Registration test decision

Application name	Nyiyaparli #3
Name of applicant	David Stock, Gordon Yuline, Raymond Drage, Victor Parker and Billy Cadigan
State/territory/region	Western Australia
NNTT file no.	WC2013/003
Federal Court of Australia file no.	WAD196/2013
Date application made	17 June 2013

Name of delegate Jessica Di Blasio

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

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

Date of decision: 27 August 2013

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Jessica Di Blasio

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

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Nyiyaparli #3 claimant application to the Native Title Registrar (the Registrar) on 19 June 2013 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 17 June 2013 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

Registration test

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

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

Information considered when making the decision

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

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

I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- form 1;
- additional material comprising affidavits sworn by members of the claim group provided with a cover letter to the Registrar on 20 June 2013;
- additional material comprising an affidavit sworn by David Stock on 4 July 2013 and provided to the Registrar on that same day; and
- geospatial assessment undertaken by the Tribunal's Geospatial services on 1 July 2013.

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

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L).

Procedural fairness steps

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

On 20 June 2013 the case manager for this matter sent a letter to the State of Western Australia providing them with a copy of the application and outlining a timeframe for them to make submissions regarding the registration testing of this matter as well as setting out a registration testing timeframe. This letter also informed the state of the additional affidavit material received by the Registrar on 20 June 2013 and requested the State sign a confidentiality undertaking in order for that material to be provided to them.

On 5 July 2013 the State returned the confidentiality undertaking for the material provided to the Tribunal on 20 June 2013, subsequently on the same day by way of letter the case manager provided to the State the additional affidavit material, and gave them until 17 July 2013 to comment on the material. In that same letter the case manager informed the State that the Applicant had provided further additional material on 4 July 2013 in the form of an affidavit sworn by David Stock, a further confidentiality agreement was sent to the State in conjunction with the letter in order for the further additional material to be provided to them.

At the date of this decision the State have neither made submissions regarding the additional material provided to them on 5 July 2013 or returned the second confidentiality agreement regarding the additional affidavit of David Stock, of which they were informed also on 5 July

2013. They therefore have not been provided with a copy of David Stock's affidavit sworn 4 July 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.

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

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

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

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

Native title claim group: s. 61(1)

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

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

In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [35] and [36]. I therefore understand that I am

required to be satisfied that the claim 'on it's face' is made on behalf of all the person in the native title claim group, this consideration does not involve assessing information that is not contained in the application itself—*Doepel* at [35] to [39].

If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then in my view, the relevant requirement of s. 190C(2) would not be met and the claim would not be accepted for registration—*Doepel* at [36].

The claim group is described at Schedule A as those people who are descendents of the nine listed Nyiyaparli apical ancestors. There is nothing on the face of the application which suggests that not all persons in the native title claim group have been included in the description at Schedule A.

I am satisfied that the application meets the requirement of s. 61(1) for the purposes of s. 190C(2).

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

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

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

Part B of the application contains the name and address for service of the applicant.

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

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

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

I understand that this provision is 'a matter of procedure' and does not require me to consider whether the description is 'sufficiently clear', merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 *(Gudjala 2007)* at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198.

The native title claim group is described at Schedule A as being based on descent from particular apical ancestors. It follows, in my view, that the application contains the details required by s. 61(4) for the purposes of s. 190C(2).

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

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

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and

(iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

Each of the applicant persons has sworn an affidavit all of which have been signed, dated and competently witnessed. Each affidavit is made in identical terms and, in my view, addresses the matters required by s. 62(1)(a)(i) to (v).

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

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

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

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

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

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

Schedule B refers to attachment B which provides a written description of the external boundary of the application area. This description is divided into Area 1 and Area 2 and specifically excludes a number of other native title determination application areas. Schedule B also includes a series of general exclusions from the application area.

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

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

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

Attachment C of the application is a map showing the external boundaries of the application area.

Searches: s. 62(2)(c)

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

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

Schedule D of the application states that no searches have been carried out by or on behalf of the native title claim group.

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

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

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

A description of the native title rights and interests claimed is included in the application at Schedule E.

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

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

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

Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s. 62(2)(e)(i) to (iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s. 190B(5), I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

Activities: s. 62(2)(f)

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

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

Schedule G of the application provides a list of activities currently carried out by the claim group in relation to the application area.

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

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

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

Schedule H of the application identifies Maisey Hyland & Others on behalf of the Ngarlawangga People native title claim as overlapping the application area. Schedule H also includes a note that it is intended that the eastern boundary of the Ngarlawangga claim will be withdrawn after the lodgement this application.

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

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

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

Schedule HA of the application states that a list of relevant notices are provided at Attachment I. Attachment I is a copy of an overlap analysis conducted by the Tribunal and includes details of relevant notices over the application area.

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

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

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

Schedule I also refers to Attachment I which is an overlap analysis of the application area and as discussed above, includes, among other things, details of relevant s. 29 notices that cover the application area.

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied— *State of Western Australia v Strickland* [2000] FCA 652. I therefore must first consider if there are any previous claims that overlap the application area, that are registered, and that remain on the register at the date of this decision. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

The Tribunal's Geospatial services conducted an overlap analysis of the application area on 1 July 2013 which states that the WC2005/003—Ngarlawangga People—WAD78/2005 registered native title claim overlaps the whole of the current application area. Although Schedule H states that the applicant understands that the eastern boundary of the Ngarlawangga native title claim will be withdrawn, to date this has not occurred. Therefore, as there is an application, that is registered and remains on the register at the date of this decision, it is necessary for me to consider whether there are any common claimants between this and the Ngarlawangga application.

Schedule O states 'there are no details of the membership of the Applicant, or any other member of the native claim group, in a native claim group for any other application that has been made in relation to the whole or part of the area covered by this Application.' Although the phrasing is somewhat unclear I understand it to be stating that there are no common claimants between this and any other application. When read together with the affidavits from the persons comprising the applicant swearing to the truth of the matters in the application, I am of the view that it is open for me to be satisfied that there are no common claimants between this claim and the Ngarlawangga claim.

Further, I have examined the Register extract for the Ngarlawangga native title claim which describes the native title claim group with reference to a number of apical ancestors. I have compared these apical ancestors with those used to describe the native title claim group for this application. I am of the view that there are no common apical ancestors in either claim group description. I also note that there are no shared surnames between the applicant persons in this claim and the Ngarlawangga claim. I am therefore of the view that there is nothing before me to indicate that there are any common claim group members between the two overlapping claims.

I am satisfied that no person included in the native title claim group for the application (being the current application) was a member of the native title claim group for any previous application.

The application satisfies 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(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition

of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

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

Schedule R of the application states that '[t]his Application has been certified under s203BE of the Act by the Yamatji Marlpa Aboriginal Corporation and Central Desert Native Title Services Limited, and the certifications are annexed (attachment R)'.

Attachment R contains a certificate from both Yamatji Marlpa Aboriginal Corporation (YMAC) and Central Desert Native Title Services Limited (CDNTS). The certification from YMAC is signed by the acting Chief Executive Officer and dated 3 November 2011. Similarly the certificate from CDNTS is signed by both the Principal Legal Officer, and the Chief Executive Officer and dated 24 November 2011.

I have had regard to a map maintained by the Tribunal which outlines the regions for representative bodies, and bodies funded to perform the function of representative bodies. I understand from this map that YMAC is a representative body and CDNTS is a body funded under s. 203FE(1) to perform the functions of a representative body, including certification functions. I have also had regard to the geospatial assessment dated 1 July 2013 which identifies both YMAC and CDNTS as the two representative bodies responsible for the area covered by the application. YMAC and CDNTS are therefore the only bodies that could certify the application.

Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met, their reasons for being of that opinion and where applicable set out what the body has done to meet the requirements of s. 203BE(3). The necessary opinions at ss. 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

I understand that my role at s. 190C(4) is not to 'look behind' the certification or enquire as to the merits of the certification, all the task requires of me is that I am 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78].

s.203BE(4)(a)

This provision requires a statement from the representative bodies that they are of the opinion that the requirements set out in s. 203BE(2)(a) and (b) have been met.

