National Native Title Tribunal

Registration test decision

Application name	Kaparn People
Name of applicant	Elizabeth Sambo, Tessa Smith, Lillian Bonney, Steven Rule, Judy Sambo, Lyall Sambo
NNTT file no.	WC2013/009
Federal Court of Australia file no.	WAD420/2013
Date application made	11 November 2013

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

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

For the purposes of s 190D(3), my opinion is that the claim does not satisfy all of the conditions in s 190B.

_____ **Date of decision:** 07 April 2014

Lisa Jowett

Reasons for decision

Introduction

Registration test

[1] The Registrar of the Federal Court of Australia (Federal Court) gave a copy of the Kaparn People native title determination application (WAD420/2013) to the Native Title Registrar (Registrar) on 13 November 2013 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] I have considered the claim as the Registrar's delegate under an instrument of delegation dated 30 July 2013 pursuant to s 99 of the Act. By this instrument, the Registrar delegated all of the powers given to her under ss 190, 190A, 190B, 190C, 190D and 190E to the Deputy Registrars of the Tribunal and to certain members of the staff assisting the Tribunal (including myself).

[3] Sections 190A(6), (6A)[1] and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C. I have reached the view that the claim does not satisfy the conditions in ss 190B(2), (4), (5), (6) and (7) and ss 190C(3) and (4). It follows that I must not accept the claim for registration. This document sets out my reasons, as the delegate of the Registrar, for the decision to not accept the claim for registration pursuant to s 190A of the Act.

[4] A summary of the result for each condition is provided at Attachment A.

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

Application overview and background

[6] The Kaparn People claimant application covers an area in the Goldfields region of Western Australia and includes the town centers of Kalgoorlie-Boulder, Coolgardie and Southern Cross.

[7] The applicant was informed on various dates prior to this decision, of my preliminary view that the claim in the application would not be accepted for registration, and highlighting the

[1] I note that s 190A(6A) does not apply to my consideration, as the claim is not contained in an amended application that has previously been accepted for registration.

specific conditions that in my preliminary view, would fail to meet the requirements of the test—on 2 December 2013, 10 December 2013, 20 January 2014 and 7 February 2014.

Information considered when making the decision

[8] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

[9] Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[10] As required by s 190A(3)(a), I have had regard to information in the application and accompanying affidavits by the six persons comprising the applicant. I note here that the Form 1 of the application refers to and provides a number of documents within a series of Attachments (A1, A2, A3, and R) to which I have also had regard, as they form part of the application. On 2 December 2013, the applicant provided additional material to the Registrar in support of the application, to which I have also had regard under the concluding words of s 190A(3)(a).

[11] I have also had regard to the applicant's response, provided to me on 23 December 2013, to submissions made on 9 December 2013 by the State of Western Australia (the state government).

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[12] I note that there is no information before me of the kind identified in s 190A(3)(b).

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[13] On 9 December 2013, the state government provided a submission in relation to the registration test of the Kaparn People application with commentary relating to specific conditions of the test.

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[14] I have also considered information from the following additional sources:

(i) an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services (the geospatial report) dated 12 November 2013; and

(ii) searches I made of the Register of Native Title Claims and Schedule of Applications for entries of previously registered native title claims that overlap the current application or were otherwise relevant to my consideration.

[15] I explain the relevance of this additional information in my reasons below for the conditions outlined in s 190B(2) (identification of area subject to native title), s 190C(3) (no previous overlapping claim groups) and s 190B(5) (factual basis for claimed native title).

Procedural fairness steps

[16] As noted above, on 2 December 2013 the applicant provided additional material in support of its application and on 9 December 2013 the state government made a submission in relation to the application of the registration test to the application. My receipt of both sets of material has necessitated that I follow certain procedural fairness steps.

[17] On 10 December 2013, I provided the applicant with a copy of the state government's submission, at the same time providing the applicant with the opportunity to make a submission in response to the matters raised by the state government. I received a response from the applicant on 23 December 2013.

[18] It was my preliminary view that the claim made in the Kaparn People application could not be accepted for registration, and as such the state government would not be aggrieved by my decision. I therefore did not provide the state government with copies of or an opportunity to comment in relation to the applicant's submissions in reply to the State's submissions, or the additional material it provided on 2 December 2013.

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.

[19] In this condition of the registration test, the Registrar considers the map and the description of the area covered by the application.

[20] The Registrar has to be satisfied that:

- the map and description contained in the application are consistent with each other to show the land and waters where the native title rights and interests are claimed; and
- that this area is sufficiently identified for it to be reasonably certain that native title rights and interests are claimed in relation to particular land or waters.

[21] In *Doepel*, Justice Mansfield said of s 190B (specifically subs 190B(2), (3) and (4)) that it has 'requirements which do not appear to go beyond consideration of the terms of the application'—at [16].

Description of the area covered by the application

[22] Schedule B of the application describes the area covered by the application in metes and bounds and uses towns, lakes, highways, pipelines, and a mine site as reference points. Schedule B also contains general exclusion statements to describe those areas not covered by the application. Schedule B1 provides more detailed types of tenure that the applicant specifically excludes from the area covered by the application.

Map of the area covered by the application

[23] Schedule C states that the required map accompanies the application. The map attached to application is a colour copy of a map labeled 'Karpan Peoples – Traditional Boundaries Figure 1' dated July 2013, and includes:

- the external boundary of the application area shown by a bold black line;
- locations and lakes, major roads and towns;
- scalebar, northpoint, and legend; and
- notes relating to the datum of data used to prepare the map.

The geospatial assessment

[24] On 21 November 2013 the Tribunal's Geospatial Services provided me with an assessment of the map and the description contained in the application (the geospatial report). The

assessment is that the map and description are not consistent with each other and therefore do not locate the area covered by the application with reasonable certainty.

[25] The geospatial report says that the description in Schedule B is not precise enough to accurately identify the area covered by the application. The description details the external boundary passing through locations and through lakes but does not accurately specify where these locations are, or where exactly the boundary should go through the lakes. An example of this is: 'At a point approximately ten kilometers southwest of the old Dulcie mine and townsite, it turns roughly east to pass through Barker Lake'. It is not possible to know where approximately ten kilometers from the Dulcie mine and townsite is, nor where the boundary should precisely pass through the lake.

[26] The geospatial report says that the description also does not match the map. Where the description details the boundary passing through named locations, the boundary line on the map often passes some distance from that location point as it appears on the map. For example, this occurs on the western boundary at Mouroubra and Lake Moore.

[27] Consequently, the map and description provide only an approximation of the external boundary of the area covered by the application.

Consideration

[28] I have considered the geospatial assessment in conjunction with the map and description contained in the application. In my view, the description at Schedule B of the external boundaries of the area covered by the application is neither precise nor specific and does not precisely identify the location of the external boundaries on the surface of the ground. The map shows the general area covered by the application with its black boundary line, however, if the boundary on the map is not the same as that described in Schedule B, there is no certainty about exactly where the external boundary is positioned on the ground.

[29] The statements made in Schedule B about those areas not covered by the application are known as general exclusion statements. In my view, the statements describing the internal boundaries appear to cover the standard types of tenure that cannot be claimed in a native title determination application. A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas falling within the generic description provided—see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[30] To conclude:

- the area *covered* by the application is not described with reasonable certainty; and
- the areas *not covered* by the application are described sufficiently clearly.

[31] I acknowledge more specific tenure details are provided at Schedule B1 to describe the areas not covered by the application. However, many of the terms used in Schedule B1 either no longer or have never have been characterised in native title law. I note, the description of the areas not covered by the application should follow the categories of extinguishing tenures defined by the Act.

[32] Should the applicant wish to amend the application to address the deficiencies outlined above, assistance can be sought from the Tribunal's Geospatial Unit, and I refer also to the Tribunal's publication, *A guide to understanding the requirements of the registration test*, for further information on satisfying this condition of the test.

[33] The claim **does not satisfy** 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.

[34] In this condition of the registration test the Registrar is required to be satisfied that either:

a) the persons in the native title claim group are named, or

b) the native title claim group is described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[35] In *Doepel*, Justice Mansfield said of s 190B (specifically subs 190B(2), (3) and (4)) that it has 'requirements which do not appear to go beyond consideration of the terms of the application'—at [16]. Schedule A of the application contains the definition of the native title claim group and other parts of the application refer to how the native title claim group is comprised.

[36] In my view, the information at Schedule A of the Kaparn People application does not name the persons in the native title claim group but is a description of the native title claim group. This means it is necessary for me to consider whether the application satisfies the requirements of s 190B(3)(b).

[37] There is case law that guides how the Registrar must consider the requirements of this condition. Justice Mansfield said in *Doepel*:

- the focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group—at [51]; and
- that the focus is not on 'the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—[37].

[38] Justice Carr said in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) that:

- a factual inquiry may be necessary to work out whether any particular person is in the native title claim group as it has been described; and
- a factual inquiry does not mean that the group has not been described adequately—at [67].

