. 251B, the Court has particularly scrutinised what may be reflective of an appropriate notice as one part of a process that seeks to afford a native title claim group every reasonable opportunity to participate in the decision to authorise an applicant. That notice 'must be sufficient to enable the persons to whom it is addressed, namely members or potential members of the native title claim group, to judge for themselves whether to attend the meeting and vote for or against a proposal or whether to leave the matter to be determine by the majority who do attend and vote at the meeting' — *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [40] (Rares J in the context of competing applications pursuant to s. 66B).

[158] The notice for the meeting was published in 'The West Australian' two weeks prior to the intended date of the meeting. The notice identified that it was the traditional owners of the Swan River area who were entitled to attend. A more specific description of those persons was set out in the notice. The proposed purpose and the intended business of the meeting was set out in some detail. The information in Schedule R of the application also provides that heads of families were also notified via some personal form of notification (i.e. by phone or post).

[159] There is no indication before me as to the proportion of representation of the whole native title claim group in attendance at the meeting. However, I consider that the form that notification took (both public and personal) was sufficient to notify members of the claim group of the opportunity to attend the meeting and to participate if they so desired.

[160] For the purpose of s. 251B(b) I must also be satisfied that authority flowed to the applicant in accordance with the process agreed to. In that regard, material going to the conduct and outcomes of the chosen forum at which authorisation is asserted to have occurred will assist in my consideration of this.

[161] The information before me reflects that at the meeting held on 21 October 2010 that the persons present discussed and agreed upon a decision-making process that would be utilised to authorise the applicant to make the application. On the basis of the material that I have considered I am satisfied that those persons present at the meeting agreed to a process where those present would attempt to reach complete or unanimous agreement on the matters to be decided, and failing this that decisions would be made by the taking of a vote (where 75% of the vote would be required to pass a resolution).

[162] It is my understanding that following this agreement, the agreed process was adopted by members of the native title claim group present in passing a number of resolutions, including that the applicant was authorised to make the application and to deal with matters arising in relation to it. The information supports that unanimous agreement was reached by members of the native title claim group present to authorise the applicant to make the application.

[163] The information relating to authorisation refers to the authorisation by members of the claim group of eight persons to comprise the applicant. However, the applicant named on the

application comprises only seven of those eight persons. There is no elucidation of the reason for the omission of one of the persons authorised to jointly comprise the applicant. Notwithstanding, I accept that the terms of the authorisation given by the native title claim group included that it was to be those of the eight persons 'as long as they are willing and able and want to be applicants.' Without any further information before me I consider it reasonable to infer that the eighth person is either unable or unwilling to be an applicant.

[164] The application that I am considering for registration has subsequently been amended since the authorisation meeting held on 21 October 2010. The chief amendment to the application that I am considering is the significant reduction in the sea portion encompassed by the application.

[165] In *Far West Coast Native Title Claim v State of South Australia* [2012] FCA 733 Mansfield J observed that '[t]he power to deal with matters arising in relation to a claim is complementary to, and additional to, the fact of making the claim. It relates in terms to the second concept in the authorisation under s 251B, namely the dealing with matters arising in relation to the claim' — at [46].

[166] The general nature and extent of authority bestowed on an applicant in a native title determination application, under the Act, has, in my view, been held to be relatively extensive. For instance, the nature of that authority, pursuant to s. 251B and 62A (s. 62A specifies the 'power of applicants where application authorised by group' is to deal 'with all matters') of the Act, was considered by the Court in *Close on behalf of the Githabul People #2 v State of Queensland* [2010] FCA 828 (*Githabul People*). On that occasion Collier J examined the question of whether the applicant was authorised to bring a notice of motion seeking leave to discontinue the native title determination application, and held that:

> The phrase "all matters arising under this Act in relation to the application" in s 62A is, in my view, unambiguous, and should not read narrowly. "All matters" means, in my view, all matters [emphasis added], including discontinuance, and the words "in relation to" have been held to be extremely wide although their meaning will be determined by the context... —at [32].

[167] There may be instances where the specific terms of authority given to an applicant pursuant to s. 251B may restrict their actions in relation to 'matters arising'. However, having considered the information before me in relation to the authorisation of the applicant, I do not understand the applicant to be impeded by any specific terms of limitation.

[168] For the reasons set out above, I am **satisfied** that the requirements of s. 190C(4)(b) are **met**, namely that the applicant is a member of the native title claim group and is authorised to make the application by all the other persons in the native title claim group.

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.

[169] This condition of registration requires that the Registrar 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 and waters.

[170] This requires the Registrar to undertake a consideration of the description and map of the application area, and to be satisfied that the boundaries of the area covered, and those areas not included, can be sufficiently identified.

[171] The external boundaries of the claim area are described in Schedule B as being shown on the map attached and marked as Attachment C and as described in the document at Attachment B. Attachment B contains an external boundary description that references geographic coordinates and landmarks. Attachment C is a map of the claim area showing in bold outline the external boundaries.

[172] I have considered the geospatial assessment prepared by the Tribunal's Geospatial services on 11 July 2013, which states that the description and map are consistent and identify the area covered by the claim with reasonable certainty. The geospatial assessment identifies an error in the map at Attachment C. This error is that the map does not exclude an area covered by a native title determination, being WAD6009/1996 Bodney. However, this exclusion is made in Part 2c of Schedule B of the application. Part 4 of Schedule B of the application also makes clear that where there is any discrepancy in the map and description, the description prevails.

[173] The areas not covered by the application are identified in Schedule B of the application. This simply includes a list of general exclusions.

[174] The use of a general formulaic approach, as is utilised by the applicant in Schedule B, was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686, 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 examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32].

[175] Given that issues in relation to interests in an area covered by a claim are often not settled until the latter stages of a matter, in my view the written exclusions in Schedule B adequately reflect the state of knowledge of the applicant at this time.

[176] I am of the view that both the written description and the map of the application area are clear and identify the area with reasonable certainty. Thus, 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'

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

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

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

[178] Schedule A of the application contains a description of the native title claim group, such that consideration falls under s. 190B(3)(b).

[179] The description contains the criteria of connection with the claim area together with either descent from a named ancestor or adoption by an ancestor or descendant of an ancestor.

