NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

Section 190E *Native Title Act 1993* (Cth)

Application Name:	Maduwongga People
NNTT File Number:	WC2014/002
Federal Court of Australia file Number:	WAD90/2014
Tribunal:	Member James McNamara
Place:	Brisbane
Date:	24 October 2014

Legislation *Native Title Act 1993* (Cth) ss 24, 29, 61, 62, 63, 123, 190, 190A, 190B, 190C, 190D, 190E, 190F, 251B

Cases *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007)

Martin v Native Title Registrar [2001] FCA 16 (19 January 2001)

Evans v Native Title Registrar [2004] FCA 1070 (19 August 2004)

Northern Territory of Australia v Doepel (2003) 133 FCR 112

Western Australia v Native Title Registrar (1999) 95 FCR 93

Lawson on behalf of the 'Pooncarie' Barkandji People v Minister for Land and Water Conservation for the State of New South Wales (NSW) [2002] FCA 1517 (9 December 2002)

Strickland v Native Title Registrar (1999) 168 ALR 242

Daniel for Ngaluma People v Western Australia [1999] FCA 686 (21 May 1999)

Harrington-Smith on behalf of the Wongatha v State of Western Australia & Ors (No 9) (2007) 238 ALR 1

Wulgurukaba People #1 v Queensland [2002] FCA 1555 (13 December 2002)

Corunna v Native Title Registrar [2013] FCA (24 April 2013)

Gudjala People (No 2) v Native Title Registrar (2008) 171 FCR 317

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (7 November 2012)

Gudjala People #2 v Native Title Registrar (2009) 182 FCR 63

Quall v Native Title Registrar (2003) 126 FCR 512

Queensland v Hutchison (2001) 108 FCR 575

Introduction

[1] The delegate of the Native Title Registrar (delegate), Ms. Susan Walsh, did not accept the claim made in the Maduwongga People native title determination application (Maduwongga People application) for registration pursuant to s 190A of the Act *Native Title Act 1993* (Cth) ('the Act'). The application did not meet the following conditions:

a. s 190B(2) – identification of area subject to native title;
b. s 190B(5) – factual basis for native title;
c. s 190B(6) – prima facie case;
d. s 190B(7) – traditional physical connection; and
e. s 190C(2) – information required by ss 61 and 62 of the Act.

[2] The decision was made on 10 July 2014 and the reasons were finalised on 21 July 2014.

[3] Pursuant to s 190D(1), notice was sent on 21 July 2014 via registered post by Ms. Marion Towndrow, Case Manager in the Western Australia Registry, to the applicant, care of Corser and Corser Lawyers, the legal representative of the applicant, notifying them of the delegate's decision. This notice enclosed a copy of the reasons and provided information about options the applicant has when an application has not been accepted for registration, namely, reconsideration by the Tribunal or a review by the Federal Court.

[4] (Name deleted), of John Toohey Chambers, applied on behalf of the applicant, for reconsideration of the claim pursuant to s 190E(1) of the Act on 2 September 2014.

[5] The email from (Name deleted) set out the following grounds for seeking reconsideration: 'On the basis of the content of the Addendum of (Anthropologist 1).' The reconsideration application included the Addendum of (Anthropologist 1) dated 30 August 2013. I understand the date to be a typographical error, and in fact it should read 30 August 2014.

[6] Ms. Claire Smith, Case Manager in the Western Australia Registry, notified Ms. Anna Celliers, the Regional Litigation Coordinator, who contacted the Federal Court in order to determine whether an application for a review under s 190F(1) had already been made. Ms. Celliers confirmed that an application for review had not been made. In addition to this, there had been no previous reconsideration requests under s 190E(3) and (4).

[7] The reconsideration must be conducted by a single Member of the Tribunal (s 190E(5)). On 4 September 2014 the President appointed me, pursuant to s 123(1)(cb), to be the Member to reconsider the claim made in the application for registration.