[39] Schedule A of the application contains the following description of the persons in the native title claim group:

> This claim is made for and on behalf of all the living descendants of Lucy, daughter of Broad Arrow Tommy Udaji (pronounced Urdutji). Photographs of the oldest and succeeding generations of the descendants of Lucy are attached.

Submissions by the state government and the applicant in response

[40] The state government's submission includes comments in respect of the description of the native title claim group and the applicant has made brief submissions in response.

[41] Relevant to this condition, the state government submits that the claim is made only on behalf of certain individuals who are currently alive. In its view, the claim is not made on behalf of any future generations, there is no provision for transmission of the native title by descent; and when the present generation are all deceased, the native title will come to an end—at [15].

[42] The applicant has responded that the application can be amended to include unborn descendents—at [1].

[43] The state government raises a further issue in relation to the native title claim group. However, in my view this is an issue which goes to matters of whether the native title claim group is in fact the 'real' native title claim group rather than the adequacy of the description such that any particular person in the group can be ascertained. In my view, this is more appropriately dealt with under conditions that relate to the factual basis for the claim (s 190B(5)) and authorization (s 190C(4).

Consideration

[44] When read literally, the description of the native title claim group is a statement about on whose behalf the claim is made and not specifically a description of the persons who comprise the native title claim group. However, in my view, the intention of the description is clear – that the claim group is comprised of those living descendents of Lucy, daughter of Broad Arrow Tommy Udaji. I have referred to the genealogy that accompanies the application (Attachment A2) which shows Udaji at the apex of four generations.

[45] From this description it is possible to ascertain whether or not a person is a member of the Kaparn native title claim group by ascertaining whether that person is descended from the union of Lucy, one of Udaji's three offspring, and [*Name Deleted*]. Based on the face of the genealogy, it would appear that Lucy's two siblings did not produce any further generations, and the persons

identified across the genealogy are those descended from Lucy. Therefore, in my view, there is a sufficiently objective means by which to establish who is or is not a member of the native title claim group as described. It would appear that the native title claim group is comprised of the single, extended, [*Name Deleted*] family, who trace their descent from a single apical ancestor.

[46] That the native title claim group is described as being made 'on behalf of the living descendants' of Lucy, is not, in my view, problematic. The term does not exclude future generations (as the state government submits) as, put simply, when they are born they will be living descendents of Lucy. The photographs of 'the oldest and succeeding generations of the descendants of Lucy' (Attachment A1) have not formed part of my consideration of the description.

[47] I am therefore satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group as described in Schedule A.

[48] I note, however, that the description could be constructed in a more straightforward manner. In the event that the applicant chooses to amend the application, I refer the applicant to page 14 of the Tribunal's *A guide to understanding the requirements of the registration test*.

[49] The claim **satisfies** the condition of s 190B(3).

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

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

[50] In this condition of the registration test, the Registrar considers the description of the native title rights and interests contained in the application at Schedule E, and is required to be satisfied that the claimed rights and interests can be readily identified—*Doepel* at [92]. Justice Mansfield said of s 190B (specifically subs 190B(2), (3) and (4)) that it has 'requirements which do not appear to go beyond consideration of the terms of the application'— at [16].

[51] In the application, the native title rights and interests are described in Schedule E as follows:

> The native title rights and interests claimed in this application are the non-exclusive rights to the possession, occupation, use and enjoyment of the area and any right or interest included within the same, and in particular comprise:
> - rights and interests to possess, occupy, use and enjoy the area;
> - the right to participate in the making of decisions about the use and enjoyment of the area;
> - the right to access the area;
> - the right to participate in the control of the access to the area;
> - the right to use and enjoy the resources of the area;
> - the right to participate in the control of the use and enjoyment of others of the resources of the area;
> - the right to trade in the resources of the area;

- the right to receive a portion of any resources taken by others from the area;
- the right to maintain and protect places of importance and significance under traditional laws, practices and customs in the area, including Aboriginal sites;
- the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area;
- the right to hold traditional ceremonies in the area; and
- the right to protect the environment in the claim area, including the waters therein.

The above rights and interests are subject to the following:
- recognition that there may be other indigenous persons who have native title rights and interests in all or part of the claim area, which rights and interests are capable of being recognised by the Common Law of Australia.
- To the extent that any minerals, petroleum or gas within the claim area are wholly owned by the Crown in the right of the Commonwealth of the State of Western Australia, they are not claimed by the applicants.
- The claim area does not include any offshore place.
- The applicants do not make a claim to any native title rights and interests which confer possession, use and enjoyment in respect of any areas in relation to which a previous non-exclusive possession act, as defined in Section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was an act attributable to the State of Western Australia and a law of that State has made provision as mentioned in Section 23I in relation to the act.
- the immediately preceding paragraph is subject to such of the provisions of Sections 47, 47A and 47B of the NTA as apply to any part of the area contained in this application, particulars of which will be provided prior to the hearing of this application.

Submissions by the state government and the applicant in response

[52] The state government's submission includes comments in respect of the description of the claimed native title rights and interests and the applicant has made brief submissions in response. In summary, the state government submits that the nature of the native title rights and interests which are being sought cannot be deduced from the Form 1, because there are two claims which are inconsistent with each other—a non-exclusive claim contradicted by a claim to rights of an exclusive nature—[30]. Specifically:

- the applicant on the one hand includes in its description of the claimed rights and interests the phrase 'non-exclusive' but appears on the other, to be claiming rights that include controlling the access of others to the area and the use and enjoyment of the resources of the area—at [31]; and
- that Schedule J (which requires the applicant to set out the draft order sought) does not assist interpretation as it simply refers back to Schedule E—at [33].

[53] The applicant's response 'disputes the Respondents assertions' and states that the claimed rights are clear, but provides no support for its views. The applicant also states that if necessary, leave will be sought to amend Schedule E—at [9].

Consideration

[54] The task of the Registrar at this condition is to consider 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99]. In other words, the application should describe the native title rights and interests that are claimed in a clear and easily understood manner.

[55] The state government's submissions raise concerns that in my view are relevant to my consideration at this condition. It is also my view, that the description is not clear and contains a number of contradictions which does not allow it to be easily understood. The applicant does not provide any reply that adequately addresses the issues raised.

[56] The opening paragraph describes a claim to 'non-exclusive rights to the possession, use, occupation and enjoyment of the area'. While the right is not expressed as 'to the exclusion of all others' and is specifically described as non-exclusive, its overall construction implies, in my view, the full measure of the claim to exclusive possession. The right is described as being comprised of a number of rights and interests. However, some of these have previously been found by the Courts to bear the characteristics of the right to possess, occupy, use and enjoy to the exclusion of all others. The following of the listed rights are capable of being claimed only on an exclusive basis:

- the right to participate in the making of decisions about the use and enjoyment of the area;
- the right to participate in the control of the access to the area;
- the right to participate in the control of the use and enjoyment of others of the resources of the area.

[57] The Courts have determined that the right to possession, occupation, use and enjoyment is an exclusive right and cannot be claimed non-exclusively. This is because the right entails speaking for country and controlling the access of others to that country. The majority decision of the High Court in *High Court in Western Australia v Ward (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (Ward HC)* considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' (emphasis added). Further, that expression (as a whole) suggests 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

[58] Because of the language used in the description, it is therefore unclear whether the applicant does not actually intend to claim the right to exclusive possession. If it is the intention to claim non-exclusive rights and interests only, the description, in my view, should not include a claim to rights of an exclusive nature, like those identified above. None of the rights and interests listed at Schedule E that infer the global right to exclusive possession would be capable of being

prima facie established in relation to areas where a right to exclusively possess, occupy, use and enjoy is not claimed.

[59] Further, if the intention is to claim both categories of rights, the description does not make a distinction between areas over which a claim to exclusive possession is made and where it is not.

[60] I note also the statement that the rights and interests are subject to the 'recognition that there may be other indigenous persons who have native title rights and interests in all or part of the claim area'. This raises further issues in relation to the clarity of the description of the claimed native title rights and interests. In my view, given the preceding description of the claimed rights and interests, it is not clear what the applicant intends to convey by including this statement.

Conclusion

[61] The description at Schedule E of the rights and interests claimed in the application is therefore not clear. In my view, it would appear that the applicant may not intend to claim the right to exclusive possession, however, the language and construction of the description does not clearly convey a non-exclusive claim. If the applicant intends to claim non-exclusive rights and interests in those areas where exclusive possession is not capable of being recognised, the description should be framed in order to make this clear and precise and understandable.

[62] I refer the applicant to pages 22-26 of the Tribunal's *A guide to understanding the requirements of the registration test* for examples of how to describe native title rights and interests so that what is claimed can be clearly identified and reliably understood.

[63] The claim **does not satisfy** the condition of s 190B(4).