Both certificates contain the required statements.

s. 203BE(4)(b)

This provision requires the representative body to set out their reasons for being of the opinion required at s. 203BE(4)(a).

The certification from YMAC provides the following relevant information:

- YMAC has provided anthropological and legal services to the Nyiyaparli claim group for their other Native Title Determination applications;
- YMAC staff have organised and been present at a series of meetings of the Nyiyaparli native title claimant group, and have observed the decision-making process of the Nyiyaparli claim group members;
- for this claim, all reasonable efforts have been made to identify and consult with the Nyiyaparli native title claimant group and YMAC has observed that the applicant for this claimant application has authority to make the application and to deal with matters arising in relation to it;
- YMAC staff and consultants have performed extensive historical, anthropological and genealogical research on connection to country, criterion for membership of the Nyiyaparli community, and the decision-making process for the Nyiyaparli native title claimant group.

The certification from CDNTS provides the following relevant information:

- YMAC has informed CDNTS staff that they have observed over time how decisions are made by members of the claim group and have taken instructions from the claim group members and have observed over time how such instructions are given;
- YMAC has informed CDNTS that meetings of the Nyiyaparli claim group took place in accordance with the usual process of decision making. Through a meeting of the Nyiyaparli claim group, members of the group authorised the applicant persons to make the application and deal with all matters arising in relation to it;
- CDNTS is not in receipt of any information to suggest that the authorisation of the applicant persons was not done in accordance with the usual process of decision making;
- CDNTS has been provided with information by YMAC which outlines the process by which the claim group description has been arrived at. This process included anthropological research conducted by [Name of Anthropologist Deleted] and [Name of Anthropologist Deleted] and a series of meetings of the Nyiyaparli claim group.

s. 203BE(4)(c)

This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s. 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

The certification from YMAC states that this application falls over part of the claim area of the Ngarlawangga native title claim. Further to this YMAC staff attended a combined community meeting on 10 June 2011 with the Nyiyaparli and Ngarlawangga claim groups. At that meeting

the Ngarlawangga claim group members agreed to reduce the eastern external boundary of the Ngarlawangga claim and the Nyiyaparli claim group authorised the applicant and the filing of a new Nyiyaparli claim in the area to be vacated by the reduction of the Ngarlawangga boundary.

In my view the YMAC certification briefly sets out what YMAC has done to meet the requirements of s. 203BE(3).

The certification from CDNTS is silent on this provision. I note that it is only 'where applicable' that a representative body is required to set out what it has done to meet the requirement of subsection 203BE(4)(c). It may be that CDNTS has not done anything to reduce overlapping claims such that there is no applicable detail for them to provide in relation to this provision.

Nevertheless, as mentioned above, failure to comply with this subsection does not render the certification invalid.

My decision

For the above reasons I am satisfied that the application has been certified under Part 11 by the only representative bodies that could certify the application in a way that complies with s. 203BE(4).

Merit conditions: s. 190B

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

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

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

Schedule B refers to Attachment B as providing a description of the external boundaries of the claim. Schedule B also lists a series of general exclusions.

Attachment B contains a document titled 'Nyiyaparli' produced by the Tribunal's Geospatial services on 28 May 2013. The application area consists of two parts, referred to as Area 1 and Area 2, both of which are described by metes and bounds, referencing the boundaries of existing native title determination applications and geographic coordinate points in decimal degrees to six decimal places referenced to the geocentric datum of Australia 1994.

Attachment B specifically excludes any areas within the WC2005/006—Nyiyaparli—WAD6280/1998, WC2010/016—Yinhawangka Part A—WAD340/2010, and WC2011/006—Banjima People—WAD6096/1998 native title claims.

Schedule C refers to Attachment C which is a colour photocopy of an A3 map titled 'Native Title Determination Application Nyiyaparli'. The map was produced by the Tribunal's Geospatial services on 28 May 2013 and includes:

- the application area depicted by a bold blue outline;
- surrounding native title determination applications shown and labelled;
- cadastral boundaries colour coded and labelled;
- topographic features shown and labelled;
- scalebar, north point, coordinate grid, legend and locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied with reasonable certainty whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 1 July 2013. The Geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having also considered the map and boundary description contained in the application, I agree with that conclusion.

In my view, the use of a generic formula at Schedule B to exclude any areas in relation to which a previous exclusive possession act has been done is an acceptable way of describing the area. The applicant has sought to specifically exclude areas where native title is known to have been

extinguished. I consider that it is reasonable to assume that the applicant may not possess a full range of information in relation to historical tenure and therefore a generic exclusion clause of this kind is acceptable—see *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 at [29] to [38].

Given the above, I am satisfied that the information and map required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The application satisfies the condition of s. 190B(2).

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

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

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

The requirements of s. 190B(3)

The nature of the task at s. 190B(3) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51]. It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has not been described sufficiently.'—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] *(WA v NTR).*

Description of the native title claim group

The native title claim group is described in Schedule A of the application. It is described as comprising:

> those persons who are descendants of the Nyiyaparli apical ancestors listed below:
>
> Mintaramunya;
>
> Pitjirrpangu;
>
> Yirkanpangu (Jesse);
>
> Kitjempa (Molly);
>
> Mapa (Rosie);
>
> Billy Martin Moses;
>
> Parnkahanha;
>
> Wirlpangunha (Rabbity-Bung); and
>
> Wuruwurunha.

My consideration

As Schedule A describes the native title claim group it follows that the requirement of s. 190B(3)(b) applies. I therefore must be satisfied that the native title claim group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s. 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person falls within the claim group as described—at [67]. For the same reasons I am satisfied that the criteria for membership to the native title claim group, being descent from an apical ancestor, is sufficient for the purposes of s.190B(3)(b).

I am therefore satisfied that the overall requirement of s. 190B(3)(b) is met, as it is possible, through some factual inquiry, to ascertain, by reference to the description in Schedule A of the application, whether a particular person is a member of the native title claim group.

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

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

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

Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise 'judgment upon the expression of the native title rights and interests claimed'. His Honour considered that it was open to the decision-maker 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—at [99] and [123].

Primarily the test is one of 'identifiability', that is, 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

The following description of native title rights and interests claimed in the application area is included at Schedule E:

> The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:
>
> 1) the common law, the laws of the State of Western Australia and the Commonwealth of Australia;
>
> 2) valid interests conferred under those laws; and
>
> 3) the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land and waters the subject of this Application.
>
> 4) In accordance with sub section 61A(3) of the Act, the Applicant does not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others in respect of any areas in relation to which a previous non-exclusive

possession act, as defined in section 23F of the Act, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision as mentioned in section 23I in relation to that act;

5) In accordance with sub section 61A (4), paragraph 3 above is subject to such of the provisions of section 47B of the Act as apply to any part of the area in this application.

The said native title rights are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the Common Law, a Law of the State or a Law of the Commonwealth.

Rights in Area A

The Applicant claims the following listed native title rights and interests relating to exclusive possession in relation to Area A only.

1) The right to possess, occupy, use and enjoy the area as against the whole world;
2) A right to occupy the area;
3) A right to use the area;
4) A right to enjoy the area;
5) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
6) A right to control access of others to the area;
7) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
8) A right to control the taking, use and enjoyment by others of the resources of the area.

Rights in Areas A and C

The Applicant claims the following listed native title rights and interests in relation to Areas A and C, but not Area B:

9) A right to hunt in the area;
10) A right to fish in the area;
11) A right to take fauna; and
12) A right to take traditional resources, other than minerals and petroleum from the area.