[8] The State of Western Australia (State) has given a number of notices under s 29 and one notice under s 24 over the area of land and waters covered by the claim. Under s 190A(2), the Registrar is required to use his or her best endeavours to finish considering the claim by certain time periods where such notices are issued. I consider that I am similarly bound by this provision of the Act and have endeavoured to complete the decision in the relevant time frames. I note that the time period for testing of a number of the notices issued over the

application area has now passed. That is because, in my view, the requirements of procedural fairness necessitated the exchange of submissions and provision of additional material by the applicant and the State. This has meant that I could not make a decision within the relevant statutory timeframe set out in s 190A(2). There are, however, a number of current notices for which the time period has not expired, and in accordance with s 190A(2) I have used best endeavours to finish considering the claim prior to the expiry of those timeframes.

[9] On 9 September 2014 Ms. Smith wrote to the applicant, care of (Name deleted), informing the applicant that the reconsideration would proceed and that a Member had been appointed to carry out the reconsideration. Ms. Smith notified (Name deleted) that the Member would be using his or her best endeavours to finalise the decision by 21 September 2014, as this was the first four month deadline for one of the relevant s 29 notices (best endeavours date). Ms. Smith pointed out that on reconsideration a Member could consider not only the information before the delegate but any other information that the Member considers relevant, and the applicant was invited to provide any further information for consideration by 4pm 12 September 2014. Enclosed with this letter was a timetable, setting out the proposed dates in order for the best endeavours date to be met, and a list of the future act notices that had been issued over the claim area from 21 May 2014 to 27 August 2014.

[10] On 9 September 2014 Ms. Smith also wrote to the Honourable Michael Mischin MLC, Attorney-General of Western Australia (State), informing him that a request for reconsideration had been received in respect of the Maduwongga People application. Ms. Smith also informed the State that the Member would be looking to finalise the decision by the best endeavours date. The State was made aware that if any additional material was received from the applicant by 4pm 12 September, it would be forwarded to the State who would in turn be given an opportunity to comment.

[11] On 13 September 2014 (Name deleted), on behalf of the applicant, provided additional material via email to the Tribunal in support of the reconsideration. This material included the following:

a. a submission addressing the sections of the statement of reasons of 21 July 2014 where the application failed to meet the requirements of the registration test;
b. a further version of (Anthropologist 1)'s Addendum with amendments shown as track changes; and
c. a final version of (Anthropologist 1)'s Addendum.

[12] (Name deleted)'s email contained the following:

> I was not aware that the deadline was as you state below for lodging further material. I am presently on leave overseas and missed seeing your email yesterday until late in the day.
>
> I now attach the additional material, in the form of submissions prepared by myself and an Addendum of (Anthropologist 1).

> I also attach a version of (Anthropologist 1)'s Addendum showing tracked changes and highlights which indicate the difference between the current version being lodged and the earlier version lodged, in case any consideration has been given to that earlier version.
>
> An extension of time for providing this information is sought to the date when this email and attachments are received by you.'

[13] On 15 September 2014, the extension of time was granted on the proviso that the applicant understood that it may mean an extension of timeframes for the completion of the reconsideration decision. The additional material was forwarded to the State on the same day.

[14] Due to the late receipt of the additional material from the applicant, on 16 September 2014 the State requested an extension of time to comment on the additional material to close of business on 3 October 2014. The extension was granted on 17 September 2014 and the applicant was notified of this on the same date. Both the applicant and the State were advised that the expected date for completion of the reconsideration was now 15 October 2014.

[15] Comments from the State dated 1 October 2014 (but received by email on 30 September 2014) were received and forwarded to the applicant. The applicant responded to the State's submission on 6 October 2014.

Background to the Maduwongga People native title determination application

[16] On 17 April 2014, the Maduwongga People application was filed with the Federal Court. The persons comprising the applicant are Ms. Marjorie Strickland and Ms. Anne Nudding.

[17] On 22 April 2014, the Registrar of Federal Court provided a copy of the application and accompanying documents to the Registrar under s 63 of the Act, thereby triggering the duty of the Registrar under s 190A(1) to consider the claim for registration in accordance with the provisions of s 190A. 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.

[18] The claim covers an area of approximately 27,824 square kilometres and is located in the Goldfields Region of Western Australia, within the Shires of Coolgardie, Menzies, Kalgoorlie-Boulder and Leonora.