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

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

[64] For the application to meet this condition of the registration test, the Registrar must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. The material also needs to support the particular assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*, Mansfield J states that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted

> factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[65] In my consideration of the quality of the factual basis for the claim made in this application, I am guided by principles outlined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*):

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

[66] Later Court decisions have supported these principles as guiding the Registrar's consideration of the factual basis of a native title determination application: *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)—at [26]; Full Court in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) and *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*).

[67] I note in particular that the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s 225. It is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the Registrar (or her delegate) to make findings about whether or not the claimed native title rights and interests exist. Nor is it the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country, as that is a judicial enquiry.

[68] However, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

Information considered

[69] The application contains a number of attachments in relation to the asserted factual basis and the applicant has submitted additional material (on 2 December 2013) in support of the asserted factual basis. This material forms the factual basis and I have considered it in relation to the requirements of this condition of the registration test. These are the documents I have considered:

[70] In the application—

- Attachment A1, historical and recent photographs of members of the claim group (2 pages);
- Attachment A2, genealogical table (6 pages);
- Attachment A3, 2003 correspondence in relation to the [*Name Deleted*] Family's withdrawal from the Central West Native Title Claim proceedings (2 pages); and

[71] In the additional material—

- Schedule A Native title claim group—historical photographs of people, newspaper clippings, copies of book extracts, genealogy of descendents of Udaji (as provided at Attachment A1), untitled landscape photographs (40 pages);
- Schedule E Description of native title rights and interests—copies of government records and official notes and reports (148 pages);
- Schedule F General description of native title right [sic] and interests claimed—untitled and unreferenced photographs of rock paintings, soaks and waterholes, landscapes (21 pages);
- Statutory Declaration, Elizabeth Sambo, dated 2 December 2013 (1 page).

[72] Some of the material is illegible, and the context in which it is to be read or understood is not made clear. Other than through the title of the documents, the applicant has not directed my consideration of the material. In addition, while much of the information appears to be of significant historical value to the descendants of Lucy and [*Name Deleted*], most of it, in my view, is not relevant to my consideration of the application against each of the individual assertions of ss 190B(5)(a), (b) and (c).

[73] I have also listened to interviews and recordings provided on compact disk by the applicant on 2 December 2013:

- [*Names Deleted*], Field Tape #8 of the Tindale West Australia recordings, 19 April 1966, Kalgoorlie;
- interview with [*Name Deleted*](b. 1928), 1/12/1992 and 14/12/1992 recorded at Boulder by [*Name Deleted*]; and
- interview with [*Name Deleted*] (, 21 April 1999, Boulder.

[74] Some of the audio is indistinct, particularly the interview with[*Names Deleted*] . I am unable to discern the relevance, if any, of much of the content of the interviews to the requirements of the registration test. The recorded interviews of the [*Names Deleted*] are clearly historically significant

and convey a very real sense of their lives and circumstances. The interviews cover such things as living and working, farming and travelling around Coolgardie and Southern Cross, however, there is very little discussion about the traditional laws and customs relative to the claim area.

[75] All of the above mentioned material has been submitted to the Registrar by the applicant, and therefore, in accordance with s 190A(3)(a), I must have regard to it. However, in my view, it is of limited assistance or relevance in relation to the asserted factual basis. This is because, in addition to what I note above, much of the material is contradictory, inconsistent and hard to understand. In my view, it is not for me to make interpretations about or to collate and draw definitive conclusions from the kind of primary sources material the applicant has provided. In my view, I am constrained by its lack of context and coherence and by the fact that the applicant has not directed me to its relevance to the asserted factual basis. As such the material simply is not capable of formulating a sufficient factual basis to support the assertions at ss 190B(5)(a)—(c).

Submissions by the state government and the applicant in response

[76] The state government's submission included comments in respect of the general description of native title rights and interests claimed and the applicant has made brief submissions in response. In summary, the state government submits that the description of the factual basis at Schedule F of the application merely repeats the assertions of (a), (b) and (c) as conclusive statements and provides no insight or exposé as to how these conclusions are reached or on what basis they are made—at [36] and [37]. The submissions do not otherwise address individually the three assertions of s 190B(5).

[77] The applicant's response is limited to stating that it disputes the submission and commenting that 'if need be leave to amend will be sought to amend Schedule F'—at [10].

[78] The state government's submissions raise concerns that in my view are relevant to my consideration at this condition. The applicant does not provide any reply that adequately addresses the issues raised by the government.

[79] I agree with the government that the factual basis is not sufficient to support the assertions at ss 190B(5)(a), (b) and (c). My reasons for this view follow.

Reasons for s 190B(5)(a)

[80] This subsection requires that the Registrar be satisfied that the factual basis is sufficient to support the assertion that:

(i) the native title claim group currently has an association with the area covered by the application, and

(ii) the predecessors of the native title claim group also had an association with the area.

[81] While it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time, it is necessary to show that the claim group as a whole has an association with the area—*Gudjala 2007* at [51] and [52].

Further, Justice Dowsett found that the facts alleged must '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]. In other words, for the purposes of the assertion at s 190B(5)(a), the factual basis should provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area. For example:

(i) showing the history of the association that those members of the claim group have, and that their predecessors had, with the application area—see *Gudjala 2007* at [51];

(ii) demonstrating that a link exists between the current claim group and its predecessors' and their association with the application area— see *Gudjala 2007* at [66].

[82] Schedule F of the application provides a broad, generalised description of a factual basis asserting that 'the native title claimant group and their parents, grandparents and ancestors have had an unbroken association with the claim area since the assertion of British sovereignty' and lists a number of resources which evidence this association, including:

- oral histories of current and previous generations;
- family trees and photographic evidence of group membership; and
- notes, genealogies, field accounts and tape recordings taken by Dr Howitt (1993) and Professor Tindale (1939 and 1966) with the cooperation of senior elders of the group.

[83] These would appear to be in reference to the text and audio materials provided to me by the applicant as additional material on 2 December 2013, as listed above.

[84] In reaching conclusions about the past and present association of the claim group with the area, I note that I am not satisfied that the area covered by the application can be identified with reasonable certainty—refer to my reasons at s 190B(2). That is, I am not satisfied that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. It will therefore follow, that any examination of the claim group's past and current association is only in relation to a provisional area. For the purposes of clarity, however, I refer in my reasons below to the area covered by the application as though it is defined with reasonable certainty.

Association of the predecessors of the native title claim group with the application area

[85] The factual material before me provides no substantial information about the association of the native title claim group's predecessors with the area covered by the application. Schedule F does not provide any particularised statements in respect of Lucy's association with the area of the application or indeed any of her predecessors.

[86] The additional material provides some historical evidence of Lucy and her children and their children living in the towns and bush and moving about the claim area, as well as evidence of their interaction with the authorities of the day. I am able to glean from the material before me that Lucy died at [*Placename Deleted*] (in the western reaches of the claim area) in November 1939

at an approximate age of 45. Her husband, [*Name Deleted*], is recorded as having died in Coolgardie in April 1959 (I am unable to ascertain his birth date). It would appear that [*Name Deleted*] travelled from the north of the State to the goldfields region where he met Lucy. The material does not refer to the presence in, or his association with, the area covered by the application of Lucy's father, Broad Arrow Tommy Udaji.

[87] The audio material of [*Name Deleted*] includes discussion of songlines and dreaming tracks and of people travelling 'in the old days' from [*Placename Deleted*] to areas within the claim area for law business.

[88] There is nothing further in any of the factual basis materials which discusses the nature of the association of the native title claim group's predecessors with the area. For instance, there is nothing which discusses or illustrates:

- the key locations and areas of association that fall within and/or in the immediate vicinity of the area;
- how the predecessors were able to remain in the vicinity of their 'country' and the area of this application after first European contact and throughout European settlement;
- how the group's predecessors' association with the area has been part of its continuing traditional law and custom for generations;
- how and where the group's predecessors were born, lived, worked and travelled, including for example, that predecessors travelled all over their 'country', or worked on stations, conducting Law business, camping, hunting, teaching and learning the traditional laws and customs of the group,
- the predecessors' exercise of their rights and responsibilities under their traditional laws and customs.

[89] In my view, the factual basis materials provided by the applicant document the legal or regulatory conditions that some of the members of the native title claim group lived under during the first half of the 20th century. These materials do not include such things as the observations of early settlers or explorers, or the records of government officials or ethnographic researchers around the time the area was first settled. Further, information from members of the native title claim group pertaining to their knowledge of the presence and activities of their predecessors in the area is also absent from the material before me. Without such detail the presence or occupation of the native title claim group's predecessors is not sufficiently demonstrated to support the assertion that they had an association with the area covered by the application.