The task at s. 190B(3)(b)

[180] The nature of the task at s. 190B(3)(b) is for the Registrar to consider 'whether the application enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[181] That is, the description in the application must operate to effectively describe the claim group such that members of the claim group can be identified — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [33].

[182] In *Western Australia v Native Title Registrar* [1999] FCA 1951 (*WA v NTR*), Carr J considered a description of a native title claim group where members were described using three criteria or rules, including descent (biological) and adoption. His Honour infers that the necessity to engage in some factual inquiry regarding the criteria 'does not mean that the group has not been described sufficiently.' Nor is it fatal that the application of the rule may prove difficult — at [67].

Consideration of the description

[183] The first part of the description limits membership of the claim group to those 'who have a connection with the claim area.' The second part of the description requires those who have a connection with the claim area to also be either biological or adopted descendants of named ancestors.

[184] There is no clear explanation or elucidation within the description or other information contained in the application as to how persons would be assessed as having a connection with the application area.

[185] In *Gudjala* Dowsett J rejected any requirement for there to be a cogent explanation of the basis upon which persons would qualify as members for the purpose of s. 190B(3)(b). His Honour

also stated that different passages of a description (and the criteria within) should generally be read together 'in such a way as to secure consistency' — at [33].

[186] Reading the description as a whole, it is my view that the criterion of descent (biological or adoption) offers an objective starting point for the inquiry into whether a person is a member of the native title claim group. Describing a claim group in reference to named ancestors is one that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b). I am of the view that with some factual inquiry it will be possible to identify the persons who fit that part of the native title claim group description — see *WA v NTR* at [67].

[187] Further, given the description I think it most likely that those who are the biological or adopted descendants of the named ancestors may be assumed to have a connection with the claim area. Thus, it is my understanding that the criterion of descent provides the fundamental basis for membership to the group.

[188] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group.

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

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

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

[190] For the purpose of s. 190B(4) the Registrar must be satisfied that the description of the native title rights and interests claimed 'is sufficient to allow the native title rights and interests claimed to be readily identified.'

[191] Whilst it is open to me to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests for the purpose of s. 190B(4), I am of the view that a consideration of the rights and interests in reference to s. 223 should be the task at s. 190B(6) — *Doepel* at [123].

[192] The native title rights and interests that are claimed appear at Schedule E of the application. Those claimed rights essentially include the right to possess, occupy, use and enjoy the land and waters (where such a right can be recognised) and the right to undertake various activities on the application area.

[193] It is my view that the rights and interests claimed at Schedule E have meaning and are understandable.

[194] The application **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.

[195] The factual basis is **sufficien**t to support each of the assertion at s. 190B(5).

[196] I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn in my reasons below.

Combined Reasons for s. 190B(5)

[197] There are clear principles established by the Court which must guide the Registrar when assessing the sufficiency of a claimant's factual basis. These include that the applicant is only required to provide a general description of the factual basis, the truth of which is not subject to scrutiny for the purpose of s. 190B(5). Thus, the Registrar must assume that the facts asserted are true and only consider whether they are capable of supporting the claimed rights and interests. That is, whether the factual basis is sufficient to support each of the assertions at s. 190B(5)(a) to (c) — *Gudjala FC* at [92]; *Doepel* at [17].

[198] The Registrar, however, must consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that regard, the law provides specific content to each of the elements of the test at s. 190B(5)(a) to (c) — see, for instance, *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*).[3]

[199] Fundamental to the test at s. 190B(5) is that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. Accordingly, this is a reference to rights vested in the claim group and further that it is 'necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) **[**hold] the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

[200] Thus, whilst the applicant is not required to prove the truth of their claims, nonetheless there must be a sufficient 'factual basis to support assertions made in the application and it is the obligation of the applicant to provide sufficient evidentiary material to form this basis'. Further, where the applicant's material is predominantly assertive 'this does not assist in building the

[3] Also note that the Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[3], including His Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5)— See *Gudjala FC* [90] to [96]. His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

factual basis necessary for assessing the application' — *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*) at [43] and [48].

[201] It follows that there must be adequate specificity of particular and relevant facts within the claimant's factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s. 190B(5).

Preliminary issue and applicant's submission

[202] Above in my reasons I have noted the decision of the Court in *Corunna v NTR* and the decision of the Registrar's delegate and the decision of the member (reconsideration decision).

[203] When previously considered for registration the application did not satisfy the requirements of s. 190B(5). The application for review under s. 190F(1) of the member's reconsideration decision was dismissed — see *Corunna v NTR*.

[204] The applicant's letter of 12 August 2013 to the Registrar submits in reference to the previous decisions that:

> We believe these decisions are relevant because they provide context and an explanation for our decision to amend the claim by withdrawing the western boundaries of the claim area.
>
> In relation to s 190B(5)(a) of the Act Mr Sosso said at paragraph [82]:
>
> The material before me is sufficient to support the claim group's association, and that of its predecessors, with the non-sea portion of the claim area.
>
> And at [96]:
>
> The material before me is sufficient to establish a prima facie spiritual association to the waters immediately off the coast from the mouth of the Swan River and extending to the islands surrounding those waters, namely Rottnest, Carnac and Garden Islands.
>
> And at [100]:
>
> If the sea boundary of the claim was restricted to that part of the sea lying immediately off the coast and extending to the islands mentioned previously, then it may have been open to make a positive finding pursuant to s. 190B(5)(a).
>
> In relation to the condition under s 190B(5)(b) Mr Sosso said at paragraph [111]:
>
> The material in Attachment F is detailed and provides a sufficient factual basis for the assertion that there exist traditional laws and customs acknowledged and observed by members of the claim group on the mainland portion of the claim area.
>
> And at [115]:
>
> If the external boundary of the claim was limited to those islands and sea between the islands and the mainland then there would be, in my opinion, a sufficient factual basis to support the claim group's traditional laws and customs to the mainland portion of the claim and that portion of the claim.

[205] The amendment to the application does include the contraction of the western boundary of the claim area in that there is now a marked difference in the portion of sea waters covered by the application. The Western boundary of the application area now extends west only to what is identified on the map as Rottnest Island.

[206] As noted above my task is to consider the claim made in the application and decide whether it satisfies all of the conditions of registration. I cannot simply refer to or rely upon the reasoning of the member outlined in the applicant's submission in forming a view as to whether I consider the factual basis to be sufficient to support the assertions at s. 190B(5). I must assess the factual basis material and decide whether it is sufficient to support each of the assertions at s. 190B(5).