[19] The area of the claim has been subject to a number of previous applications:

WC1994/003	Maduwongga	Filed on 19 April 1994	Registered from 8 September 1995 to 5 November 1999	Dismissed on 23 March 2010

WC1995/011	Maduwongga People #2	Filed on 6 April 1995	Registered from 8 September 1995 to 5 November 1999	Dismissed on 23 March 2010
WC1997/088	Maduwongga O'Donoghue People	Filed on 15 October 1997	Registered from 16 October 1997 to 21 May 1999	Withdrawn on 21 May 1999
WC1998/020	Maduwongga People #3	Filed on 8 April 1998	Registered from 8 April 1998 to 5 November 1999	Dismissed on 23 March 2010
WC1999/009	Maduwongga People	Filed on 28 January 1999 (combination of WC94/3, WC95/11 and WC98/20)	Not accepted for registration	Dismissed on 23 March 2010
WC2010/014	Strickland/Nudding	Filed on 14 October 2010	Not accepted for registration	Dismissed on 3 July 2013

Claim Group Description

[20] Schedule A of the Native Title Determination Application states that 'the claim is brought on behalf of the descendants of Kitty Bluegum'.

Information considered when undertaking the reconsideration

[21] Pursuant to s 190E(7)(a), in reconsidering the claim, 'the NNTT must have regard to any information to which the Registrar was required to have regard under ss 190A(3) – (5) in considering the claim.' This information was provided to the Member on 5 September 2014. In addition to this, pursuant to s 190E(7)(b), 'the NNTT may have regard to any other information which the NNTT regards as appropriate in reconsidering the claim.'

[22] Pursuant to s 190E(7)(a), I have had regard to the documents mentioned by the delegate in her reasons for decision. In addition I have also had regard to the documents outlined at paragraph [5] above.

[23] Pursuant to s 190E(7)(b), I have had regard to the documents outlined at paragraph [11], the State's submission referred to in paragraph [15] and the response from the applicant also referred to in paragraph [15].

Registration Test General Principles

[24] As outlined above, where the Registrar is given a copy of a claimant application under either ss 63 or 64(4), he or she is obligated to consider the claim made in the application in accordance with s 190A. If such an application complies with the conditions prescribed by

ss 190B and 190C the Registrar *must* register the claim on the Register of Native Title Claims – s 190A(6). That is, *all* of the conditions prescribed by these sections must be complied with and there is no discretion vested in the Registrar to accept a claim if only a majority of the requirements of these provisions are met –Mansfield J in *Quall v Native Title Registrar* (2003) 126 FCR 512 (*Quall*) at 518/[17]; see also *Evans v Native Title Registrar* [2004] FCA 1070 (19 August 2004), [46].

[25] This obligation of the Registrar under s 190A when considering a claim made in an application for registration includes having regard to certain information. That is, the Registrar *must* have regard to information contained in the application and in any other documents provided by the applicant, any information obtained by the Registrar when searching registers of interests maintained by a government and, where reasonably practicable, any information provided by a government that is relevant to the matters outlined in ss 190B or 190C – s 190A(3). Importantly, this evidences that the Registrar is not understood to be circumscribed or restricted in the sense of confining his or her consideration to information contained only in the application — see, *Quall,* [22].

[26] Further, s 190A confers a relatively broad discretion upon the Registrar when considering a claim made in an application and the information to which he or she *may* have regard. That is, he or she may also '*have regard to such other information as he or she considers appropriate*' — s 190A(3). In that regard, the Court has recognised that the 'public significance of the Native Title Register' is indicative that 'the Registrar should be entitled to inform himself or herself of matters of significance, and (as contemplated by s 190A(3) of the NT Act) to receive information...'— *Quall,* [22].

[27] The task under s 190A is defined by the conditions of registration prescribed in ss 190B and 190C. Each condition of the registration test must be considered having regard to the law and how it defines that particular requirement, and applying those to the specific facts of the matter. I understand, however, that the task generally is not to find 'in all respects the real facts on the balance of probabilities' or to supplant the role of the Court by undertaking some kind of preliminary hearing. Nonetheless, ss 190B and 190C impose 'a range of different tasks upon the Registrar' and any limitations upon the Registrar will arise from the particular conditions— *Northern Territory of Australia v Doepel* (2003) 133 FCR 112 (*Doepel*), 119/[16].

[28] I consider that the above will equally guide me in the reconsideration of the claim made in the application.

Non-contested findings of the Delegate

[29] Reconsideration by a Member is a review de novo. Nonetheless, I consider that it is open to me to adopt, where appropriate, the reasons and conclusions reached by a delegate.