Rights in Areas A, B and C

The Applicant claims the following listed native title rights and interests in relation to Areas A, B and C:

13) A right to be present on or within the area;
14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
15) A right to invite and permit others to have access to and participate in or carry out activities in the area;
16) A right of access to the area;
17) A right to live within the area;
18) A right to erect shelters upon or within the area;

19) A right to camp upon or within the area;

20) A right to move about the area;

21) A right to engage in cultural activities within the area;

22) A right to conduct and participate in ceremonies and meetings within the area;

23) A right to visit, care for and maintain places of importance and protect them from physical harm;

24) A right to take flora (including timber);

25) A right to take soil;

26) A right to take sand;

27) A right to take stone and/or flint;

28) A right to take clay;

29) A right to take gravel;

30) A right to take ochre;

31) A right to take water;

32) A right to manufacture traditional items from the resources of the area;

33) A right to trade in the resources of the area; and

34) A right to maintain, conserve and protect significant places and objects located within the area.

I note that Areas A, B and C are defined in the definitions section at the beginning of the form 1 as follows:

> ***Area A*** means land and waters within the Application area that are landward of the high water mark and which comprise:
>
> (i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown;
>
> (ii) areas to which s. 47 of the Act applies;
>
> (iii) areas to which s. 47A of the Act applies;
>
> (iv) areas to which s. 47B of the Act applies; and
>
> (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which to there has not been any prior extinguishment of native title.
>
> ***Area B*** means land and waters which are a "nature reserve" or "wildlife sanctuary" (as those terms are defined in the *Wildlife Conservation Act 1950* (WA)) created before 31 October 1975.
>
> ***Area C*** means land and waters within the Application area that is not included in Areas A or B above.

It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

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

The nature of the Registrar's task at s. 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions'—*Doepel* at [17].

The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s. 190B(5)—at [83] to [85]. The Full Court also said that a 'general description' of the factual basis as required by s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92].

The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts—*Doepel* at [47];
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*Doepel* at [17].

It is however, important that the Registrar consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala [2007]* and *Gudjala People #2* [2009] FCA 1572 (*Gudjala [2009]*) gave specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise

generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

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

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

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

Doswett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—at [52];
- that there is information which supports that the claim group is associated with the 'area as a whole'—*Gudjala [2009]* at [67].

I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section—*Martin v Native Title Registrar* [2001] FCA 16 at [26].

The applicant's factual basis material

Some factual basis information has been provided in the application at Schedule F. Some relevant information from that Schedule is as follows:

- '[S]ince prior to the acquisition of sovereignty, the Nyiyaparli people have had, and continue to have, a system of traditional laws and customs which they continue to acknowledge and observe'.
- The Nyiyaparli laws and customs are believed to have been put in place by ancestral beings known as Mangunpa. Mangunpa governs what Nyiyaparli people can and cannot do on Nyiyaparli country, including things like kinship and marriage, rules for ceremonies and rituals and the consumption of food.
- '[T]hese laws and customs were observed by the Nyiyaparli people at the time sovereignty was asserted and their descendants and successors are the Nyiyaparli people today. These laws and customs have been acknowledged and observed and had a substantially continuous existence and vitality since prior to sovereignty. They were taught to the Nyiyaparli people of today by their elders, and they in turn have passed it

[1] See *Gudjala FC* [90] to [96]

on to their children. The Nyiyaparli people continue to follow and teach their children these ways and to exercise the rights and interests claimed in the area today.'

Further information which goes to supporting the asserted factual basis of the claim was submitted to the Registrar in the form of several affidavits from some members of the native title claim group. Several of these affidavits speak of Nyiyaparli country generally and have been used to assist the Registrar in the application of the registration test in the past. Some affidavits were sworn in 1999, some in 2002, 2010 and some this year. All affidavits speak of the rich Nyiyaparli tradition and the teaching patterns associated with the traditional laws and customs that have passed the Nyiyaparli laws and customs from generation to generation.

Many of the places referred to throughout the affidavits fall within what I understand to be wider Nyiyaparli country though not necessary exactly within the claim area. In particular some of the named places fall within the Nyiyaparli registered native title claim WC2005/006—Nyiyaparli People—WAD6280/1998 which abuts this claim. However, I am of the view that, nevertheless, several of the affidavits speak with geographic particularity of areas that fall specifically within or in close proximity to the boundaries of both area 1 and area 2 of this claim, including affidavits used for previous registration tests.

[Name of Person One Deleted] affidavit sworn on 12 June 2013 provides a great deal of detail regarding the decision of the Nyiyaparli claim group to make this claim. She details that the area covered by this claim, according to traditional law and custom, is and always has been Nyiyaparli country, and she provides a wealth of information regarding specific locations within both area 1 and area 2 as well as details of the activities undertaken by the claim group in those areas.

> The Nyiyaparli country that I was taught by elders about covers the area in the main Nyiyaparli claim and also the areas to be covered by the new Nyiyaparli claim where the Ngarlawangga claim is or used to be. We had been talking about wanting to claim this area for a long time but the Nyiyaparli people could not claim this area until we had talked and got agreement with the Ngarlawangga People about it. I went to a community meeting of Nyiyaparli and Ngarlawangga people on 10 June 2011 at Tom Price when the Ngarlawangga People agreed that the areas were Nyiyaparli country and for us to claim it. The Ngarlawangga People agreed to take their claim off the areas and the Nyiyaparli People agreed at the meeting to lodge a claim over the areas.
>
> The new claim areas were part of the Nyiyaparli country from the beginning and the same Nyiyaparli laws and customs apply to these areas like they do for all of Nyiyaparli country. Nyiyaparli people have the same rights through these new claim areas as they have for the rest of the Nyiyaparli country.
>
> The new claim areas include the areas around [Place Name Deleted] to [Place Name Deleted] which we call [Place Name Deleted] to [Place Name Deleted] which we call [Place Name Deleted] to [Place Name Deleted] around [Place Name Deleted]. I was always taught about these areas as being Nyiyaparli country. [Place Name Deleted] is an important Nyiyaparli culture area. [Place Name Deleted] is an important site where we go fishing. I have been told there are carvings in this area. [Place Names Deleted] are boundary markers between Ngarlwangga and Nyiyaparli. I go around to those places when I am in that area.
>
> [Place Name Deleted] is the top end of [Place Name Deleted] which is an important area for my family, from my grandparents' family. I go camping in this [Place Name Deleted]. The old Nyiyaparli people also used to camp right through that area.

> Wunna Munna is the Nyiyaparli name of a seed that you get from that area and grind it down to make damper. You can also get yumbula there which is a bush medicine that you put around your nose when you have a cold. You can also make a pillow with it. You can also get milardu from that area which is another medicine that you drink or have a bath in. There are also kartinyba, which are cork trees, in that area which is good for babies if they have a fever as you rub it on them. You can also get wintamurra, that skinny tree, marawu (snakewood) trees there. Other medicines from there are the guranga leaves of the gum tree that you boil up for medicine. The area also has marta (sweet potatoes) and jibarlyi that you can cut up and boil. I have got jarntaru (bush honey) in the [Place Name Deleted] area. You cut the tree that has the honey but have to do it in a way that does not kill the tree. This is the way I was taught by my elders to do it.
>
> [Place Name Deleted] is an area where a lot of wartu (a type of grass that blows in the wind) grows. Wartubarna means a lot of grass in Nyiyaparli and this is what we call the area around [Place Name Deleted]—at [13] to [18].

The following are some other examples of the claim group's current association with areas within the application area:

> I am a descendant of Kitjiempa, also known as Molly. Her skin group was also karimarra. She was my grandmother, my kantayi, and was a Nyiyaparli woman. She was from the [place Names Deleted] area in Nyiyaparli country and this was part of her special area. There are special waterholes in that area called [Place Names Deleted]... she married [Name Deleted], also known as [Name Deleted] whose skin group was Panaka. His special country was from around [Place Name Deleted].—affidavit of [Name of Person One Deleted] 12 June 2013 at [4].