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

[207] For the purpose of s. 190B(5)(a), the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007]* at [52]; *Gudjala FC* at [90] to [96].

[208] I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but I am not obliged to accept broad statements which are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16 at [26] and *Corunna v NTR* at [39].

<u>The factual basis material in support of the assertion at s. 190B(5)(a)</u>

Attachment F

[209] The applicant's material sets out asserted facts in relation to the named ancestors of the native title claim group. There are references to various historical sources and records that place the named ancestors and their descendants within the claim area beginning around the 1830s. This includes the following information in relation to the ancestors Goongar and Cundee and their descendants:

> Armstrong included Goongar in his lists of Perth Aboriginal people on three occasions between 1836 and 1837. In 1840 Goongar was working as a servant in the home of Francis Armstrong.
>
> Cundee was born in the 1830's and had probably died by the 1880's. In the 1880's Moke [also known as Goongar] was married to Koperkin (Capagan) who was formerly married to Giatamarra (aka Dutemerry or Dudemurry) was associated with Gogalee (Cundee's father-in-law) at Perth in 1835.
>
> There are numerous police and newspaper records that place Moke and Tommy Nettle [Moke's son in law] in either Gingin, Perth or Guildford between 1879 and 1906. For instance, in 1879 Moke and Tommy Nettle were referred to by the *West Australian Times* as "a couple of dethroned kings or princes of the soil"...During the latter part of the nineteenth century Moke and Tommy Nettle worked as stockmen for the Hamersley family at Lockridge and the

> Brockman family at Gingin. They lived in bush camps, hunted and conducted traditional ceremonies.
>
> According to oral histories, Tommy Nettle was born at the site of Perth railway station. Tindale recorded him as a "full blood".
>
> On 24 March 1908 Tommy Nettle, his wife Alice and his daughters Olley [Ollie], Ellen and Peula received blankets issued by the native welfare at Moora...
>
> Ollie Nettle married Billy Worrell from Moora and lived at camps in the Swan Valley during the first half of the twentieth century. Ollie Worrell was a turtle hunter and a source of law and cultural information regarding the *Waugal* and the *winnarch* places of the Swan River.
>
> Edna Nettle, William Worrell and Robert Bropho, among others, learned from Ollie Worrell and lived at the Eden Hill camps and other camps in the Swan Valley during the second half of the twentieth century.
>
> The descendants of Moke and Cundee are Bropho, Nettle, Warrell, Anderson, Moody, Parfitt, Spratt and Willaway families, who generally all live in the claim area today. All of these families trace their ancestry on the Swan River via Moke and Cundeed in the 1830's back to Nardooitch, who George Gray estimated was born around 1735.

[210] The factual basis material also sets out information in relation to the other ancestors. For instance Numbat was born before 1829 and was present at Mount Eliza in 1837. Sources place Numbat at the Middle Swan during the 1850's.

[211] In relation to the ancestor Annie, the factual basis material sets out that:

> According to the Native Welfare file of William Garlett, Annie was the daughter of Chendalen. Chendalen (aka Jindenung or Benan) was recorded at the Mount Eliza ration station in 1835. The group he was with were engaged in "hunting wallabies and bandicoots, fishing and burying nuts". Chendalen was listed as belonging to the "Canning Tribe" by Armstrong in 1837. He had two wives Bowar and Yourdoop and an infant child named Nalleer. Bates wrote that Benan was "uncle" to Fanny Balbuk and held territorial rights in the shores of Perth Water and Melville Water.
>
> The descendants of Annie are the Garlett and Humes families, many of whom live in the claim area today. All of them have genealogical connection to Chendalan who was born before 1829 and who was described as a territorial owner of the parts of the claim area during the 1830's.

[212] There are various stories within the factual basis that also speak to the association of the predecessors with the claim area dating back to sovereignty, including the following:

> In 1835 George Fletcher Moore described an event at Lennard Brook which included 100 men, women and children from surrounding areas including Upper Swan. Mr J. H. Brockman remembered a 'corroboree' hosted by Moke at Lennard Brook in 1886.

[213] Within the factual basis material there is also a timeline of association from the 1830s through to the present day, citing examples of member's association with the area which go to the continuity of association:

- asserted facts of the association in the 1830's include that Goongar (Moke) is recorded as attending the Mount Eliza ration station and that Rottnest Island prison was established with many senior men being captured and taken there, including [Names deleted];
- asserted facts of the association in the 1840's include that Yooyat (the father of Tommy Nettle) is recorded as working at Lockridge and that Yalgonga was arrested at Gingin for spearing stock and again at Gingin in 1847 for stealing;
- asserted facts of the association in the 1850's include that Numbat was arrested in the Middle Swan and that Tommy Nettle was born at the site of Perth railway station;
- asserted facts of the association in the 1860's include that Alice Taylor was born at Gingin in this decade and that Fanny's daughter Cecilia Munderan was also born at Guildford;
- asserted facts of the association in the 1870's include that Tommy Nettle was arrested after deserting the service of a Gingin farmer;
- asserted facts of the association in the 1880's include that Moke, Capagan, Dingel and Tommy Nettle were hosting corroborees near Gingin and that Alice Taylor's daughters were born near Gingin;
- asserted facts of the association in the early 1900's include that Wilkes, Nettle, Warrell, Hedland and Parfits camped at Eden Hill and Ollie Worrell and her son William lived at Riverdale camps;
- asserted facts of the association in the mid 1900's include that Ollie Worrell is recorded as living at Middle Swan, Widgee Road camps and Eden Hill camps

Affidavits

[214] The affidavits of Albert Corunna and Bella Bropho, both dated 24 November 2011, give accounts of their own and other claim group members' current association with the claim area and also that of their predecessors. In her affidavit, Bella Bropho states that she has lived in the claim area for the whole of her life. As a child she was taught about the dreaming tracks of the Waugal, and names where these are within the claim area. She also speaks to her knowledge of the laws and customs that relate to the land and waters within the claim area.

[215] In an affidavit dated 18 April 2012 Albert Corunna sets out the following in relation to his association with the claim area and that of his predecessors, with a particular focus on the sea portion of the claim area extending to Rottnest Island:

4. [Text deleted for cultural reasons].