[30] As with the delegate, I am required to assess the material before me to determine if the Maduwongga People application meets all the conditions prescribed by ss 190B and 190C.

[31] In this matter the delegate was satisfied that the application met the requirements mandated by s 190C, other than s 190C(2) and some of those mandated by s 190B, but not the requirements of s 190B(2), (5), (6) and (7).

[32] The delegate was satisfied that the applicant met the following requirements of 190B:

s 190B(3) – Identification of native title claim groups

[33] Subsection 190B(3) provides:

> 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] As I understand, the task at s 190B(3) requires that I be satisfied that either the persons in the native title claim group are named in the application or otherwise described 'sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

[35] Having considered the contents of the application and the delegate's reasons, it is clear that the application contains a description of the native title claim group, such that s 190B(3)(b) is the relevant condition of registration that must be met.

[36] The delegate referred to the decision of Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93 to support the view that a description which relies on descent from a named ancestor or ancestors provides a reasonably clear mechanism for the purpose of s 190B(3)(b).

[37] The delegate's reasons were as follows:

> In addition to the fact that Kitty Bluegum is at the apex of the claim group's genealogy, it appears from the applicant's information that the task of ascertaining her descendants and thus the members of the claim group will not pose these kinds of evidentiary difficulties. The anthropologist Norman Tindale noted that Kitty was 60 years old in 1939 when he recorded her genealogy. Kitty died in 1945. Her descendants thus span a considerably shorter period of time than considered in Ward v Registrar. Working out who is or is not a descendant of Kitty, should not pose the kind of difficulties for descendants to be ascertained from unnamed ancestors alive at the time of sovereignty. In fact, the identity of the grandchildren, great-grandchildren and great-great grandchildren of Kitty has been researched and well known, as is evidenced by a comprehensive genealogy report provided by the applicant in an affidavit that accompanies the application. (Page 7/[28])

[38] Having examined the description in Schedule A, which defines the native title claim group as being the 'descendants of Kitty Bluegum', I am similarly of the view that this description

satisfies the condition at s 190B(3)(b). The naming of an ancestor or ancestors from whom the members of the claim group are descended provides an objective criterion of membership from which it will be possible, in my view, to ascertain whether any particular person is in that group.

[39] The condition at s 190B(3) is satisfied.

s 190B(4) Identification of claimed native title

[40] Subsection 190B(4) provides:

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

[41] This condition of registration is premised on the application containing 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interest that may exist, or that have not been extinguished' — s 62(2)(d).

[42] Further to the application containing such information, I must be satisfied that it is 'sufficient to allow the native title rights and interests claimed to be readily identified.'

[43] I note that at Schedule E of the application there is an extensive list of native title rights and interests that are claimed in relation to the land and waters covered in the application.

[44] The delegate referred to the decision of Mansfield J in *Doepel* , 139/[99] where his Honour agrees with the Registrar's approach to this condition, being that the question of satisfaction as to this requirement is premised primarily upon 'whether the claimed native title rights and interests are understandable and having meaning.'

[45] The delegate's reasons were as follows:

> In my view, there is no infringement of s 62(2)(d). Each item in the bundles of Area A and B rights is comprehensively and particularly described, such that the description does 'not merely [consist] of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law (Page 8/[34]).

[46] Having considered the description of the native title rights and interests claimed in Schedule E of the application I am of the view that they are understandable and have meaning for the purpose of this requirement. When I consider the merit condition at s 190B(6) I will examine whether those claimed native title rights and interests are native title rights and interests as defined under s 223 of the Act and if they are prima facie established.

[47] The condition at s 190B(4) is satisfied.

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

[48] Subsection 190B(8) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of section 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.

[49] The delegate's reasons were as follows:

> There are no determinations of native title in relation to the area covered by the application. For this reason, I am satisfied that the application does not offend s 61A(1).
>
> Schedule B of the Form 1 stipulates that any areas within the boundaries where a previous exclusive possession act was done, is excluded, except where the non-extinguishment principle (as defined in s 238) applies, including any area to which ss 47, 47A and 47B apply. As the acts described in s 61A(2) are expressly excluded, I am satisfied that the application does not offend this part of s 61A.
>
> Schedule E of the application states that native title rights and interests conferring possession, occupation, use and enjoyment to the exclusion of all others are only claimed in relation to 'Area A', which is defined at the outset of the Form 1 to comprise areas of unallocated Crown land that have not been previously subject to any grant by the Crown; areas to which ss 47, 47A and 47B of the Act apply, other areas to which the non-extinguishment principle of s 238 of the Act applies and in relation to areas where there has been no prior extinguishment of native title. As the claimed rights and interests do not include exclusive possession over areas covered by previous non-exclusive possession acts, I am satisfied that the application does not offend s 61A(3) (Pages 35-35/[140]-[142]).