And;

> The special areas of Kitjiempa and [Name Deleted] in Nyiyaparli country were the areas they got from their Nyiyaparli ancestors and they became the special areas for my mother and for me too and they are for my children as well. I know songs for the [Place Name Deleted] area that I was taught by my old people—Affidavit of [Name of Person One Deleted] 12 June 2013 at [4].

David Stock, a Nyiyaparli applicant for both this and the earlier Nyiyaparli claim, in his affidavit sworn on 4 July 2013, provides details of activities and association of the claim group with particular areas in the new claim area. Like the extracts from [Name of Person One Deleted] affidavit above, it is clear David Stock is familiar with many traditional laws and customs that are undertaken or practiced on the claim area itself, and that this understanding of Nyiyaparli law has been taught from older generations. Some examples that demonstrate David Stock's understanding of the boundaries of Nyiyaparli country with reference to the claim area include:

> The new claim area is Nyiyaparli country. It has always been Nyiyaparli. I know this because the old people used to tell me. When we go with the young people they tell me the same thing that is how the story goes. That new area includes [Place Names Deleted]—at [5].

And;

> The [Place Name Deleted] area is the top end of [Place Name Deleted]. You have to go over some rough country to get there. That river is an important area for Nyiyaparli. That area is special for the Nyiyaparli people, we used to camp around there, we still do. That creek is connected to my mother and my father—at [9].

And;

> [Place Name Deleted] that's the boundary that belongs to Nyiyaparli and Ngarla. Some of the old people belong to that waterhole there. [Name Deleted] belonged to that area, he was a Ngarla his country goes the other way, west. Nyiyaparli showed those young Ngarla people, we took them

> camping and told those young fellas this your country [sic]. Your grandfather comes from this country—at [12].

Both David Stock and [Name of Person One Deleted] were born around 1940. Both are descendants from one of the named apical ancestors in the claim group description. [Name of Person One Deleted] is the granddaughter of Kitjiempa, also known as Molly, and David is the grandson of Minturamunha. Similarly Gordon Yuline, identifies at [8] of his affidavit sworn 18 March 2010 that his great-grandmother Pitjilrrpangu is one of the named ancestors for the Nyiyaparli claim group. Gordon Yuline states in a separate affidavit sworn 28 January 1999 that he was 'born during the war' I understand this to be WWII and therefore understand he was born at a similar time to David and [Name of Person One Deleted].

Both David Stock and Gordon Yuline provide details about each of the apical ancestors named at Schedule A, including the names of Nyiyaparli persons descended from those ancestors and, in some cases, the location of their special places, or their places of origin across Nyiyaparli country—Affidavit of Gordon Yuline sworn 18 March 2010 at [11] to [17] and affidavit of David Stock sworn 18 March 2010 at [10] to [18].

My consideration

Based on the above information I am satisfied that the claim group as a whole presently has and previously had an association with the application area. Many of the place names or landmarks discussed in the material, examples of which are extracted above, fall within the external boundary of the application area or within close proximity to it. Each of the affidavits provided to support the asserted factual basis demonstrates that members of the claim group (and their predecessors) have (and had) an association with the application area. This association has been passed to them through generations back to the listed apical ancestors. I am of the view that the information can be said to contain geographic particularity, which supports the assertion of an association held by the claim group members and their predecessors with locations across the whole claim area.

The factual basis material does not assert a date at which European contact is said to have occurred. Schedule F provides several general assertions that the traditional laws and customs as understood today are the same as those that existed before sovereignty and were created in Mangunpa time. Several of the affidavits also assert this:

> [t]he Mangunpa put the law in the Nyiyaparli country. Nyiyaparli people have been taught the laws from the Mangunpa by their elders and have passed it on to their children. This was from long before whitefellas came to our country. Nyiyaparli people have always been taught to follow these laws and still follow them today'—affidavit of Gordon Yuline sworn 18 March 2010 at [3] and affidavit of David Stock sworn 18 March 2010 at [3].

And;

> Nyiyaparli people have to be descended from a Nyiyaparli person. The Nyiyaparli ancestors we have named in the papers for our claim are the names of the ancestors of Nyiyaparli people today. They all come from families of the Nyiyaparli people who were the people belonging to Nyiyaparli country from when that country was created in the Mangunpa time. This is what we have been taught—affidavit of Gordon Yuline sworn 18 March 2010 at [7] and affidavit of David Stock sworn 18 March 2010 at [7].

It is clear from the information that those who have sworn affidavits as well as other members of the claim group are direct descendants of one or more of the named apical ancestors. These

ancestors are often either grandparents or great grandparents of the deponents of the affidavits. Given that people like David Stock and [Name of Person One Deleted] and others who have provided affidavit material were born around the same time, namely the 1940's, I am able to infer that the apical ancestors for this claim likely formed a society, or part of a society, that lived sometime around the mid to late 1800's.

It is my view that the factual basis materials are sufficient to support an assertion that the society in which the apical ancestors lived is substantially unchanged from that which exists today and as such I am able to infer that the society of the apical ancestors would also have been substantially unchanged from that which existed at sovereignty. That is, there is a clear pattern of teaching laws and customs through the belief in the creation of Nyiyaparli country by the Mangunpa passed on by elders through many generations, and continuing today. The persons who have sworn affidavits in many instances have living memories of the apical ancestors for the claim and attribute their understanding of what it means to be Nyiyaparli to those kinship ties and stories passed on to them from those ancestors, in much the same way, it is asserted, that those ancestors received this knowledge from earlier Nyiyaparli people, back to the time of creation.

For the above reasons I am satisfied that the application meets the criteria in s. 190B(5)(a).

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

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

Doswett J in *Gudjala [2007]* linked the meaning of 'traditional' as it appears in s. 190B(5)(b) with that outlined at s. 223(1). This idea of 'traditional' necessarily requires consideration of the principles derived from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of Doswett J's decision was not criticised by the Full Court on appeal—*Gudjala FC* at [90] to [96].

Doswett J's examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact—*Gudjala* [2007] at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

Dowsett J stated in *Gudjala* [2007] that the facts necessary to support this aspect of the factual basis must address:

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content— at [65]; and see also at [66] and [81];
- that explain the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any

society existing at sovereignty, even if the link arose at a later stage'—at [66] and see also at [81].

Factual basis material

Schedule F of the application provides some detail which goes to support this particular requirement. It is asserted that the native title claim group have, since before sovereignty, abided by a system of traditional laws and customs which they continue to acknowledge and observe. These traditional laws and customs are derived from ancestral beings known as Mangunpa. I understand the Mangunpa to be the spiritual origin from which the Nyiyaparli people and their descendents derive their Nyiyaparli identity and the system of normative rules that form that identity. Mangunpa seems to essentially be the concept of creation from which the Nyiyaparli people believe their laws and customs and their ancestral line descend.

These traditional laws and customs govern what Nyiyaparli people can and cannot do, including ceremonies, rituals, who they can marry, what they can eat, how food should be prepared and other rules and customs. The application states that these laws and customs, currently observed by the claim group are the same laws and customs which were observed by Nyiyaparli people before sovereignty and continuing since then to the present day.

The affidavit material provided to the Registrar goes some way to detailing examples of laws and customs which members of the claim group have been taught by older generations and continue to abide by and teach younger generations today. The following are some relevant examples:

> We often had corroborees at [Place Name Deleted], where we would sing and dance and pass on our traditions to the younger generation. We have corroboreees at a number of different places now in order to pass on our Law and culture and to keep it alive.
>
> When the Nyiyaparli people have a ceremony, we paint a special Nyiyaparli design on our bodies. It is our own mark. It is different to other group's marks—affidavit of David Stock sworn 18 April 2002 at [8] and [9].
>
> There are important cultural sites within Nyiyaparli country. Areas like [Place Name Deleted] are very important to the Nyiyaparli people. There is a special way to approach [Place Name Deleted]. You drink a little bit of water and spray it out. Then you talk to the water snake, the Wartu, to let it know where you have been and that you belong to this country. The water snake keeps the water alive. If the water snake was scared off the water would dry up. It is important to approach an important area the proper way. If you approach a place like [Place Name Deleted] the right way the spirit will look after you. If you went there and did not say anything then you might get sick—affidavit of David Stock sworn 18 April 2002 at [12].