5. [Text deleted for cultural reasons].

6. [Text deleted for cultural reasons].

7. [Text deleted for cultural reasons].

8. [Text deleted for cultural reasons].

9. [Text deleted for cultural reasons].

Consideration

[216] When analysing the requirements of s. 190B(5), there is a necessity for the factual basis material to elicit 'the relationship which all members claim to have in common in connection with the relevant land'. Further, the fact that some members of the claim group and their relevant predecessors are, or may have been, associated with the application area, does not automatically lead to the conclusion that all members and their predecessors are associated. Thus, the factual basis should demonstrate a common association of the native title claim group with the land and waters—*Gudjala [2007]* at [39], [40] and [51].

[217] Within the factual basis material it is my understanding that the claimant's explain their association with the claim area with reference to the Nyoongar Way. This is the system of laws and customs that it is asserted gives rise to the claim group's native title rights and interests. At the time of sovereignty it is asserted that the persons living in the claim area identified as 'Yoongar' and were united in their observance of the relevant system of laws and customs. This has continued throughout the successive generations of persons in the claim area. In that regard, it is clear from the factual basis that the nature of the association is both physical and spiritual.

[218] The factual basis material speaks to how the Nyoongar Way permeates the association of the claim group with the area and that of their predecessors. For instance, the continued observance of *winnarch* places is described:

> This literally means "dead" and can mean a special place that is associated with a dead person or ancestral being. A gesture of some kind is usually made when visiting *winnarch* places and it is believed that misfortune will befall anybody who fails to do this. *Winnarch* places can be springs, creek mouths, river bends, deep pools, ochre deposits, stone formations and burial grounds. People descended from the *moort* [the ancestor] associated with the *winnarch* place have a responsibility to act as custodians for these places and the stories attached to them. In 1835 George Fletcher described the observance of *winnarch*:
>
> Proceeding for some miles in a south-westerly direction, we came to a tall standing stone, where our guides made a halt, and plucking the tops of the grass tree, strewed them, with great gravity, on the ground around it. They were of a more taciturn disposition than our old friend Geear, and we had some difficulty in getting any explanation of this strange observance. What is this? This is 'Boyay Gogomat.' That is, I believe, the owl or hawk stone...
>
> Mallewar, the man who performed this ceremony, was an owner of Lennards Brook but was also recorded by Symmons as having rights to the land from Bassendean to the Upper Swan.[].

[219] Both the affidavits of Bella Bropho and Albert Corunna speak to their responsibility for *winnarch* places within the claim area, being those places that have special importance to the ancestors. Albert Corunna says that:

> [Text deleted for cultural reasons].

[220] As observed by Dowsett J in *Gudjala [2007]* asserted facts going to a history of association is also important in the context of s. 190B(5)(a). This requires more than facts which simply support the assertion of an association of the predecessors at sovereignty or contact and the association of current claim group members. It requires facts which are sufficient to support 'the history of such association' in the period over that time — at [51].

[221] There are within the material sufficient facts relating to the association of the predecessors. Also, the timeline of association throughout the period since sovereignty coupled with the affidavit material provide facts which are, in my view, sufficient to support the assertion of a continuity of association with the claim area.

[222] I have also considered whether the factual basis is sufficient to support the assertion of an association between the whole group and the whole area. In my view the factual basis material provides adequate examples of how claim group members are associated with the whole area and how their predecessors were similarly associated. These examples are sufficient to support the assertion that the whole group is associated with the area. I have also extracted above examples within the factual basis that go to demonstrating the association with the sea portion of the claim, which extends west to Rottnest Island.

[223] In my view, the factual basis is sufficient to support the assertion at s. 190B(5)(a).

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

[224] In requiring that the factual basis describe the basis of the native title claim group's entitlement to the claimed rights and interests, the focus of s. 190B(5)(b) is upon the existence of traditional laws and customs acknowledged and observed and that give rise to the claimed native title rights and interests.

[225] The phrase 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s. 223 of the Act and, thus, the meaning to be afforded to the term 'traditional' in s. 190B(5)(b) can be derived from cases that explore s. 223—see *Gudjala [2007]*—at [26] and [62] to [66] (citing the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*)).[4]

[226] Thus, the expression employed in s. 190B(5)(b) may be understood as referring to:

- 'A traditional law or custom is one which has been passed from generation to generation usually by word of mouth or common practice'—*Yorta Yorta* at [46].
- '[T]he origins of the content of the law or customs concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty...'—*Yorta Yorta* at [46].
- '[T]he normative system...is a system that has had a continuous existence and vitality since sovereignty'—*Yorta Yorta* at [47].
- 'When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist'—*Yorta Yorta* at [53].

[4] This aspect of the judgment was not criticised by the Full Court, and see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*)—at [19] to [22].

- '[D]emonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim'—*Yorta Yorta* at [83].

[227] In *Gudjala [2007]* Dowsett J observed that the above principles are relevant in deciding whether the factual basis is sufficient to support the assertion at s. 190B(5)(b). His Honour noted that '[t]here can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived', with the starting point for any consideration being whether the facts identify an indigenous society at the time of sovereignty — at [66].

[228] In the context of the registration test (and explicitly the task at s. 190B(5)(b)), it is clear that the facts asserted, assuming that they are true, must be capable of supporting the assertion that there are 'traditional' laws and customs, acknowledged and observed by the native title claim group and that give rise to the claimed native title rights and interests—*Gudjala [2007]* at [62] and [63].

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

Attachment F

[229] The factual basis material at Attachment F identifies the persons asserted to have been a part of the relevant indigenous society at, or around, the time of sovereignty in the claim area. Those persons are the named ancestors of the native title claim group. Attachment F sets out facts in relation to those persons' association with the land and waters within the claim area and their link to the relevant society through historical accounts .