Current association of the native title claim group with the application area

[90] The Schedule E additional material provides copies of government records and correspondence from the Commissioner of Native Affairs, the Department of Native Affairs and the Protector of Aborigines; Death Certificates and Certificates of Citizenship, medical records and the notes and reports of government officials and police officers. This material largely

evidences the movement, residences and employment, and the health of and relationships between members of the [*Name Deleted*] family (Lucy and her children) between the period from 1937 through to 1959 (when Lucy's husband, [*Name Deleted*](, died). The districts that the records cover appear to extend to most centers that fall within the area generally covered by the Kaparn People application – Southern Cross, Coolgardie, Kalgoorlie. For example, records include:

- The death of [*Name Deleted*] was recorded at [*Placename Deleted*] on 14 April 1959;
- [*Name Deleted*] (b.1928, son of Lucy) was recorded in June 1937 as present in Southern Cross and Coolgardie ; and
- '[*Name Deleted*] and Lucy household' residing in the [*Placename Deleted*] in 1937, as recorded in documentation sent to the Protector of Aboriginal and Half-caste Natives.

[91] Other material in the Schedule E additional material includes various testimonials affirming the presence and long term residence of the [*Name Deleted*] family in the Kalgoorlie, Coolgardie districts. The majority of the information refers to the lower three generations of the [*Name Deleted*] family with some slight reference to other families and persons, whose membership of or relationship with the native title claim group is not specified, for example, the [*Names Deleted*] families.

[92] This material, and the information it contains, is of considerable historical importance. It illustrates the heavily regulated conditions and harsh circumstances under which Aboriginal people, the [*Name Deleted*] family in particular, lived in the region throughout much of the 20th century under the governance of the Department of Native Affairs. Unfortunately, it is not possible to establish the relevance of much of this information to the specific requirements of the registration test, and particularly to the matters the factual basis is required to address pursuant to s 190B(5).

[93] The photographs in the Schedule F additional material are neither labeled nor dated, but show what I presume to be some key features of the landscape of the area. Some of the photographs show rock paintings, vegetation and people walking around and tending to soaks and waterholes. However, without any information to identify the locations and persons shown in the photographs or their sites' relevance to the claim group's association with the claim area, in my view, they do not provide sufficient support for the asserted association of the claim group with the area.

[94] The list of activities at Schedule G provides broad support for the association of the native title claim group with the area, making the general statement that the group has continuously carried out activities on the land and waters within the claim area as did the preceding generations of the group since before the assertion of sovereignty. Hunting, gathering, fishing and performing traditional ceremonies are said to be activities conducted in relation to their possession, occupation, use and enjoyment of the natural resources of the area. It is stated that members of the claim group:

- continue to live in the townships in the claim area;
- camp in the claim area maintaining contact with and supervising the area, educating and growing generations in laws and customs and protecting places of significance on a regular basis;
- collect raw materials to make traditional utensils, tools, weapons and 'esoteric paraphernalia';
- hunt and gather wild foods including seeds, nuts, fruit, edible gums, kangaroo, emu, goanna;
- maintain and protect places of importance under traditional laws, practices and customs, including the conduct of Aboriginal heritage surveys and studies in relation to mining and government activities on the land and waters of the claim area.

[95] The statutory declaration of Ms Elizabeth Sambo briefly describes her activities in hunting and gathering of bush tucker in a number of areas within the claim area – [*Placenames Deleted*]. Some of the audio interview with [*Name Deleted*] evidences his life as a child and his association with and connection to locations in the claim area. There are no other statements or factual evidence from other members of the native title claim group.

[96] In my view, the material that is relevant to my consideration here primarily consists of broad statements, generalized descriptions or information lacking in any context in which it is to be understood. The material is not assisted or supported by any particularized statements by members of the claim group that would illustrate the specific contemporary association that specific members of the group have with specific areas or sites within the area covered by the application. The evidence of Elizabeth and [*Name Deleted*] alone does not, in my view, sufficiently demonstrate the particular knowledge, stories, traditions, customs or cultural practices that may evidence the contemporary association of the claim group as a whole with area.

[97] The factual material showing the current association of the native title claim group is, in my view, limited to a few illustrations that do not sufficiently support the assertion that the native title claim group currently has an association with the area covered by the application.

Consideration

[98] In *Gudjala 2007* Justice Dowsett considered the requirements of s 190B(5) generally and, in particular, the necessity for the Registrar to address 'the relationship which all members claim to have in common in connection with the relevant land'—at [40]. This should be considered in conjunction with His Honour's statement that the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—at [39]. These principles are particularly relevant when the sufficiency of the claimant's factual basis is examined for the purpose of the assertion at s 190B(5)(a). That is, the factual basis material needs to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area of the application.

[99] I am of the view that what I have before me is a factual basis comprises of broad, generalised and non-specific assertions. Unfortunately, the majority of the additional material, whilst historically important, does not assist to support the current and previous association of the claim group with the area. It does not relate with enough particularity to the area and claim group before me. What is required to provide a sufficient factual basis under s 190B(5) are sufficient details which can be understood as applying or having relevance to the particular native title claimed by the particular group over the particular area covered by the application.

[100] In conclusion, the material before me does not support the existence of a link between the current claim group and its predecessors' and their association with the (provisional) area covered by the application. None of the information is sufficient to support the claim group's asserted association with the land and waters of the application area. Particularly, it does not demonstrate how any contemporary association would have its origins in the preceding generations' association with the area.

[101] I am therefore **not satisfied** that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

[102] This subsection requires that the Registrar be satisfied that the factual material is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group. These are the traditional laws and customs that give rise to the native title rights and interests claimed in the application. As noted earlier in these reasons, the test at this condition requires the delegate to 'address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests'—*Doepel* at [17].

[103] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate (and this was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]):

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

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

The society at sovereignty

[105] To demonstrate this, the factual material must provide information about the society of the native title claim group and its links back to the society of its predecessors. The native title claim group's traditional laws and customs must have their roots in the society that existed in the area of the application at the time that British sovereignty was asserted, or at least since European settlement of the region. This is one of the main principles decided on by the High Court's decision in *Yorta Yorta*:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist—at [46]—[47].

[106] Therefore, when considered as a whole, the information before me is required to identify the society that is asserted to have existed at the time of British sovereignty, or at least since first European contact. It is not sufficient to make a general statement that one existed. In this sense, I need to be satisfied that there is material in the application before me that contains several statements which, when read together, will provide material upon which I can be satisfied that there was, at the time of first contact, 'an Indigenous society in the claim area observing identifiable laws and customs'— *Gudjala FC* at [96].

[107] In my view, Schedule F and the additional material does not provide sufficient factual details about the traditional laws and customs acknowledged and observed by the pre-sovereignty society from which the native title claim group claims descent. The material does not identify in any detail the particular society of which the identified ancestor, Lucy, was a part, that is, the body of persons united in, and by, its acknowledgement and observance of a body of laws and customs—*Yorta Yorta* at [49]. This material provides no assistance to understand what were the traditional laws and customs of the pre-sovereignty society such that a connection can be made to the normative and contemporary society of the native title claim group.

[108] In my view, therefore, the application and additional material do not provide a sufficiently clear or detailed factual basis that illustrates the normative society which operated in relation to the area covered by this application at the time sovereignty was asserted.

The native title claim group and the factual basis

[109] The factual basis is also required to show the connection between the contemporary native title claim group and its pre-sovereignty society. In doing so the factual basis should address how it is asserted that the claimed rights and interests as currently expressed by the claim group are 'rooted in pre-sovereignty laws and customs'.

[110] In failing to demonstrate the society that existed in the claim area at sovereignty, or at least at the time of European settlement, the factual basis then fails to demonstrate the connection between that earlier society and the contemporary society and its continuing vitality. Further, the factual basis material lacks coherence and structure and when read as a whole, there is, in my view, a substantial amount of information that reveals inconsistent and conflicting information in relation to the composition of the native title claim group and the society in which it may operate.

[111] The factual basis material, including the audio interviews, reveals the [*Name Deleted*] family as linked to Gubrun people. For example, the [*Name Deleted*] family claims traditional affiliation with Gaban (Gubrun) country and [*Name Deleted*], Lucy's eldest child, 'has extensive knowledge of Gaban sites of secular significance and is one of the few people left who has knowledge of Gaban language and corroboree songs' (at p. 3, Schedule E additional material). [*Name Deleted*] is said to have been initiated in Gubun law and [*Name Deleted*] (son of [*Name Deleted*]) to have learnt about the sites in Gabun territory from his father and uncles (p. 148, Schedule E additional material). The Gaban/Gubrun identity is neither formally nor anthropologically explored in the material provided by the applicant. On the face of it, it may be possible that 'Gubrun' is the governing society of the native title claim group, but this is neither clear nor demonstrated sufficiently in the factual basis material such that I can confidently draw that conclusion.