[50] Having independently assessed the material before me, I have reached the same conclusion as the delegate in relation to s 190(8). The condition at s 190B(8) is satisfied.

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

[51] Subsection 190B(9) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:
>
> a. to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or
> b. to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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 subsection 47(2), 47A(2) or 47B(2)).

[52] The delegate's findings were as follows:

> Schedule Q states that no claim is made to any minerals, petroleum or gas owned by the Crown. In my view, this express statement satisfies s 190B(9)(a).
>
> The application area is located well inland from the coast and the claimed native title rights and interests do not, therefore, relate to waters in an offshore place. The claim thus satisfies s 190B(9)(b).
>
> The application and accompanying documents do not disclose, and I am not otherwise aware that, the native title rights and interests claimed have otherwise been extinguished. The claim satisfies s 190B(9)(c) (Page 36[145]-[147]).

[53] Having independently assessed the material before me, I have reached the same conclusion as the delegate in relation to s 190B(9). The condition at s 190B(9) is satisfied.

[54] I adopt the delegate's reasons relating to each of her non-contested findings in relation to s 190B.

[55] In this matter the delegate was satisfied that the application met the following requirements of s 190C:

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

[56] Subsection 190C(3) provides:

> The Registrar 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. an entry relating to the claim in 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 consideration of the previous application under section 190A.

[57] I understand that this condition would require the Registrar to consider the existence of common claimants in circumstances where an entry relating to a claim in a previous application was on the Register when the current application was made.

[58] The current application (being this application) was made on 17 April 2014.

[59] When a claim is referred to the Registrar under s 63 or 64(4), it is the standard practice for a request to be made to the Tribunal's Geospatial Services to produce an overlap assessment

and analysis of the area covered by a claimant application. The Geospatial assessment and overlap analysis was prepared on 6 May 2014 (GeoTrack: 2014/0693) (geospatial assessment) and this revealed that there was one overlapping application on the Register of Native Title Claims (Register), being the Central East Goldfields People claimant application (WAD70/1998). It is my understanding that this application was on the Register when the current application was made.

[60] I understand that subsequent to this assessment, however, the Central East Goldfields People claimant application was discontinued by the Court on 16 June 2014 and removed from the Register of Native Title Claims on 17 June 2014. That is, there was no overlapping application on the Register when the delegate made her decision.

[61] Subsequently, a further Geospatial overlap analysis dated 4 September 2014 (GeoTrack: 2014/1648) was prepared for the purpose of my reconsideration (geospatial overlap analysis) which shows that at the date of the geospatial assessment there were no overlapping applications on the Register.

[62] The requirements of s 190C(3)(a) – (c) speak in the past tense. For instance, the requirement is to consider if a 'previous application *covered* the whole or part of the area *covered* by the current application' [my emphasis] (s 190C(3)(a)) and further, to consider if that 'previous application *was* on the Register of Native Title Claims when the current application was made' [my emphasis] (s 190C(3)(b)) and whether it *was* an entry made pursuant to s 190A (s 190C(3)(c)).

[63] However, the common sense intention of s 190C(3) is to prevent the registration of multiple applications with overlapping members being *on the* Register at the same time. As there is currently no previous application on the Register, it is my understanding that there is no need for me to consider whether there are any common claimants. This would be my understanding of why the delegate did not refer to the Central East Goldfields People claimant application when considering this requirement.

[64] The delegate's findings were as follows:

> There are no native title determination applications which cover any of the area covered by the current application, such that I am not required to consider the issue of common members between this application and any other previously registered applications (Page 41/[163]).

[65] I am satisfied that this requirement is met.

s 190C(4) – Identity of claimed native title holders

[66] Subsection 190C(4) provides:

> The Registrar must be satisfied that either of the following is the case:

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.