[230] Those persons it is asserted were bound by the traditional laws and customs of the Nyoongar Way. The material provides details of the laws and customs and how they were observed by the relevant predecessors, including:

> *Kalyeep*. This literally means "home fire" and relates to the law of inherited property in land. Rights and interests in land derive from the process of being "raised up" since childhood by parents of a family group who live according to Nyoongar Way and also have rights in that same land.
>
> According to Fanny Balbuk, a Daisy Bates informant:
>
> Balbuk's father Goon debung's run embraced the swamp and springs on the north side of Perth, called Wan'ner-mung, and a place north again called Kar'bungurra, extending from there along the coast nearly to Gingin.
>
> The family estates defined by Robert Menli Lyon in 1833, ie. Mooro, Beeloo, Beeliar and Waylo were family runs within a wider *kalyeep* that is defined by the water catchment areas described in Schedule B of this application.
>
> *Walluk yonga.* This literally means "divide the kangaroo" and refers to the law of mutual obligation. Within family groups there is an expectation that, when a kangaroo is killed, the meat will be shared with everybody at the camp. In 1833 Menli Lyon observed "on the

kangaroo they meal in common" and in the 1900s Bates wrote "When Woolbear killed a kangaroo he divided it according to the food law". This law also applied to other meat.

Warra Warra. This means "bad" or "go away" and implies a responsibility to defend the *kalyeep* from unlawful intruders. In Nyoongar Way everybody belongs to a particular place with well understood boundaries and does not generally travel beyond that area without obtaining permission:

To access, speak for or use the resources of another person's country without permission is forbidden. When Captain Fremantle rowed up the Swan River on 2 May 1829, the Nyoongars on both sides of the river called out *warra warra,* meaning he had no right to be in the area and should leave immediately. Fremantle ignored the warnings and landed on the south bank of the river.

Yaleroo. This literally means "dance" and can mean a special occasion in which different family clans converge at a culturally appropriate location for a formal ceremony. In 1835 George Fletcher Moore described an event at Lennard Brook which included 100 men, women and children from surrounding areas including Upper Swan. Mr J. H. Brockman remembered a 'corroboree' hosted by Moke at Lennard Brook in 1886.

[231] The information at Attachment F contains more examples and references to material which supports the assertion of the traditional nature of the above laws and customs. For instance, the following is cited from historical sources from the period around sovereignty in the application area:

I had not proceeded far before I heard the yelling of the black fellows and we gained the top of the hill where we saw a Native with a firebrand in one hand and two spears in the other, shouting "Warra" "warra" and pointing to the shore where the boat was, desiring us to go away. I proceeded on when he became furious and stood on a rock about thirty yards off and pointed his spear at me, holding one in one hand across which he placed the other, evidently with the intention of throwing it. As I should have been sorry to have commenced hostilities, which must have followed had the spear been thrown, I moved off to the right taking care not to turn my back on the savage. When he saw we did not persevere in going forward he left us.

Warra warra did not just apply to white trespassers, it also applied to uninvited Aboriginal people from neighbouring areas. In March 1835 Googalee was involved in the ceremonial spearing of some Murray River men who had trespassed by setting fire to his land without obtaining permission: "The occasion of this encounter is a satisfactory proof of the importance the natives attach to the right of certain prescribed limits for their hunting grounds, and the jealousy with which they watch any incursions upon them."

[232] The information and details in the factual basis material at Attachment F also provides accounts of generational acknowledgement and observance of the laws and customs of the native title claim group, including the following examples:

The law of *kalyeep* was still observed in the 1950s according to Albert Corunna:

[Text deleted for cultural reasons]. Daisy Bates records some of Fanny Balbuk's *winnarch* [the law of special places] stories in the early twentieth century. In one story a white man is frightened away by the Waugal after digging *winnaich* ground at Belmont.

Affidavits

[233] The affidavits also speak to the intergenerational transmission of the laws and customs of the native title claim group. The affidavit of Bella Bropho contains information and facts in relation to the laws and customs that are set out above and how they were taught to her and others within the claim group:

> [Text deleted for cultural reasons].

[234] In the affidavit of Albert Corunna dated 24 November 2011 he states that:

> [Text deleted for cultural reasons].

Consideration

[235] A sufficient factual basis for the purpose of 190B(5)(b) must firstly clearly identify the relevant pre-sovereignty society. That is, there must be some basis for my inferring that the factual basis elicits details of a pre-sovereignty society 'which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'. The facts set out must, in turn, sufficiently support the assertion that those laws and customs give rise to the claimed native title rights and interests of the native title claim group—*Gudjala [2007]* at [62], [66] and [81].

[236] There are also other matters to which the Registrar or her delegate must turn her mind in examining the sufficiency of a factual basis for the purpose of s. 190B(5)(b). If, for instance, descent from named ancestors is the basis of claim group membership the factual basis must demonstrate some relationship between those named ancestors and the relevant pre-sovereignty society from which it is said that the laws and customs are derived. Further, to this, the factual basis must contain some explanation of how current laws and customs are said to be traditional. A sufficient explanation of such does not transpire from the mere assertion that the laws and customs are traditional — *Gudjala [2009]* at [40], [52], [55] and [69].

[237] The factual basis material states that the Swan River People at sovereignty were part of a society that identified at the time as "Yoongar." There is also a reference to the relevant system of laws and customs, referred to as the "Nyoongar Way," acknowledged and observed by these persons.

[238] The claim group in the application is described primarily in reference to identified ancestors. Thus, within the factual basis there must be some explanation of the asserted relationship between those persons and the relevant society. Within Attachment F there are asserted facts in relation to each of the identified ancestors, including specific facts going to their association with the land and waters in the application area. There is also reference to these persons and their descendant in the cited historical documents and records. For instance:

> Armstrong wrote that in 1836 Swan River people received "cloaks, bags &c" from "stranger tribes" visiting Perth "in return for permission to visit here." Attendance at the ration stations reflected an observation of *Walluk yonga*, the law that demanded reciprocity on the part of guests for the use of the owners' land and resources. Most of the men who were sent to Rottnest Island, when charged with "stealing" livestock were arguably claiming what was owed to them by their non-Aboriginal guests.