[112] In addition to this, some of the factual basis material relies on evidence pertaining to persons whose connection to the native title claim group as described is not, in my view, clear. For example:

- Broad Arrow Tommy is said to be the cousin of [*Names Deleted*] father (p. 148, Schedule E additional material);
- [*Name Deleted*]is described as a senior custodian for Gaban law in the Kalgoorlie area—Schedule E additional material;
- [*Name Deleted*] elders, born at Southern Cross ('most of the remembered Gaban identities travelled freely between the two places')—Schedule E additional material;
- references to the [*Names Deleted*] families as relations of the [*Name Deleted*] family and appear to have connections to areas within the area covered by the application—for example, letter of [*Name Deleted*], dated 21/11/2000 in Schedule E additional material;
- [*Name Deleted*], as 'last of the Gaban born in Southern Cross'—pp. 3 to 5, Schedule E additional material; and
- photographs of [*Names Deleted*] (1904) of the [*Placename Deleted*] district, [*Name Deleted*] (undated)—Schedule A additional material.

[113] The picture [*Names Deleted*] in the Schedule A additional material, dated 1904 (perhaps the parents of [*Name Deleted*]?) would imply that they are a generation above Lucy (who by my calculation was born sometime in the 1890s). In my view, the place of the [*Name Deleted*] family in the genealogy of the native title claim group is unclear although [*Names Deleted*] field tape interview is clearly important primary evidence provided in support of this application.

[114] It is not apparent to me the basis on which I am to consider photographs included in the Schedule A additional material of named and unnamed persons. They are clearly of historical importance and some are certainly of members of the native title claim group, as described in Schedule A, and their predecessors. However, there are many other photographs of persons whose connection to the group as a whole is not identified. In this sense, this material further confuses my understanding of the composition of the native title claim group.

[115] Correspondence signed by members of the [*Name Deleted*] family, dated in 2003, at Attachment A3 refers to the fact that the [*Name Deleted*] family was part of a group of persons who brought a previous native title claim (Central West Goldfields claim—WAD 65/1998) and that they then identified as Gubrun People. The applicant states (in its reply to the state government's submissions) that the genealogy table was prepared in relation to the Central West claim. I have referred to the application summary (maintained by the Tribunal's Schedule of Applications) of this now dismissed application (NTD65/1998). The description of the persons in this group included descendents of people also mentioned in this application — [*Name Deleted*] aka [*Name Deleted*] aka [*Name Deleted*], [*Name Deleted*], Broadarrow Tommy, Lucy Sambo, [*Name Deleted*], [*Name Deleted*].

[116] In my view, my task in deciding whether or not to accept this claim for registration is not one that includes embarking 'upon some general fact finding exercise, balancing and weighing conflicting evidence'—*Doepel* at [47]. However, the information found in the application and the applicant's own additional information, alludes to the possible existence of a wider native title claim group than that which is described in Schedule A. It may be that the 'Gabun/Gubrun' is the larger group in which the native title rights and interests in the claim area are vested. Alternatively, it may be that Lucy and her descent line comprise a sub group governed by 'Gabun/Gubrun' traditional laws and customs under which they possess rights and interests in the area covered by the application.

[117] Whatever the case, for the purposes of s 190B(5), an explanation is required of the interrelationship between the native title claim group and the rights and interests claimed in the application:

> Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in

> describing the claim group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—*Gudjala 2007* at [41].

[118] The applicant has not provided a sufficient factual basis that supports the identification of the native title claim group. As a consequence, I am not satisfied, that there is sufficient support for the assertion that there is a native title claim group acknowledging and observing traditional laws and customs in the claim area under which the rights and interests claimed are possessed.

Existence of traditional laws acknowledged and traditional customs observed

[119] As referred to earlier, without information about the traditional laws acknowledged, and traditional customs observed by, the pre-sovereignty society, there is a compounding effect. I refer to *Gudjala 2009*:

> ... it is necessary to demonstrate both a pre-sovereignty society having laws and customs, from which the laws and customs of the claim group are derived, and continuity of the pre-sovereignty society, including its laws and customs. Clear evidence of the existence of such a society and acknowledgment and observance of its laws and customs shortly after first European contact, and continuity thereafter, may satisfy both requirements, the first by available inference and second, directly. 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. However when the evidence as to both aspects is weak, the combined effect may, in some respects, be further to undermine, rather than to strengthen, the claim—at [33].

[120] Dowsett J states that without a demonstrable connection between the apical ancestors and a pre-existing society and its laws and customs relating to land and waters, there is no explanation as to how current laws and customs of the claim group can be traditional—*Gudjala 2009* at [54]. Other than the general assertion in Schedule F, none of the material before me speaks to the intergenerational transmission of laws and customs. There are no statements in the material before me, for example made by any members of the claim group, that demonstrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*.

[121] The factual basis does not sufficiently support the assertion that the claim group's traditional laws and customs exist because, in my view, it does not illustrate such things as:

- the claim group's social organisation and the content of its traditional law and custom;
- matters of spiritual and cultural significance to members of the claim group, including aspects of the claim group's wider spiritual life;
- the rights and interests held by the group under its traditional laws and customs showing, for example, the practices and customs in relation to the claim group's use of natural resources and access to country;
- the system that defines such things as claim group membership and how people acquire rights and interests in land and waters (which has its roots in a traditional system); and
- how the group's traditional laws and customs have been transmitted through the generations.

Conclusion

[122] The claimants' factual basis does not provide the necessary explanation about the asserted existence of a relationship between the present laws and customs of the native title claim group and those laws and customs acknowledged and observed by a body of Kaparn people at the time of sovereignty or European settlement. The claimant's factual basis must support the assertion that the laws and customs acknowledged and observed by the native title claim group are those which have their origins in a society existing at and before the time of sovereignty. The material before me does not do this.

[123] In my view, the factual basis raises significant questions about the description of the native title claim group. Is the native title claim group wider than for which the description allows, possibly to include the [*Names Deleted*] families and persons who descend from the [*Name Deleted*]. Or is the [*Name Deleted*] family the native title claim group governed by acknowledgement and observance of overarching Gubrun traditional laws and customs? Without answers to these questions, the factual basis material fails to sufficiently describe the basis upon which the claimed rights and interests are alleged to be vested in the native title claim group.

[124] Further, there is no discussion regarding the content of the traditional laws acknowledged and customs observed by the claim group beyond one or two general assertions. There is no discussion of the operation of the contemporary society bound by laws and customs. Without greater detail and supporting factual evidence, I have no information before me to support the following assertions:

- that the content of the native title claim group's laws and customs originated from the normative rules of a society that existed prior to European settlement; and
- that the rights and interests possessed under the traditional laws and customs acknowledged and observed by the claim group are derived from a normative system that has had a continuous existence and vitality since European settlement.

[125] I am **not satisfied** that the application contains a factual basis to support the particular assertion in s 190B(5)(b).

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

[126] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. In my view, the assertion relates to the continued holding of native title through the continued acknowledgement and observance of the traditional laws and customs of the group.

[127] Dowsett J, in *Gudjala [2007],* held that this requirement 'implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date'—at [82]. Without a factual basis that identifies the pre-sovereignty society or a factual basis for the connection between that society and the group's currently asserted laws and

customs, it is unlikely for there to be support for the assertion that the society and its laws and customs have continued substantially uninterrupted since sovereignty.

[128] The information before me does not include any examples of the exercise of rights and interests by the claim group. It does not illustrate the practices which have been passed down to members of the claim group by their elders, thereby showing continuing acknowledgement and observance of traditional laws and customs by a society with a vibrant and substantially uninterrupted existence since sovereignty to the present time.

[129] The material and recorded interviews do reveal that members of the claim group continue to live in and proximate to the area covered by the application. However, the extent to which they continue to hold rights and responsibilities in relation to country is referred to only by way of generalities. For example, it is not clear what stories, cultural practices and traditions are known by the contemporary claim group, nor whether they have been passed onto them through the preceding generations. There is simply not sufficient support for the assertion that the group has continued to acknowledge and observe its traditional laws and customs since sovereignty or at least since European settlement.

[130] This, in addition to my conclusion above in relation to s 190B(5)(b), means that, I am therefore not satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title in accordance with its traditional laws and customs.

Conclusion

[131] Firstly, I am not satisfied that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. Secondly, I am not satisfied that the information is sufficient to support the assertion that the claimed native title rights and interests exist and to support the assertions:

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

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

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.

[133] Under s 190B(6) I must be satisfied that some of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

[134] However, it is my view that the application cannot satisfy this requirement because of the conclusions I have formed above at s 190B(5). In my view, the factual basis is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title rights and interests. As a consequence, there is no basis from which to examine whether any of the rights and interests can on the face of it be established.

[135] There is the additional issue that I consider the description of the claimed native title rights and interests in Schedule E of the application not to be readily identifiable. For this reason also it is my view that the application cannot meet the requirements of this condition of the registration test.

[136] However, I provide the following comments should the application have met the requirements of ss 190B(4) and (5).

[137] The task of the Registrar at this condition is to examine each individual right and interest claimed in the application in relation to whether they:

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

[138] In meeting these criteria, a claimed right will therefore be considered capable of recognition. The examination of each right and interest then involves consideration of the factual basis material to ascertain if it prima facie supports the existence of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the native title claim group. The material currently before me provides virtually no information that can be said to prima facie support the existence of any of the rights or interests claimed in the application. It is fundamental to consideration of the prima facie condition that there is sufficient factual material and commentary that illustrates the native title claim group's continuing practice and possession of the native title rights and interests it claims in the application.