Gordon Yuline in his affidavit sworn 18 April 2002 provides detail regarding the teaching of law, stating that he learnt the law from his parents and grandparents and other senior Nyiyaparli people. He states that there are various stages of the law, as one progresses through the law one learns more about Nyiyaparli ways and culture. Gordon then provides examples of cultural practices such as camping, hunting, collecting bush tucker, using minerals like ochre and using timber to make boomerangs. It is asserted that he learnt these laws and customs as a result of going through the law and I understand this to demonstrate the patterns of teaching from one generation to the next of the Nyiyaparli traditional laws and customs. Gordon's explanation of the law is as follows:

> As a Nyiyaparli elder I have responsibility for land within the Nyiyaparli native title claim. I followed my grandmother on my mother's side who was Nyiyaparli, when she passed away I was

> given responsibility for her country. My country is around the [Place Names Deleted] area. I can make decisions about that area, such as who can go into that area. If someone wants to go into that area they need to ask for my permission first. I have responsibility for looking after the many cultural sites within this area.
>
> The country that I talk for was first held by my grandmother on my mother's side, it was then passed on to my mother, then my mother handed this country over to me. When the time is right I will hand this country to my son or daughter.
>
> I learnt about where Nyiyaparli lands are from my father as he handed all of his knowledge to me before he passed away.
>
> I also learnt about Nyiyaparli land when I went through the law. When you go through the law you learn all about country, as well as Nyiyaparli culture. The law teaches you to look after country. There are various stages to the law. As you progress through the different stages you are taught by a more senior person each time. Before I went through the law I knew very little about Nyiyaparli law and culture. When you go right through the law you become a leader—Affidavit of Gordon Yuline sworn 18 April 2002 at [8] to [11].

Several other affidavits provide details of laws and customs currently observed by the claim group which have their root, it is asserted, in a pre-sovereignty society, through the passing of this knowledge from generation to generation back to the Mangunpa. Many of the affidavits talk of hunting, rules for preparing food and use of resources like timber, ochre and sand from the land. An example from the affidavit of [Name Deleted] is as follows:

> I together with other members of the claim group still go hunting and gathering for bush tucker and medicine as we have done for generations. We still hunt and gather for food and medicine from our country including kangaroos, emu, wild turkeys, wild ducks, goannas, porcupine, frogs, lizards, rock python, tortoise, pigeons, cockies, bungarras, bardies, wild onions, wild cucumbers, wild tomatoes, wild potatoes, wild oranges, wild passionfruit, pyemelon, wild tobacco, wild figs, condongs, sandalwood, seeds, wogalas, wattle seeds, honey ants, gums, roots, fish, clams, catfish, bonefish, eels, trees, wood and bark from the trees.
>
> A lot of the bush tucker is also used as a medicine like gum from certain trees are eaten, used as medicine, it is boiled and we drink it or use it to bathe sores or cuts, we also use it in tool making. Bark is another thing which our people use a lot. It is used as a table, to cover food, to cook food in, it's a medicine which we boil and drink, we cook our tobacco with it for chewing (important trade item) its [sic] also used for sport and ceremonies. Different types of roots are used for different things, to catch fish in waterholes, to make spears and even smoke—Affidavit of [Name Deleted] sworn 28 January 1999 at [4]

My Consideration

As discussed at my reasons for s. 190B(5)(a) the factual basis material does not assert when European contact was likely to have first occurred in the application area. I note that many of the persons who have submitted affidavit material state that they were born around the 1940s and they are able to link themselves, through grandparents or in some instances great grandparents to the apical ancestors from whom the claim group is said to descend. I therefore am able to infer that that apical ancestors for this claim were likely living around the mid to late 1800s.

It is also clear from the factual basis material, some of which is extracted above that many members of the claim group were taught about and inherited their understanding of Nyiyaparli laws and custom from older generations, including their parents and grandparents, such that in many instances members of the claim group can recall being taught about the Nyiyaparli way from the apical ancestors themselves.

The material demonstrates a factual basis for a rich, continuous system of normative rules or laws and customs which are acknowledged and observed by the claim group members in the application area today. I understand the factual basis to say that these laws and customs are rooted in a spiritual belief system which has at its core the concept of mangunpa, a belief that all Nyiyaparli people descend from the Mangunpa (ancestral beings) who were present in Nyiyaparli country when the world was created. The Mangunpa are the origin for the laws and customs to which the Nyiyaparli traditionally have abided and to which they continue to abide today. It is asserted that the claim group are descendants of the apical ancestors listed at Schedule A, and that those ancestors are in turn descended from Nyiyaparli people, who along with other Nyiyaparli people who may not have any descendents today, belonged to Nyiyaparli country when it was created in Mangunpa time.

I am of the view that there is sufficient detail in the factual basis material provided to demonstrate a strong pattern of inter generational transmission of cultural practises and belief systems and rituals unique to Nyiyaparli people. The factual basis materials support an assertion that these laws and customs have been orally transmitted in a substantially unchanged manner since at least the time at which the apical ancestors for the claim were occupying the application area and surrounding Nyiyaparli country.

In *Gudjala [2009]* Dowsett J discussed circumstances where it may be possible to infer continuity of the relevant pre-sovereignty society

> In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as pre-sovereignty laws and customs—at [30]

With this in mind I am of the view that although there is little specific detail of transmission of laws and customs from the generation of the apical ancestors back to a society that existed prior to sovereignty, it seems that a Court could make a favourable inference, based on the factual basis materials with this claim, that the 'snapshot' of the society from the generation of the listed apical ancestors implies continuity prior to that. In my view, the factual basis materials are sufficient to support an assertion that there has been a strength of continuity since the generation of the apical ancestors through to the present generations. This, in my view, is sufficient to support an assertion that there has been a vitality and continuity that is likely to have been transmitted in much the same way in the period between the mid to late 1800s and sovereignty.

The information before me discusses a rich, substantially continuous cultural tradition derived from various ancestral lines arising from birth and evidencing a longstanding connection with the application area and its surrounding country. Having regard to all of this information I am satisfied that the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests.

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

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

I am of the view that this requirement is also necessarily referrable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being that, the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—at [47] and also at [87].

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

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

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

In addressing this aspect of the factual basis Doswett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

> 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].

In my reasons at s. 190B(5)(b) I have explained why, and the basis upon which, I was able to be satisfied that the factual basis is sufficient to support the assertion that there was a society from which the current members of the claim group descended, inhabiting the application area, acknowledging and observing a normative system of laws and customs at or around the mid to late 1800s. I am also of the view that my reasons above outline the basis for my being satisfied that there is a sufficient factual basis to support an assertion that the laws and customs observed today are 'traditional' laws and customs, being that they were observed by and have their source in the normative rules of the society that existed at the time the apical ancestors were living and there is also an available inference, back to sovereignty.

The information in the application provides a considerable amount of information regarding the continuity in the observance of the claim group's laws and customs since sovereignty, or at least the time at which the apical ancestors would have been living. The information in the affidavits speak of the deponents being taught about Nyiyaparli culture from parents and other 'old people'. Many of the affidavits discuss the centrality of skin groups and kinship systems to the Nyiyaparli culture. These skin groups, I understand, determine ones relationship and behaviour with immediate and extended family as well as other Nyiyaparli people. Skin groups are determined by birth, depending on parents' skin groups and many of the applicant persons who have sworn affidavits provide information regarding the skin groups of their predecessors.

> Our skin grouping and kinship system is a very important structure, which determined our relationship and behaviour within our immediate family, our extended family and other people we meet from other groups within our region. The skin group is determined at birth by parents [sic] skin group and determines the child's relationship and behaviours throughout their life, i.e. their

education, marriage, punishment, law, ceremonies even in death—affidavit of Victor Parker sworn 28 January 1999 at [5].