In 1838 George Grey described a meeting with some Swan River elders at Joondalup:

> The horses were scarcely treated tethered and our fire made, when four more natives joined the party; their names were Noo-gong-oo, Kur-ral, Jee-bar, and Du-de-murry; they brought us a present of twenty-seven fresh-water tortoises, the average weight of which was half a pound. They said, that although the lake was called Mooloore, the name of the land we were sitting on was Doon-da-lup.
>
> This narrative is significant because and his brother Noogongoo were senior elders of the Swan River People in the 1830's and had family links to Moke and Cundee who are listed in Schedule A of the application [According to Grey Jeebar and Noogongoo were the sons of Nardooitch and were grandfathers to Moke. Jeebar's half brother Beregore was Tommy Nettle's paternal grandfather].
>
> Grey continued his journey north in the company of young men approved by Jeebar. These were Warrup, Jenna, Dwer and Ugat, who were all his grandchildren except Ugat who was Jeebar's son.
>
> The grandsons of Jeebar demonstrated their knowledge of the land by naming all the lakes and waterways that Grey passed through until they came to Maubeebee, which is now known as Loch McNess or Wagardu.
>
> Maubeebee is one of the boundary points of the claim area. Instead of continuing north [Name deleted]'s guides took him in a north-easterly direction which follows the boundaries of the claim area defined in Schedule B of the application. Once they reached Bambanup Grey's guides realised they were about the enter foreign territory...

[239] This, in my view, contains facts sufficient to support the assertion of the link between the identified ancestors and the pre-sovereignty society. It does this, in my view, by placing these persons within the claim area and gives examples of how those persons acknowledged and observed laws and customs in relation to the claim area, being those of the relevant pre-sovereignty society.

[240] The factual basis material also contains a sufficient explanation of how the current laws and customs of the native title claim group can be said to be traditional. This is primarily done via the provision of examples of the laws and customs acknowledged and observed by the relevant ancestors and those that are now acknowledged and observed by current claimants. There is also sufficient facts to support continuity, via the provision of examples of the transmission from generation to generation.

[241] The system of land holding rights under the Nyoongar Way, for instance, is described in Attachment F. Referring to *kalyeep*, which means "home fire", the material explains that rights and interests in the application area derive from being "raised up" by persons who live according to the Nyoongar Way. This system places considerable emphasis on descent and inheritance. Whilst *kalyeep* refers to the wider country, within that country there is also the concept of the 'family run.' Referring to historical sources, it is implicit that the ancestors of the claim group derived their rights and interests in the application area pursuant to these laws and customs. Examples are provided as to how this system continues. For instance:

> The family estates defined by Robert Menli Lyon in 1833, i.e., Mooro, Beeloo, Beeliar and Waylo, were family runs within a wider *kalyeep* that is defined by the water catchment area described in Schedule B of this application.
>
> The main thing is that we have a spiritual connection to the place where we were born and also the places where our parents were born. We have obligations towards those places because they connect us to our ancestors. Under our law we are still owners of our lands, despite the colony that has been set up here...I remember my mother telling us we still own the land— extract from Attachment F of current claimant's account of land ownership.
>
> I stay in my area. I go around on family business up to Joondalup or over to Redcliffe, or sometimes into the hills, but mostly I stay close to Lockridge and Guildford. My ancestors are buried here —extract from Attachment F of current claimant's account of 'family run.'

[242] In my view there are sufficient asserted facts upon which a comparison of the current laws and customs with those that are asserted to have existed at sovereignty is possible. Of particular note is the way in which the current laws and customs continue to reflect the traditional concept of land ownership with family connection to land and inheritance practices enduring over the period since sovereignty.

[243] In my view the factual basis is sufficient to support the assertion at s. 190B(5)(b).

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

[244] This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. This assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[245] This aspect of the test was considered by Dowsett J in *Gudjala [2009]*. His Honour stated that:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'—at [33].

[246] There are, within the factual basis material, asserted facts about the pre-sovereignty society and the links between that society and the claim group. As observed above in my reasons for s. 190B(5)(b) there are also asserted facts which point to a similarity of laws and customs between the pre-sovereignty society and those laws and customs that are now acknowledged and observed by the native title claim group. It is my view that the factual basis material contains sufficient asserted facts to support an inference of continuity, including that:

- the society existing at and before sovereignty was known as Yoongar;
- the identified ancestors and other predecessors of the native title claim group were linked to or were members of that society;
- the members of the native title claim group are descendant from those ancestors who were associated with the application area at sovereignty;

- there has been continual association with the application area since the period after sovereignty;
- members of the native title claim group and their predecessors have continued to acknowledge and observe the laws and customs of the Yoongar, being the Nyoongar Way.

[247] In my view the factual basis is sufficient to support the assertion at s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

[248] The application **satisfies** the condition of s. 190B(6).

[249] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

The nature of the task at s. 190B(6)

[250] I understand that a right or interest may be said to be prima facie 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].

[251] The task at s. 190B(6) is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Furthermore, where appropriate, 's. 190B(6) may also require consideration of controverting evidence' —*Doepel* at [126], [127] and [132].

[252] Primarily, however, I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act (see *Gudjala [2007]* at [85]). That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

[253] In *Gudjala [2007]*, Dowsett J referred, in relation to the requirement at s. 190B(5), to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*) and to the Court's consideration of s. 223 and 'traditional'— *Gudjala [2007]* at [86].

[254] In *Yorta Yorta* it was observed 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].
>
> ..."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].

[255] In that native title '***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law' (*Yorta Yorta* at [110]) I consider that a prima facie case to establish a particular native title right or interest would be one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

[256] I now turn to consider each of the native title rights and interests that are claimed in the application. These are set out in Schedule E of the application. In some instances, I have grouped certain rights and interests together.

Consideration of the native title rights and interests claimed in Schedule E

Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 applies) the Swan River claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world.

[257] In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority considered that '[t]he 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***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

[258] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> [T]he question whether the native title right 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 usfructuary or proprietary. ***It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—at [71].

[259] Further, in exploring the notion of exclusive possession in this context, the Full Court in *Griffiths FC* was of the view that control of access to country could also flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised—at [127].

[260] For the purpose of the task at s. 190B(6), the above principles elicit the kind of asserted facts that may be necessary in order to prima facie establish the right to possess, occupy, use or enjoy the land and waters to the exclusion of all others.

[261] The factual basis material contains facts which support the assertion that at sovereignty there were laws and customs acknowledged and observed that gave rise to this claimed right.