Submissions by the state government and the applicant in response

[139] The state government's submission included comments in respect of the prima facie condition. In summary, the state government submits that without any exposé of the factual basis, it follows that it is not possible to be satisfied that the applicant has made a prima facie case that at least some of the native title rights and interests claimed in the application can be established—at [38]. The applicant did not respond to these submissions.

[140] I agree with the state government that it is not possible to consider that the native title rights and interests claimed in the application can be prima facie established.

Rights and interests

[141] I make the following comments in respect of some of the rights and interests claimed and whether, as currently expressed, they are capable of recognition:

the right to access the area;
the right to use and enjoy the resources of the area;
the right to trade in the resources of the area;
the right to maintain and protect places of importance and significance under traditional laws, practices and customs in the area, including Aboriginal sites;
the right to hold traditional ceremonies in the area;
the right to protect the environment in the claim area, including the waters therein.

[142] On the basis that the above listed rights are claimed non-exclusively, in my view, they are capable of recognition and potentially able to be prima facie established. The application and additional material do not currently show how the group's traditional laws and customs give rise to these rights. In my view, there is not sufficient particularized or relevant material provided in the application or additional material that shows these things. The photographs submitted as part of the additional material show people exercising some of these rights, however, they do not identify the persons as members of the native title claim group nor the areas depicted as falling within the area covered by the application. The activities listed at Schedule G and referred to in Ms Sambo's affidavit go some way to establishing that these rights exist, however this supporting material is general in nature and in my view, not particularized to the claim group or the area covered by the application. There is not, therefore, material before me that sufficiently evidences that these rights exist under the traditional laws and customs of the native title claim group.

the right to possession, occupation, use and enjoyment of the area (to the exclusion of all others)

[143] I refer to my reasons in relation to s 190B(4) where I explain that claiming rights and interests non-exclusively cannot be made using the language and construction of a claim to exclusive possession. As referred to in my reasons there, the terms 'possession' and 'occupy' imply a notion of 'control' which is not consistent with the asserted non-exclusive character of the right as expressed in this application—see [16]—[17] *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283. The language and construction of the claim to rights and interests in

Schedule E create an inherent contradiction which does not allow the description of the rights and interests to be readily understood.

[144] However, in the event that the applicant's intention is to claim a right to exclusive possession over areas where it can be recognised, I make the following comments.

[145] The majority decision of the *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[146] I have assessed whether the application and additional material evidences that a right to exclusive possession exists under the native title claim group's traditional laws and customs. In my view, no information is provided about:

- the claim group's continuing acknowledgement and observance of traditional laws and customs in respect of the right to speak for and make decisions about country;
- the continuing practice of claimants granting access to country;
- how the right to speak for and make decisions about country is exercised and determined by members of the native title claim group;
- the restriction of access to country or use of its resources by persons other than the native title claim group; or
- the permission and restriction protocols in relation to controlling access to country, or the use of resources, or the making of binding decisions about country.

[147] Without this kind of information the right to exclusive possession cannot be established, prima facie, over areas covered by the application where it can be recognised.

the right to receive a portion of any resources taken by others from the area;

[148] In my view, this is a right that has been found by the Court not to be a right and interest in relation to lands or waters—*Yarmirr v Northern Territory* (1998) 156 ALR at [118]. It is therefore not a right capable of recognition (under s 223(1)(b)) and therefore cannot be prima facie established.

the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area;

[149] The Court in *Ward HC* was of the view that:

> To some degree…respecting access to sites where artwork on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the NTA. However, it is apparent that what is asserted goes beyond that to something

> approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The "recognition" of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was found there or took place, there, or elsewhere—at [59].

[150] It is therefore not a right capable of recognition (under s 223(1)(b)) and therefore cannot be prima facie established.

recognition that there may be other indigenous persons who have native title rights and interest in all or part of the claim area

[151] As referred to my reasons in relation to s 190B(4), the meaning of this clause as it relates to the rights and interests claimed is not clear. I note, however, that ' the right to make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders' may be recognised as a non-exclusive right. The Court has recognised this or a similarly expressed right in a number of consent determinations. However, it has also commented on the difficulty of recognising this right in circumstances where it is unclear as to how other Aboriginal people would be bound by the laws and customs of another native title claim group.

[152] Recent consent determinations have however recognised a form of non-exclusive right for native title holders to control the access of other Aboriginal people in certain circumstances.

Conclusion

[153] The deficiencies in the application and the additional material that mean the application fails to meet this condition of the registration test are therefore significant. In summary:

1. the application does not describe the rights and interests such that they can be readily identified;
2. the factual basis for the application is not sufficient to support the assertion that the rights and interests exist under the native title claim group's traditional laws and customs;
3. the factual and evidentiary material provided in support of this application does not address or illustrate in sufficient detail the existence of the claimed native title rights and interests; and
4. some of the rights and interests claimed are not rights and interests in relation to land and waters and therefore not capable of recognition.

[154] The application does not satisfy the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

> 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:
> the Crown in any capacity, or
> a statutory authority of the Crown in any capacity, or
> any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[155] This condition requires that there be evidentiary material capable of satisfying the Registrar that at least one member of the claim group 'has or previously had a traditional physical connection' with any part of the application area. While the focus is not the same as that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel* at [18].

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

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

[157] The statutory declaration of Elizabeth Sambo (repeated at Schedule M of the application) provides information that goes some way to demonstrating her traditional physical connection with parts of the claim area. Schedules G and M also provide support for the proposition that at least one member of the native title claim group has or has had the requisite physical connection. However, in my view the information lacks the support of a factual basis that the native title claim group continues to acknowledge and observe its traditional laws and customs. This was my conclusion above at s 190B(5) and, in my view, it must follow that the application cannot satisfy this condition. I therefore do not consider that there is sufficiently detailed information before me which demonstrates either a previous or current physical relationship by any member of the claim group with the particular land or waters covered by the application.

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

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:

A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
If:
a previous exclusive possession act (see s 23B) was done in relation to an area; and
either:
the act was an act attributable to the Commonwealth; or
the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
a claimant application must not be made that covers any of the area.
If:
a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
either:
the act was an act attributable to the Commonwealth, or
the act was attributable to a State or Territory and a law of the State or Territory has made provision 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 claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
However, subsection (2) or (3) does not apply to an application if:
the only previous exclusive possession act or previous non-exclusive possession act concerned 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
the application states that section 47, 47A or 47B, as the case may be, applies to it.

[159] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[160] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 21 November 2013 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area. I refer to by reasons at s 190B(2) and note that this conclusion is based only on the approximation of the boundary, however, in my view, it is likely to be correct given no determinations exist in the immediate vicinity of the area covered by the application.

Section 61A(2)

[161] 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. Schedule B provides the general exclusion statement that any areas in relation to where an exclusive possession act has been made are excluded from the area covered by the application.

Section 61A(3)

[162] 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. Schedule E provides the statement that exclusive possession is not claimed over areas in relation to which any previous non-exclusive possession acts were made.

[163] Schedule E also refers to claiming the benefit of the provisions of ss 47, 47A and 47B (the circumstances described in s 61A(4)). However, Schedule L provides statements that appear to confirm that such circumstances do not arise in relation to the area covered by this application. If the application is to be amended, the applicant should clearly state its intentions in respect of these provisions, even if it is to make the general statement that the applicant will rely on the benefit of the provisions should they be applicable.

[164] I also refer to my conclusion in relation to the condition at s 190B(4) that the claimed native title rights and interests are not readily identifiable, specifically in relation to the exclusive possession claim. I note that, while not directly material to this condition, it is not clear whether or not the application does in fact make a claim to native title rights and interests which confer possession, use and enjoyment to the exclusion of all others. However, should the application be amended, and a claim to exclusive possession be made where it can be recognised, the requisite statement should be included in the application.

[165] In any event, it is my view that the application does not reveal a claim to exclusive possession over areas where a non-exclusive possession has been made.

Conclusion

[166] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

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.

[167] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[168] Schedule Q contains the statement required of this condition.

Section 190B(9)(b)

[169] Schedule P provides the statement that the application does not include any offshore place.

Section 190B(9)(c)

[170] Schedule B provides the statement that areas in relation to which native title rights and interests may have been extinguished are excluded from the area covered by the application. I refer also to my reasons above in relation to s 61A(3) as relevant to this condition.

Conclusion

[171] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

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.

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

[173] The condition in s 190C(2) is a procedural one only and simply requires the Registrar 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 the Registrar to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Doepel* at [16] and also at [35]—[39]. In other words, is it the case that the application contains the prescribed details and other information?

[174] 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). 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.