Information regarding the transmission of knowledge of skin groups and the types of behaviour and interactions that must be attributed to them is just one example from the material provided that demonstrates, in my view, a sufficient factual basis for the continuity of the traditional laws and customs of the Nyiyaparli claim group. It is said that claim group members have been taught about skin groups and the rules associated with them from older generations, and to this end claim group members are able to identify which skin group older generations of their family were part of, including in some instances the apical ancestors for the claim group—see for example the affidavit of [Name of Person One Deleted] sworn 12 June 2013 at [4].

I am of the view that this provides a sufficient factual basis for an assertion that there has been an intergenerational transmission of a key cultural practice that dictates members of the claim groups' association with certain places, the types of foods they can eat and the special places they must protect. In this way I understand it to be asserted that the laws and customs currently observed and acknowledged were derived from pre-sovereignty laws and customs and continue today. For the reasons above, I am therefore satisfied that the factual basis is sufficient to support an assertion that the native title claim group, have continued to hold the native title rights and interests subject of the claim, in accordance with their traditional laws and customs.

Subsection 190B(6)
Prima facie case

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

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

Nature of the task at s. 190B(6)

The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel,* discussed what 'prima facie' means stating that, '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'—at [135]. It is accepted that the Registrar may be required to undertake some 'weighing' of the material or consideration of 'controverting evidence' in order to be satisfied that this condition is met—at [127].

In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s. 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

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

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest in relation to land or water'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to' are of wide import'—(*Northern Territory of Australia v Wlyawayy, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawayy FC*).

I note that the rights and interests have been broken up into three areas, being areas A, B and C. It would appear that area A is an area over which the native title claim group believe exclusive possession may be able to be recognised. The other rights, claimed in area B and C and also in A, I have understood as being those rights which are claimed by the native title group and are non-exclusive in nature. I have therefore inferred that the claim group only claim exclusive possession in area A and not B or C. I also note that areas A, B and C have been defined at the beginning of the form 1 in the definitions section. The definition of each area has been extracted above in my reasons at s. 190B(4).

I will now consider each of the rights and interests claimed in Schedule E. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

The following rights are those claimed in Area A only:

The right to possess, occupy, use and enjoy the area as against the whole world;

A right to occupy the area;

A right to use the area;

A right to enjoy the area;

A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

A right to control access of others to the area;

A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and

A right to control the taking, use and enjoyment by others of the resources of the area.

In *Ward HC* the majority considered that the 'expression "possession, occupation, use and enjoyment...to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over land'—at [89] and [93].

Further, it was held that:

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

The Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) examined the requirements necessary for proving that the right to exclusive possession is vested in the native title claim group, finding that:

> ... the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal

> classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.—at [71].

There is a great deal of material in the affidavits provided to the Registrar which speak to the existence of the right to exclusive possession. The following are some examples:

> If somebody wanted to go into my country they would have to come and talk to me first. I would welcome them to the area and make sure it was safe for them to enter. If a mining company wanted to do work in this area I would have to clear the area first before they did any work there.
>
> If someone wants to come into Nyiyaparli country then they should talk to the right people they would have to talk to the Nyiyaparli elders. We do not like it if somebody goes into our area without our permission. Mining companies or anyone has to enter my country and Nyiyaparli country the right way—Affidavit of David Stock sworn 18 April 2002 at [19] and [20].

And;

> If someone wants to enter Nyiyaparli country they should ask the Elders. I am one of the Elders people can ask for permission to enter Nyiyaparli land. If someone wants to come on to our country I usually say it is all right, as long as they respect the land and do not damage it.
>
> I can say no if somebody wants to enter Nyiyaparli country. As well if someone wanted to come into the area of country I speak for, and I if I [sic] did not give that person permission to enter that area, I could go into that area and get what ever it was that person wanted. If someone wants to enter our land they will usually say what they want to do. They may want to go to an area to collect wood to make boomerangs—Affidavit of Gordon Yuline sworn 18 April 2002 at [16] and [17].

I consider that the right to exclusive possession is established, prima facie, as the material shows at a prima facie level that it has been held pursuant to traditional laws and customs and passed from the claim groups' predecessors since before European contact.

The affidavits speak to the importance of non claim group members seeking permission from senior members of the claim group before entering their country. The necessity of seeking permission is demonstrated in examples such as those given above, including mining companies, anthropologists and other Aboriginal people from neighbouring groups, which all serve to highlight the level of control that the claim group, under traditional law and custom, assert is a right vested in the group over their country, including the application area.

I note that in *Griffiths v Northern Territory of Australia* [2006] FCA 903 (*Griffiths*) it was stated that:

> In some circumstances, native title will be found to be "exclusive". In such cases, the "bundle of rights and interests" that make up native title may be expressed as including "a right to possession, occupation, use and enjoyment of the land or waters to the exclusion of all others"—at [608].

Further, it is the expression in these terms which 'reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing'—*Ward HC* at [88].

Given the above I understand that the first right claimed being '[t]he right to possess, occupy, use and enjoy the area as against the whole world' is a way of expressing the bundle of rights that are then particularised below and claimed in area A. Nevertheless, I am of the view that there is

nothing to preclude the native title claim group phrasing their claim to exclusive possession in a manner different to that considered by the Court in *Ward HC* and therefore find that each of the listed rights and interests relating to exclusive possession and claimed in area A can be established, prima facie.

Outcome: established, prima facie.

The rest of the rights are those rights which I understand to be non-exclusive in nature. The below rights are those which are said to be claimed in areas A and C only:

A right to hunt in the area;

A right to fish in the area;

A right to take fauna;

A right to take traditional resources, other than minerals and petroleum from the area

Many of the persons who have sworn affidavits speak of hunting on Nyiyaparli country and collecting fauna and other traditional resources such as plants and timber for food and bush medicine, amongst other things. Some examples of this have been extracted above, see for instance the extract of [Name Deleted] affidavit at s. 190B(5)(b), where she discusses hunting and collecting animals including kangaroos, emu, wild turkeys, wild ducks, goannas, porcupine, frogs, lizards, rock python, tortoise, pigeons and cockies.

The affidavit material also speaks to the claim group fishing on Nyiyaparli country. The following is an example from the affidavit of [Name of Person One Deleted] sworn 12 June 2013:

> We go fishing in Nyiyaparli country. There are little small fish we call gabi or yuda. We get a little worm type of bait for it out of the ground, called iligirga. We also use the kalaru, a kind of reed from the river as a fishing line. When you are fishing you can't use the plain kangaroo or emu or turkey as bait as you are not allowed. That snake we call milurra will smell that and make a whirlwind and you'll be gone. It will chuck you straight in the water. It's OK to use hill kangaroo as bait—at [11]

I am of the view that these and other examples in the material establish, prima facie, that these rights are held by the claim group pursuant to traditional law and custom.

Outcome: established, prima facie.

All of the remaining rights and interests have been claim in relation to all three areas, being A,B and C:

A right to be present on or within the area;

A right of access to the area;

A right to live within the area;

A right to move about the area

There is a wealth of information in the material before me which demonstrates that the Nyiyaparli people regularly access the application area and to that end move across and about Nyiyaparli country. Many of the examples extracted above demonstrate that Nyiyaparli people

access the application area to undertake cultural activities like hunting, fishing, camping, protecting sacred sites, teaching younger generations about the songs and stories for particular places and undertaking cultural ceremonies.

Additionally much of the affidavit material speaks of Nyiyaparli people living on the application area. Many of the apical ancestors are named after certain sites where they were from and many of those who have sworn affidavits talk of growing up on Nyiyaparli country and continuing to live on the stations that are on Nyiyaparli country. Several of the affidavits assert that Nyiyaparli people have always lived on Nyiyaparli country as David Stock states in his affidavit sworn 18 April 2002, 'Nyiyaparli people have always lived in their country', and he again states in his affidavit sworn 9 August 2005 'I can live on my family's country if I want. No one can stop me'.