[262] Upon my understanding of the asserted facts, at sovereignty the ancestors and predecessors of the native title claim group were bound by a system of inheritance that defined rights and interests in the application area. The law of *kalyeep* defines the wider country and boundaries of the Swan River People. Within that wider boundary, smaller family boundaries and estates are also strictly defined. The law of *warra warra,* which defines the responsibilities that members of the society have in relation to the protection of country is also pertinent in this regard. The Nyoongar Way is said to be such that 'everybody belongs to a particular place with well understood boundaries and does not generally travel beyond that area without obtaining permission.' The system is explained in the following terms:

> Land is beyond doubt an inheritable property among them, and they boast of having received it from their fathers' fathers, &c., to an unknown period back. All the sons appear to succeed equally to their fathers' lands [source 1836].
>
> A whole tribe does not, as a custom, migrate beyond its own district; but sometimes a whole tribe pays a visit of a few weeks to a neighbouring tribe, but this is always on a previous invitation, which is sometimes sent to its neighbours by a tribe that has had extraordinary good luck in hunting, or has had a whale cast on its coast [source 1836].
>
> To access, speak for or use the resources of another person's country without permission is forbidden. When Captain Fremantle rowed up the Swan River on 2 May 1829, the Nyoongars on both sides of the river called out *warra warra,* meaning he had no right to be in the area and should leave immediately. Fremantle ignored the warnings and landed on the south bank of the river.
>
> The observance of this law continues today however the observance may range from silent disapproval, social avoidance or a verbal or written warning that they should leave the area.
>
> Warra warra gives rise to the right to maintain and protect places of importance under traditional laws and customs and practices in the claim area; and the right to control access to, and use of, the application area by other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional laws and customs.

[263] Reference within the factual basis to the historical sources and other reports provide sufficient support for the assertion that these laws and customs derive from the pre-sovereignty society. It is apparent that the present acknowledgment and observance of the above has endured, albeit with some necessary adaptation. For instance, the observance of defending boundaries in accordance with *warra warra* has become more subtle and linked to the visiting upon trespassers of spiritual sanctions.

[264] Current claimants possess knowledge of their predecessors country and the laws of inheritance. For instance, in his affidavit of 24 November 2011 Albert Corunna states that:

> [Text deleted for cultural reasons].

[265] In my view, the factual basis material sufficiently demonstrates how this right (which has the character of the assertion of control of access) arises under the traditional laws and customs of the relevant society.

[266] This right is prima facie established.

Over areas where a claim to exclusive possession cannot be recognised, the Swan River People claim the following rights and interests:

the right to access the application area;

the right to live on the application area;

the right to move about freely on the application area

[267] The factual basis material provides details and asserted facts that support the assertion that the ancestors and predecessors lived upon and accessed the application area in accordance with traditional laws and customs of the Nyoongar Way.

[268] Throughout the factual basis material there are historical accounts of the identified ancestors and other predecessors of the Swan River People living on and traversing the application area. There is also within the factual basis a timeline of continuous association from the ancestors who occupied the application area at sovereignty through to the current claimants. Much of this material is cited above in these reasons.

[269] In my view, the claimant's factual basis establishes, prima facie, that these rights exist under the traditional laws and customs of the native title claim group.

the right to hunt, fish and gather natural resources on the application area

[270] This right may be said to arise under the law of mutual obligation (*walluk yonga*) which is described in the factual basis material. This is explained in the following terms:

> Within family groups there is an expectation that, when a kangaroo is killed, the meat will be shared with everybody at the camp. In 1833 Menli Lyon observed "On the kangaroo they meal in common" and in the 1900s Bates wrote: "When Woolbear killed a kangaroo he divided it according to the food law". This law also applied to other meat: "The emu food enjoined that every person in camp must receive a portion of emu food, however minute the helping may be".
>
> The observation of *walluk yonga* also extends to guests as there is an expectation that guests will give something of comparable value in return for the hospitality given. This applies to any guests, whether they be Aboriginal or non-Aboriginal and the expectation of reciprocity exists today just as it did prior to 1829. Armstrong wrote that in 1836 Swan River people received "cloaks, bags &c" from "stranger tribes" visiting Perth "in return for permission to visit here".

[271] In my view, the claimant's factual basis material establishes, prima facie, that this right arises from the traditional laws and customs of the native title claim group.

the right to hold meetings on the application area

the right to conduct cultural activities on the application area

the right to maintain and protect places of importance under traditional laws, customs, and practices in the claim area

[272] From the factual basis material I understand that the spiritual and cultural life of those persons who were present in the application area at sovereignty was vital. The historical sources cite the occurrence of meetings, gatherings and other cultural activities. According to the traditional laws and customs of the Nyoongar Way, *yalleroo* 'involves a convergence of family groups to share food, make decisions and participate in cultural activities.' The asserted facts set out in the factual basis provide accounts of these kinds of activities being practiced by the ancestors of the native title claim group. There are also accounts from current claimants as to the continued importance of cultural events, including:

> Gathering together in groups for special occasions is part of who we are. Dad told me about the corroborees behind the Eden Hill tip when he was a boy...One part of our culture is to have big meetings...We was part of a big meeting at Rottnest Island.

[273] The right to maintain and protect places of importance comes from the traditional laws relating to the right to speak for country within the application area. Current claimants speak of the responsibility that they have for their country and how this was taught to them from their predecessors. For instance, Bella Bropho, in her affidavit, explains how she was taught about dreaming tracks and her responsibility to protect.

[274] The above rights are established, prima facie.

the right to make decisions about the use and enjoyment of the application area;

the right to control access to, and use of, the application area by other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional laws and customs

[275] The law has observed a tension with the expression of these kinds of claimed rights as non-exclusive. For instance, in the *Ward HC* joint judgment, the Court concluded that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—at [52].

[276] In *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), the Court in making a consent decision recognised 'a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs' as a non-exclusive right and held that it was not inconsistent with the existence of pastoral lease entitling the lessee to determine who has access to the area—at [27]. Also in *Jango v Northern Territory of Australia* [2006] FCA 318 (*Jango*), Sackville J considered that he was bound by the Full Court in *Ward FC* and held that a non-exclusive right 'to make decisions about the use or enjoyment of the Application Area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc' could be recognised—at [571]. A number of consent determinations have also recognised a similarly expressed right[5].