[175] Below I consider 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)

[176] This subsection falls under the overall condition of s 190C(2) which seeks to verify that an application contains all the details and information required by ss 61 and 62. The Registrar is required to consider whether the application sets out the native title claim group in the terms required by s 61(1) and that a claim 'on its face, is brought on behalf of all members of the native

title claim group' as that term is defined in s 61(1). This limited task was explained by Justice Mansfield in *Doepel*, where His Honour said:

> Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains `all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult. And the identity of those on whose behalf the claimants would enjoy procedural rights under subdiv P of Div 3 of Pt 2 of the NT Act upon registration of the claim would be unclear. It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers; Quall v Native Title Registrar* [2003] FCA 145 (*Quall v NTR*).
>
> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [35]—[36].

[177] His Honour then went to make clear that:

> [Section] 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

[178] In accordance with the approach articulated by Mansfield J, I have confined my inquiry to whether or not the application contains the information required by s 190C(2) in relation to s 61(1).

State government's submissions

[179] As referred to earlier in these reasons, I have received submissions opposing the registration of the Kaparn People application from the state government. The submission asserts that the application does not comply with s 61(1) because, in its view, on the basis of the description at Schedule A, there are potentially 'component sections' which may be excluded from the native title claim group. I take this to mean that the state government is of the view that the claim group, as defined in the Kaparn People application, does not include all the persons in 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'—s 61(1). Given the above articulation of the Registrar's task, however, I have not accorded any weight to these submissions for the purposes of assessing the application against the requirements of s 190C(2).

Consideration

[180] Part A of the application contains the information regarding persons authorised to make this application, listing the names of the applicants, and providing details regarding their authorisation by the native title claim group. Schedule A of the application contains a description of the native title claim group as comprising the descendents of a single decent line.

[181] I note my reasons for the condition of s 190B(5) and the conclusion I reached that there is some uncertainty about the composition of the native title claim group: in light of the applicant's additional information that reveals a possible wider Gubrun society and/or the potential existence of persons who may assert native title in the area covered by the application, persons who are not included within a claim group whose members are limited to the descendants of Lucy, via her union with [*Name Deleted*].

[182] However, for this procedural condition, I am confined to the application alone. What is found on the face of the application about the identity of the native title claim group (as that term is defined in s 61(1)) does not reveal a problem of the kind discussed by Mansfield J at [35] to [36] of *Doepel* (quoted above).

[183] In light of this, my decision is that the application **contains** all details and other information required by s 61(1).

Name and address for service: s 61(3)

[184] Part B of the application states on page 22 the name and address for service of the persons who are the applicant

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

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

[186] Schedule A provides a description of the persons in the group that includes the name of the apical ancestor from whom the native title claim group is said to descend.

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

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

[188] The application is accompanied by affidavits from each of the 6 persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and make all the statements required of this section.

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

Details required by s 62(1)(b)

[190] Subsection 62(1)(b) requires that the application 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)*

[191] Schedule B contains a description of the purported external boundaries of the area covered by the application, as well as a description of those areas not covered by the application.

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

[192] Schedule C contains the statement that a map accompanies the application. This map is entitled 'Kaparn People's Traditional Boundaries Figure 1' which is a map showing the external boundaries of the area purported to be covered by the application

Searches: s *62(2)(c)*

[193] Schedule D states that no searches have been carried out by the applicant.

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

[194] A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Schedule E. This description (included as an excerpt within my reasoning at s 190B(4)) consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that may not have been extinguished, at law.

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

[195] The task of the Registrar at this condition is undertaken in the context of the requirements of s 190C(2)—that is, that the application contains certain information. As referred to above, I am not required to carry out any form of merit of qualitative assessment when considering the details and information prescribed by that section—*Doepel* at [16] and [35]—[37].

[196] Therefore, any genuine assessment of the details/information contained in the application in relation to s 62(2)(e) is to be undertaken when assessing the applicant's factual basis for the purposes of s 190B(5). All that is required at s 62(2)(e) is that the application contain the details and other information amounting to a 'general description' of the factual basis on which it is asserted that the native title rights and interests claimed exist. There is no requirement that at this point the Registrar consider the sufficiency of the factual basis—*Gudjala FC* at [92].

[197] In my view, Schedule F of the application contains the requisite 'general description' in respect of all three assertions. Schedules G and M also contribute to this general description.

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

[198] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

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

[199] Schedule H contains a list of 4 native title determination applications and the statement that they cover part of the area the subject of this application.

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

[200] The Form 1 does not provide any details of s 24MD(6B)(c) notices of which the applicant is aware, because it does not use the updated Form 1 which contains a schedule HA for these kinds of details I have decided that the requirements of s 62(1)(b) are nonetheless met, because the applicant is only required to provide details of notices of which it is aware. There is no information before me to indicate that there are any notices of the relevant kind affecting the area covered by the application of which the applicant is aware.

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

[201] Schedule I states that the applicant is not aware of any such notices

Conclusion

[202] The application **contains** the details specified in ss 62(2)(a)—(h), and therefore **contains** all details and other information required by **s 62(1)(b)**.

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.

[203] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if a previous application meets the conditions found in ss 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court. The Kaparn People application, which is the current application for the purposes of s 190C(3), was made when it was filed in the Court on 11 November 2013.

[204] Once an application is before a delegate of the Registrar for consideration under s 190A, the Tribunal's Geospatial Services conducts a geospatial analysis (the geospatial report) that includes an assessment of the area covered by the current application and any overlapping

applications This geospatial report in respect of the Kaparn People application, prepared on 21 November 2013, identified 4 registered and 1 unregistered claimant application that fall within the external boundaries of the area covered by this application:

Tribunal Number	Federal Court Number	Name	Status	Status Date	NTDA Area (sq km)	Overlap Area (sq km)	% NTDA Overlapping WC2013/009	% WC2013/009 Overlapping NTDA
WC1996/098	WAD6123/1998	Badimia People	Accepted for registration	04/10/1996	36129.970	2076.900	5.75	2.48
WC1999/002	WAD6020/1998	Ngadju	Accepted for registration	03/03/1999	102581.560	695.042	0.68	0.83
WC1999/010	WAD6064/1998	Wutha	Accepted for registration	15/06/1999	32684.500	972.068	2.97	1.16
WC1999/030	WAD70/1998	Central East Goldfields People	Accepted for registration	04/10/1999	23941.660	1113.200	4.65	1.33
WC2012/005	WAD100/2012	Badimia #2	Not accepted for registration		36129.970	2076.900	5.75	2.48

[205] The first 4 claimant applications were all made and were entered onto the Register as a result of their consideration for registration by a delegate of the Registrar at the time the current application was made (when it was filed in the Court on 11 November 2013). As the latter claimant application is not on the Register, it is not relevant to my consideration of the requirements of this condition. It is only the Badimia People, Ngadju, Wutha and Central East Goldfields People applications that are previous applications which overlap the area covered by the current application in the sense discussed in s 190C(3)(a)—(c). I therefore need to be satisfied that there are no common claim group members between these previous applications and the current Kaparn People claimant application.

[206] I note that Schedule H identifies two of the four applications as having been made in relation to the area covered by the current application and Schedule O states that the claimant group does not have any person in common with any application also covering all or part of the area covered by the current application.

[207] I have produced an extract from the Register for each of the previous overlapping applications and considered the native title claim group descriptions for those applications. I have identified the following named apical ancestors in two of the overlapping applications potentially common to the current application:

- Ngadju – *Lucy*; and
- Central East Goldfields People – [*Name Deleted*]

[208] In my view there are a number of issues relevant to my deliberations at this condition of the registration test. Firstly, the geospatial report identified that the map and description of the area covered by the Kaparn People application were not consistent with each other and do not identify the area with reasonable certainty (see also my reasons in relation to the requirements of

s 190B(2)). The geospatial report as a consequence makes the proviso that the aforementioned overlap analysis is based on an approximation of the boundary shown on the map. Secondly, the extent to which the four previous applications overlap the current application is relatively small – 2000 sq km being the largest area of overlap. Given this context, I am not confident that there is an intentional or deliberate overlap between the areas of the previous and current applications. The overlaps may simply have occurred through inaccurate mapping.

[209] Thirdly, the additional material provided by the applicant in support of the factual basis for the application refers to persons named [*Names Deleted*]. On the face of the application itself it is not clear whether or not the [*Name Deleted*] and their descendents are members of the Kaparn People native title claim group. It is not clear either, who are their ancestors. Finally, the Ngadju apical ancestor Lucy, without further inquiry, may or may not be the same Kaparn apical ancestor.

[210] However, I have decided that on the face of it, based on all of the information before me there is, in my view, a potential for claimants in common between the current Kaparn People application and at least two of the overlapping previous applications.

[211] I am therefore not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any relevant previous applications.

[212] The claim **does not satisfy** the conditions 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.

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

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

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

[213] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, in order for the condition in s 190C(4) to be satisfied. As the application is not certified pursuant to s 190C(4)(a), it is necessary to consider if the application meets the condition in s 190C(4)(b); that

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

[214] Additionally, in my consideration of the authorisation condition at s 190C(4)(b) I must also consider the requirements as set out in s 190C(5), the terms of which are set out above.