I understand that Nyiyaparli people believe they are the descendants of the Mangunpa who occupied the application area and Nyiyaparli country more broadly since creation and that by virtue of this belief system they have continued to access the area and live within the area pursuant to traditional law and custom.

Outcome: established, prima facie

A right to take flora (including timber);

A right to take sand;

A right to take stone and/ or flint;

A right to take clay;

A right to take gravel;

A right to take ochre;

A right to take water;

A right to manufacture traditional items from the resources of the area

The affidavits speak in great detail of the Nyiyaparli people using the resources of the land such as flora, sand, clay, water, stone, gravel and ochre, for traditional purposes. The following are some relevant examples:

> Sand is used in lots of ways. Sand is used to cook our bread and meat in. We generally look for a sandy creek to sleep in. When we make soaks in the riverbed we usually find a sandy creek bed as it filters and cleans the water for drinking. Hot sand is used for healing sore muscles or reducing temperature of babies and children.
>
> Gravel is still used to make bush ovens; it's also mixed with water to make thick mud which food can be cooked in. Ochres are very important to our claim group, we still use ochres in our ceremonial activities for law, funerals, colouring our artefacts, and tools. Flints are still used in ceremonies, in the preparation of food, for cutting tools and making weapons. Clays are used for cooking, for ceremonial use, for paintings, making toys, dishes, bowls and binding tools and utensils. Salt is collected from riverbeds, inland lakes and coastal strips for us in food for healing.
>
> Trees are very important to our people, they provide shelter, shade, food and medicines, and heat to cook and light at night. We also make a lot of things from different types of wood like boomerangs, spears, digging sticks, and windbreaks and very rarely funerals—Affidavit of [Name Deleted] sworn 28 January 1999 at [4(v)], [4(vi)] and [4(ix)].

And;

> I collect bush tucker from Nyiyaparli country like seeds called marti mili for making damper, kulyu (a sort of wild yam or potato), ngargu (wild onions), parjarra (a kind of plum fruit), kuraru seeds from the wintamarra tree, miniri (bush tomato), payala (bush passionfruit), sap and seeds from the munturu tree, sap from the taku tree, the fruit from the katinypa tree and we use the bark from that tree for rubbing new born babies and to cool them down, ngalputa (bush pea), jarntaru (honey bag) from tree and emu eggs from Nyiyaparli country...we collect bush medicines like leaves from trees like the kartinba (cork) tree, pipitali, urangarram pipiju, jilbukarri. We use the yumbala which we call the Vicks plant. You boil them to drink up or bathe in them. We use fruit like grapes from the jibarlyi tree, which has sticks like needles, for pain or lowering blood pressure. We use a nut called purtartu which we break and burn and it helps grow hair, like Vaseline. We use wood and bark from trees like junpa (red river gum), which we use for tobacco, maruwa (snakewood), kartinypa (corktree). We use the seeds or wax of pukuliny (a kind of spinifex) and paru (spinifex). Nyiyaparli people also made the stone axe called bulbu from Nyiyaparli country. You can't just get that stone from other people's country. We make it up to a knife to cut up a kangaroo when we don't have a steel knife. You also have to get stones from Nyiyaparli country for grinding damper and can't use stones from other people's country or you may get sick. People must ask Nyiyaparli people for permission if they want to use stones from our country—Affidavit of [Name of Person One Deleted] sworn 12 June 2013 at [11].

It is clear that the resources of the land, such as clay, water, gravel and ochre and many seeds, plants and other flora are central to the Nyiyaparli culture and way of life. The above examples outline the many uses of the natural resources for food and medicinal purposes as well as how the Nyiyaparli people manufacture spears, boomerangs and windbreaks, amongst other things from the resources of the land, especially timber.

Outcome: established, prima facie

A right to erect shelters upon or within the area;

A right to camp upon or within the area

I am of the view that both of these rights have been established, prima facie. There are several examples of Nyiyaparli claim group members talking of camping on the land in the affidavit material. David Stock and Gordon Yuline, in particular, discuss camping for ceremonies and hunting 'I go camping on Nyiyaparli country when ceremonies are on or to go hunting' and '[Place Name Deleted] is one of the main water holes, and it is a good area for the old people to camp and hunt.' —Affidavit of Gordon Yuline sworn 18 April 2002 at [12] and [19]. David Stock states 'At christmas time we would live in the bush. My parents would take us out and we would camp near the bottom end of [Place Name Deleted] where the hunting is very good' and 'I go camping at different places on Nyiyaparli country. When I go camping I hunt...' —Affidavit sworn 18 April 2002 at [6] and [23].

I note also that there are some examples in the material before me of claim group members building shelters for the purpose of camping. There are references extracted above referring to the use of timber in building of windbreaks and Gordon Yuline also states 'if you make a camp you can make a shelter with spinifex and bushes'—Affidavit sworn 9 August 2005 at [2]. Although this material is perhaps not in as much detail as that provided about other rights, I am of the view that it is sufficient to establish the right, prima facie.

Outcome: established, prima facie.

A right to engage in cultural activities within the area;

A right to conduct and participate in ceremonies and meetings within the area;

A right to visit, care for and maintain places of importance and protect them from physical harm;

A right to maintain, conserve and protect significant places and objects located within the area

Ceremonies play a central role in the cultural life of Nyiyaparli people and I understand that Law and Business are pivotal points in the lives of Nyiyaparli people when they go through various ceremonies in order to inherit the cultural knowledge of Nyiyaparli laws and customs. Once initiated or having undergone Law Business Nyiyaparli people are considered elders and it is their job to protect the sacred sites and important places on Nyiyaparli country, to teach younger generations about these and continue the Nyiyaparli way of life. Several of the affidavits speak to these cultural and ceremonial activities taking place both in the past and continuing today. The affidavits of Gordon Yuline and David Stock provide ample examples as follows:

> We have to look after sites and objects on our country. We have to go and have a look around to see that the sites and objects are not disturbed, see any tracks, if anyone been around there [sic]. In really sacred places you check if secret things are all there—affidavit of Gordon Yuline sworn 9 August 2005 at [1].

And;

> We often had corroboress at [Place Name Deleted], where we would sing and dance and pass on our traditions to the younger generation. We have corroborees at a number of different places now in order to pass on our Law and culture and to keep it alive.
>
> When the Nyiyaparli people have a ceremony, we paint a special Nyiyaparli design on our bodies. It is our own mark. It is different to other group's marks.
>
> The Nyiyaparli had a corroboree a few months ago near [Place Name Deleted]. The young boys and girls were given training for the corroboree. I danced with the young people to show them which way to dance. Gordon Yuline, a Nyiyaparli elder sang songs about Nyiyaparli country at the corroboree.
>
> There is a Nyiyaparli spirit that can grab anybody and take them around Nyiyaparli country. When the spirit takes you it shows you where Nyiyaparli country is and names different areas of the country. If someone asks you how you know the country, you say that the spirit took me and showed me the country. The spirit gives you a song about Nyiyaparli country. If the spirit takes someone, then no matter which group the person is from, the song is sung in Nyiyaparli language.
>
> There are important cultural sites within Nyiyaparli country. Areas like [Place Name Deleted] are very important to the Nyiyaparli people. There is a special way to approach [Place Name Deleted]. You drink a little bit of water and spray it out. Then you talk to the water snake, the Wartu, to let it know where you have been and that you belong to this country. The water snake keeps the water alive. If the water snake was scared off the water will dry up. It is important to approach an important area the proper way. If you approach a place like [Place Name Deleted] the right way the spirit will look after you. If you went there and did not say anything then you might get sick—affidavit of David Stock sworn 18 April 2002 at [8] to [12].

I am of the view that these and other examples in the material before me establish, prima facie these rights.

Outcome: established, prima facie.