[277] Upon my understanding, however, the above authorities demonstrate that the nature and extent of the right to make decisions about the use and enjoyment of the area has, as a non-

[5] See for instance *Mundraby v Queensland* [2006] FCA 436 and *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142.

exclusive right been limited or qualified in its expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

[278] In contrast, the claimed right to make decisions about the use of enjoyment of the area in this application is not limited or qualified in that way. Thus, while *Ward FC* and *Jango* make the distinction from the decision in *Ward HC*, that distinction does not apply in this instance as the circumstances are not analogous. There is a clear difference in how the right is expressed in this application as compared to *Ward FC* and *Jango*.

[279] In relation to the claimed right to 'control access', there is authority where a distinction has been made. For instance in *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), O'Loughlin J acknowledged the authority of *Ward HC* but indicated a willingness to recognise the non-exclusive rights to grant access to the application area to Aboriginal persons governed by the laws and customs of the native title holders and to refuse access to the application area to Aboriginal persons governed by the laws and customs of the native title holders—at [553], although no determination of native title was subsequently made by His Honour in that matter. The consent decision in *Mundraby v Queensland* [2006] FCA 436 recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people' bound by the laws and customs of the native title holders.

[280] Again, of the above, I would note the limiting or qualifying nature of the expression used. In my view, the nature and extent of the right to control access through the right to grant or refuse access has in those cases, as a non-exclusive right, been limited or qualified in its expression and meaning by reference to such decisions binding only those Aboriginal persons who will recognise such decisions or, more specifically, the native title holders.

[281] Here, the claimed right to control access of other Aboriginal People to the area in this application is not limited or qualified in that way. I am of the view that the distinction made in *De Rose* is not applicable as the circumstances are not analogous. There is a clear difference in how the right is expressed in this application as compared to *De Rose*.

[282] In reference to the expression of such rights, the High Court in *Ward HC* observed that it would be neither appropriate nor sufficient to convey the nature and extent of a right or interest in terms equivalent to an exclusive claim where 'those rights and interests that are found to exist do not amount to a right, as against the whole world'—at [51]. While this observation was made in the context of a determination of native title, specifically the requirements of s. 225, I am of the view that this principle is applicable to the registration test and the rights and interests claimed. Where it is clearly not the intention of the applicant to claim the right or interest as an exclusive claim against the whole world, then it should not be expressed in those terms. That is because the expression of the right or interest explicitly contradicts the intended nature of the right or interest.

[283] In my view, to use the expression that the native title claimants have the right to make decisions about the application area and to control the access of other Aboriginal People to the areas [but without a right of possession as against the whole world] 'is apt to mislead'—*Ward HC* at [52].

[284] These rights are not prima facie established.

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.

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

[286] Section 190B(7) is said to require 'evidentiary' material 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. Whilst the focus is necessarily confined, as it is not commensurate to 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].

[287] I also understand that the term 'traditional,' as used in this context, should be construed in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]. In so construing the necessary physical 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].

[288] As explained above, I am satisfied that the factual basis material is sufficient to support the assertion that there are traditional laws and customs acknowledged and observed by the native title claim group that give rise to native title rights and interests in the application area. Throughout the factual basis material provided there are also facts which go to supporting the traditional nature of the physical connection that particular persons in the native title claim group have with the application area.

[289] In the affidavit of Albert Corunna dated 24 November 2011 he explains the nature of his and his family's connection with the claim area and how it is in accordance with the relevant traditional laws and customs, including that:

> [Text deleted for cultural reasons].

[290] The above considered with all of the claimant's factual basis material is such that I am satisfied that at least one member of the native title claim group has a traditional physical connection with part of the land and 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.

[291] In the reasons below, I look 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.

[292] The application **satisfies** the condition at s. 190B(8).

Section 61A(1)

[293] 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.

[294] The geospatial assessment states that no determinations of native title fall within the external boundary of this application as at 1 July 2013. I have undertaken a more recent search of the Tribunal's mapping database to confirm that this information remains current — see overlap analysis report dated 10 October 2013 which states that no determinations of native title fall within the application area.

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

Section 61A(2)

[296] 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.

[297] Schedule B of the application excludes any areas where native title rights and interests have been wholly extinguished unless the circumstances in subparagraph (4) apply — Schedule B at [2] and [3].

[298] In my view, this statement in the application is sufficient to satisfy me that the claim is not made over areas covered by a previous exclusive possession act unless the circumstances described in subparagraph 61(4) apply.

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

Section 61A(3)

[300] 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.

[301] The claim made in the application for the native title right to possess, occupy, use and enjoy the land and waters to the exclusion of all others is only made in relation to areas where such a right can be recognised. In my view, that statement is sufficient to satisfy me that this right is not claimed over areas where a previous non-exclusive possession act was done

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

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

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

[303] I consider each of the sub-conditions of s. 190B(9) in my reasons below.

[304] The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three sub-conditions, as set out in the reasons below.

Section 190B(9)(a)

[305] For the purpose of s. 190B(9)(a), the application must not disclose (or the Registrar must not be aware) that 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.

[306] Schedule Q of the application states that the native title claim group do not make a claim for ownership of minerals, petroleum or gas wholly owned by the Crown

[307] The application satisfies the sub-condition of s. 190B(9)(a).

Section 190B(9)(b)

[308] For the purpose of s. 190B(9)(b), the application must not disclose (or the Registrar must not be aware) that a claim is being made for exclusive native title rights and interests to waters in an offshore place.

[309] Schedule P of the application states that the native title claim group do not make a claim for exclusive possession of all or part of any waters in an offshore place.

[310] The application satisfies the sub-condition of s. 190B(9)(b).

Section 190B(9)(c)

[311] For the purpose of s. 190B(9)(c) the application must not disclose (or the Registrar must not be aware) that a claim is being made where native title rights and interests have otherwise been

extinguished (except to the extent that the extinguishment is required to be disregarded under ss. 47(2), 47A(2) or 47B(2)).

[312] Schedule B of the application contains the statement that the application area excludes any areas within the external boundaries where native title rights and interests have been wholly extinguished.

[313] In my view the information in the application and other information that I have before me does not disclose that a claim is being made where native title rights and interests have otherwise been extinguished.

[314] The application satisfies the sub-condition of s. 190B(9)(c).

[End of reasons]

Attachment A

Summary of registration test result

Application name	**Swan River People #2**
NNTT file no.	**WC2011/2**
Federal Court of Australia file no.	**WAD 24/2011**
Date of registration test decision	**11 October 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)			Not Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

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

[End of document]