Information considered

[215] In my consideration of the authorisation of the applicant to make the application and to deal with matters arising in relation to it, I have had regard to all the information contained in the application, the additional material later provided by the applicant, the state government's submissions in relation to the registration test and the applicant's reply to those submissions.

State submissions

[216] Relevant to the Authorisation condition, in summary, the state government:

- asserts it is necessary to establish by credible evidence whether or not [*Name Deleted*] and [*Name Deleted*] (the daughter of Broad Arrow Tommy and her spouse) had any offspring and if so, why they should not be included in the native title claim group—at [19];
- asserts that the genealogical table shows Udaji aka Broad Arrow Tommy as the apical ancestor and it is a reasonable assumption that his offspring and their descendants would have the same rights and interests in the claim area as he did—at [20]; and
- questions why it is that Lucy is the named apical ancestor of the native title claim group and not her father, Broad Arrow Tommy—at [20].

[217] The state government submits that it is uncertain whether the claim is brought, in accordance with s 61(1), by 'persons authorised by all the persons (the native title claim group) who ... hold the common or group rights and interests comprising the particular native title'—at [11]. It contends that the applicant has not been properly authorised by all of the persons in the native title claim group, but only by a portion or subgroup of the 'real' native title claim group. The basis for this contention is that potentially there are more descendants of Broad Arrow Tommy than simply those descendants of his daughter Lucy, because there is no certainty that the union of [*Name Deleted*] did not have any offspring.

Applicant's submissions in response

[218] The applicant has responded by stating that the only offspring of Broad Arrow Tommy to have had children was Lucy. It submits that it relies on the genealogical table as it was prepared by the Tribunal for the purpose of proceedings in the Central West Goldfields People—WAD65/1998 (dismissed 26 August 2010). The applicant contends that the state government should name the descendants of the other offspring of Broad Arrow Tommy who should be included and that it is not appropriate to make an allegation that the 'Applicant is a subgroup [sic]'—at [2] to [5].

The native title claim group on behalf of whom the application is made

[219] I did not take these matters into account when I considered the adequacy of the description of the native title claim group for the purposes of s 190B(3), because my task there was to consider whether there is clarity around the description of the native title claim group. For the purposes of that condition of the registration test I was not to consider the correctness of the description (*Doepe*l at [37]) or whether there was 'a cogent explanation of the basis upon' which members of the claim group qualify for their identification (*Gudjala 2007*) at [28]— [34]). Nor did I consider these matters under s 190C(2), in relation to the requirements of s 61(1), which only requires me to be satisfied that the application contains the information required by ss 61 and 62.

[220] The matters of which I am required to be satisfied at s 190C(4) are quite different to those in relation to ss 190B(3) or 190C(2). For the purposes of s 190C(4) I am to be satisfied as to the *identity* [original emphasis] of the claimed native title holders including the applicant'—*Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [29].

[221] In examining the factual basis material provided by the applicant for the purposes of s 190B(5), I decided that its content alluded to the existence of a wider or larger native title claim group than that which is described in Schedule A, or (at the very least) a wider governing body under which traditional laws and customs are acknowledged and observed. I noted there examples of the indicators that concern me that the application is not brought on behalf of the 'real' native title claim group, including reference to a previous claim brought by a claim group of which the [*Name Deleted*] family was part. I came to the conclusion that the identification of the native title claim group is not certain.

[222] In my view, it is appropriate that I deal with the issue of *who* must authorise the applicant to make the application and to deal with matters arising in relation to it. The authority of *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) is that a consideration of the composition of the native title claim group, as defined in s 61(1), is required to be undertaken by the Registrar when assessing authorisation under s 190C(4)(b). O'Loughlin J held that:

> A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute a group.
>
> The task of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group.
>
> The authorisation must come from all the persons who hold the common or group rights and interests —at [60] and [62].

[223] I refer to the decision of Collier J in in *Watson v Native Title Registrar* (2008) FCR 187; [2008] FCA 574 (*Watson*) at [28] to [36] who agreed that consideration by the Registrar of the authorisation condition in s 190C(4)(b) requires a consideration of whether the applicant is authorised by a 'native title claim group', as that term is defined in s 61(1).

[224] It follows that the authorisation of the applicant, with which s 190C(4)(b) is concerned, must flow from the 'native title claim group'. That definition, by virtue of s 253, is found in s 61(1):

> All 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.

[225] As I have said earlier, on the basis of the information before me, I am of the view that there is not cogent or consistent information before me as to the composition of the native title claim group. As such I am not certain that the group described in this application comprises 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests'. The factual basis material identifies persons whose descendents (the [*Names Deleted*] families[2]) possibly form part of the contemporary claim group. This is despite the genealogical information in Attachment A2 of the application indicating that the relevant native title claim group are only the descendants of Lucy, via her union with [*Name Deleted*]. It also reveals a possible wider governing society identified as Gaban or Gubrun. Contrary to both these possibilities, the description at Schedule A appears to be limited to the single, extended [*Name Deleted*] family whose descent is from a single ancestor who was born in the 1890s, well after sovereignty was asserted in Western Australia.

[226] I note, however, that the identity or composition of the claim group is not one that I can decide or resolve in the course of this administrative decision as it is not my role to determine the identity of all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed in the area of this application. I simply do not have sufficient information or detail before me to be certain as to the nature of that composition and the basis on which it is asserted to be the native title claim group.

[227] I am therefore not certain that the native title claim group described in Schedule A of the Kaparn People application includes all the persons in the native title claim group, as that term is defined in s 61(1). It appears to me a distinct possibility that the applicant should rely on authorisation by something or persons *more* than the persons described as the native title claim group in Schedule A. Consequently, I am not satisfied that the persons comprising the applicant are authorized by the native title claim group to make the application and deal with matters arising in relation to it.

[228] For the reasons set out above, I am **not satisfied** that the requirements set out in either ss 190C(4)(a) or (b) are met.

[End of reasons]

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[2] Referenced in the applicant's additional material, marked 'Schedule E'.

Attachment A

Summary of registration test result

Application name	**Kaparn People**
NNTT file no.	**WC2013/009**
Federal Court of Australia file no.	**WAD420/2013**
Date of registration test decision	**February 2014**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s 190C(2)			**Aggregate result:** **Met**
	re s 61(1)		**Met**
	re s 61(3)		**Met**
	re s 61(4)		**Met**
	re s 62(1)(a)		**Met**
	re s 62(1)(b)		**Aggregate result:** **Met**
		s 62(2)(a)	**Met**
		s 62(2)(b)	**Met**
		s 62(2)(c)	**Met**
		s 62(2)(d)	**Met**
		s 62(2)(e)	**Met**
		s 62(2)(f)	**Met**
		s 62(2)(g)	**Met**
		s 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s 62(2)(h)	Met
s 190C(3)			Not Met
s 190C(4)			Overall result: Not Met
	s 190C(4)(a)		N/A
	s 190C(4)(b)		Not Met

Section 190B conditions

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

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

Attachment B

Information Considered

The following lists information and documents that I have considered in reaching my decision:

- Kaparn People native title determination application and accompanying documents and affidavits, as filed in the Court on 11 November 2013;
- the Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) of 21 November 2013, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register of Native Title Claims, Schedule of Applications, Determinations of Native Title, Indigenous Land Use Agreements and s. 29 (future act) notices and equivalent;
- Extracts of the Register of Native Title Claims in the following claims:
  - WC1996/098—Badimia People—WAD6123/1998
  - WC1999/002—Ngadju—WAD6020/1998
  - WC1999/010—Wutha—WAD6064/1998
  - WC1999/030— Central East Goldfields People— WAD70/1998
  - WC199/029— Central West Goldfields People— WAD65/1998
- Schedule A Native title claim group—historical photographs of people, newspaper clippings, copies of book extracts, genealogy of descendents of Udaji (as provided at Attachment A1), untitled landscape photographs (40 pages);
- Schedule E Description of native title rights and interests—copies of government records and official notes and reports (148 pages);
- Schedule F General description of native title right [sic] and interests claimed—untitled and unreferenced photographs of rock paintings, soaks and waterholes, landscapes (21 pages);
- Schedule R Certification or Authorisation (27 pages);
- Statutory Declaration, Elizabeth Sambo, dated 2 December 2013 (1 page);
- [*Names Deleted*], Field Tape #8 of the Tindale West Australia recordings, 19 April 1966, Kalgoorlie;
- Interview with [*Name Deleted*] (b. 1928), 1/12/1992 and 14/12/1992 recorded at Boulder by; [*Name Deleted*];
- Interview with [*Name Deleted*], 21 April 1999, Boulder.
- Submissions made by the State of Western Australia, 9 December 2013
- The applicant's response to the submissions of the State of Western Australia, 23 December 2013.

[End of document]