A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong

I am of the view that this right can be established, prima facie. Members of the claim group, in their affidavits, talk of particular families having to care for areas that their family are most

associated with, or for protecting special places that are associated with particular ancestral lines. Similarly some claim group members speak of elders holding the most cultural knowledge for the Nyiyaparli people and it being up to them to share that with other Nyiyaparli people and to make decisions about who can know about Nyiyaparli law and culture. An example from the affidavit of David Stock sworn 18 April 2002 is as follows:

> I have responsibility for an area of country between [Place Name Deleted] and [Place Name Deleted] pastoral stations. I inherited this country from my uncle who was a Nyiyaparli. During law time when the old people think you are old enough, and they trust you, you are given ownership of country. The ownership of this country is handed down through the generations. When the time is right I will hand my country over to my son. It has always been this way—at [18].

Outcome: established, prima face.

A right to trade in the resources of the area

There is much information before me that speaks of the existence of this right. Many claim group members speak of important trade items and using resources from the area in trade with other groups in the region. It is clear from the material before me that the trade of materials like boomerangs and spears is traditional in the sense that it is a right in land that has been passed through the generations and arises as a result of the claim groups understanding of Nyiyaparli culture. Some examples are as follows:

> Nyiyaparli people have exchanged boomerangs and spears from our country with other people in exchange for gifts from them. I can do these things because I am Nyiyaparli. This is what I was taught by my elders—Affidavit of [Name of Person One Deleted] sworn 12 June 2013 at [11].

And;

> The Nyiyaparli group trades goods with other groups. When we get together at law time or corroborees. We share food, stories, and other items. When we trade with other groups we get something back in return. The old people would make and give bundles of spears to other groups. The old people would do this because the other group may not have any spears and we had the best trees in our area to make spears because they are so straight. These days we trade other items amongst our people—Affidavit of David Stock sworn 18 April 2002 at [28].

I am of the view that the material before me indicates that this is a right that is held pursuant to traditional law and custom.

Outcome: established, prima facie.

A right to take soil

I am of the view that the material before me does not speak to the existence of this right, and as such I consider that this right cannot be established, prima facie. Although there are some references to digging sticks and collecting root vegetables there is no direct reference to taking soil or the use of soil associated with any traditional laws or customs. Given this, I am of the view that this right cannot be established, prima facie.

Outcome: Not established, prima facie

A right to invite and permit others to have access to and participate in or carry out activities in the area

I am of the view that this is another way of re-phrasing a claim to exclusive possession and is included within the claim to a 'right to possess, occupy, use and enjoy the area as against the whole world'. As such I refer to my reasons above for those rights claimed in only Area A. I am

of the view that this right, which is claimed in all three areas was intended to be understood as a non-exclusive right. Having regard to the definition for areas A,B and C, I understand that exclusive possession is only claimed in area A. I am of the view that control of access to an area is not compatible with other people possessing rights and interests in the area and that this right is therefore not an non-exclusive right, and cannot be established, prima facie in areas B and C. Given this I am of the view that this right is not established, prima facie.

Outcome: Not established, prima facie.

Subsection 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

I understand the phrase 'traditional physical connection' to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed the High Court's decision in *Yorta Yorta—Gudjala [2007]* at [89].

Mansfield J in *Doepel* considered the Registrar's task at s. 190B(7) and stated that it requires the Registrar 'to be satisfied of particular facts' which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

> The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters covered by the application I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely [Name of Person One Deleted].

I have extracted material from the affidavit sworn by [Name of Person One Deleted] in my reasons above. Each of these examples demonstrate [Name of Person One Deleted] traditional physical connection with her country, including the application area. The affidavits speak of her family members being born or raised on the application area, of visiting the application area to undertake traditional practices such as hunting, caring for sites, performing ceremonies and rituals and teaching younger generations about Mangunpa songs and stories. These examples

evidence [Name of Person One Deleted] acknowledgement and observance of the traditional laws and customs of the Nyiyaparli society.

[Name of Person One Deleted] asserts in her affidavit sworn 12 June 2013 that she is a senior elder of the Nyiyaparli people and that her skin group is Karimarra. She states that she is a descendant of Kitjiempa, also known as Molly. Kitjiempa (Molly) is listed as an apical ancestor for the claim at Schedule A. [Name of Person One Deleted] states that Kitjiempa was her grandmother and that she was from the [Place Names Deleted] area, which I understand to be in the application area. [Name of Person One Deleted] states that the [Place Names Deleted] area was part of Kitjiempa's special area and that in particular two waterholes in the area known as [Place Name Deleted] and [Place Name Deleted] have been passed from her grandmother, to her mother, and now to her and her children as special areas for their family—at [4].

[Name of Person One Deleted] explains where her parents are from and that they taught her about Nyiyaparli laws and customs, including the belief that the Mangunpa 'put the law and country and Nyiyaparli language there. The Nyiyaparli people are the people of that Nyiyaparli country from the beginning, long before whitefellas came to our country'—at [9]. [Name of Person One Deleted] also states that she learnt 'out bush not at whitefella's schools' and that she grew up at pastoral stations on Nyiyaparli country—at [6].

Given all of the above I am of the view that [Name of Person One Deleted] and her ancestors previously had a physical connection with the application area. With regard to a current traditional physical connection [Name of Person One Deleted] provides great detail about activities she currently undertakes on the application area and in broader Nyiyaparli country. Examples include hunting and fishing, making stone axes and other items like boomerangs. She details using seed from the application area to make damper and bush medicine and where she goes camping on the application area:

> [Place Name Deleted] is the top end of [Place Name Deleted] which is an important area for my family, from my grandparents' family. I go camping in this [Place Name Deleted] area. I have been told that there are lots of old rock art at [Place Name Deleted]. The old Nyiyaparli people also used to camp right through that area—at [16].

And;

> Wunna Munna is the Nyiyaparli name of a seed that you get from that area and grind it down to make damper. You can also get yumbula there which is a bush medicine that you put around your nose when you have a cold. You can also make a pillow with it. You can also get milardu from that area which is another medicine that you drink or have a bath in. There are also kartinyba, which are cork trees, in that area which is good for babies if they have a fever as you rub it on them. You can also get wintamurra, that skinny tree, marawu (snakewood) trees there. Other medicines from there are the guranga leaves of the gum tree that you boil up for medicine. The area also has marta (sweet potatoes) and jinarlyi that you can cut up and boil. I have got jarntaru (bush honey) in the [Place Name Deleted] area. You cut the tree that has the honey but have to do it in a way that does not kill the tree. This is the way I was taught by my elders to do it—at [17].

It is clear from the information provided in [Name of Person One Deleted] affidavit that she has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection [Name Person One Deleted] has with the area and the laws and customs she acknowledges and observes in relation to the area and Nyiyaparli country more generally have been taught to her by her parents and grandparents and that they are rooted in the Nyiyaparli belief that Mangunpa ancestors created Nyiyaparli country

and set down the Nyiyaparli laws and customs. It is these same laws and customs that she understands were taught to her and that she teaches to her children and grandchildren. For these reasons I am satisfied that the material is sufficient to support an assertion that [Name of Person One Deleted] currently has, and previously had, a traditional physical connection with the application area.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The Geospatial assessment confirms that the application is not covered by any approved determination of native title.

Reasons for s. 61A(2)

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

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

Schedule B of the application expressly excludes any area in relation to which a previous exclusive possession act was done.

Reasons for s. 61A(3)

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

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

Schedule E includes a statement to the effect that the applicant does not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of others in respect of areas in relation to which a previous non-exclusive possession act was done.

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

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

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

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

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

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

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

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

The application does not cover any offshore places.

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

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

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

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Nyiyaparli #3**
NNTT file no.	**WC2013/003**
Federal Court of Australia file no.	**WAD196/2013**
Date of registration test decision	**27 August 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**
		s. 62(2)(h)	**met**

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

Test condition	Subcondition/requirement	Result
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]