[67] As I understand, the applicant does not rely upon the certification of the application as provided for under s 190C(4)(a). Rather, in this instance it is s 190C(4)(b) which I must be satisfied of.

[68] The delegate's reasons for being satisfied were as follows:

> It follows, on the basis of the information in Schedule R and that contained in the affidavits by the applicant, that I am satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group (Page 42/[170]).

[69] The Registrar is firstly required to consider whether the application contains certain statements and information that are prescribed by s 190C(5). In that regard, I have considered that the application includes the statement under s 190C(5)(a) and that it briefly sets out the grounds that are required by s 190C(5)(b). This is contained in Schedule R of the application.

[70] The Registrar then is required to be satisfied of a particular fact or facts, being that the applicant is a member of the native title claim group and is authorised by all the persons in the native title claim group.

[71] When considering the authorisation of an applicant to make an application and to deal with matters arising in relation to it, there is ample authority from the Court as to what may need to be considered before the Registrar can be satisfied of this condition.

[72] It is clear that the Registrar must be satisfied as to the 'fact of authorisation'. In that regard, the task at s 190C(4)(b) is distinct from that at s 190C(4)(a) and it clearly 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' — *Doepel*, 134/[78].

[73] A note in s 190C(4)(b) refers the Registrar to the meaning of authorisation as being defined by s 251B of the Act. Section 251B specifies that *all the persons* in a native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b). Albeit, in this context I understand that the word 'all' used here may be understood to have 'a more limited meaning than it might otherwise have' — *Lawson on behalf of the 'Pooncarie' Barkandji People v Minister for Land and Water Conservation for the State of New South Wales (NSW)* [2002] FCA 1517 (9 December 2002) (*Lawson*), [25].

[74] As I understand, it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'—*Lawson,* [25].

[75] Taking account of the above, any consideration of the applicant's authorisation to make this claimant application must also flow from an understanding of which process it is asserted that the applicant is authorised in accordance with under s 251B.

[76] Accompanying the application when filed were affidavits by (Name deleted) and (Name deleted) which outline the basis of their authorisation as persons jointly comprising the applicant. I have considered those affidavits and their content. For instance, in the affidavit of (Name deleted) dated 9 October 2013, she sets out that the process of decision-making complied with was an agreed process adopted by the persons in the native title claim group at a meeting, which took place on 12 July 2013. As to the details of that agreed process, (Name deleted) says that:

> [T]he agreed process was a process of convening a meeting of those members of the claim group who were able to attend and deciding the matters required to be decided and circulating by mail to the remaining members of the native title claim group who were not able to attend the meeting a minute of the matters required to be decided and obtaining their written endorsement of the matters required to be decided — [7].

[77] As the delegate noted in her reasons for decision (Page 42/[169]) there does not appear to be anything overtly controversial in the material about this matter of authorisation.

[78] The affidavits describe a process that is contemplated by the relevant provisions of the Act, being an agreed and adopted process, such as is described in s 251B(b). Upon my understanding such a process may be agreed to and adopted where there is no decision-making process that under the traditional laws and customs of the native title claim group must be complied with (s 251B(a)).

[79] I note that there is nothing in the material before me to suggest that there is any such process of decision-making mandated under the traditional laws and customs as would be required to be followed under s 251B(a). Generally, there would be a statement by the applicant or within the application that there is no such process that must be followed. However, in the absence of any contradictory information, I am of the view that there is not a process under the traditional laws and customs that must be complied with and thus that s 251B(b) is the relevant provision that must be satisfied.

[80] Having independently assessed the material about the authorisation of the applicant before me, I have reached the same conclusion as the delegate in relation to s 190C(4)(b). The condition at s 190C(4)(b) is satisfied.

My conclusion on the non-contested matters

[81] As indicated above I have independently assessed the information that I have before me about each of the non-contested matters (i.e. where the delegate accepted that she could be satisfied of the condition of registration). In doing so I have formed the view that I too am satisfied in relation to each of these conditions. I adopt the delegate's reasons relating to each of her non-contested findings in relation to s 190C.

Contested findings of the Delegate

[82] I will deal hereafter with each of the grounds where the delegate was not satisfied the applicant met the relevant conditions mandated by either s190B or s190C. In assessing whether each condition is met I will, where relevant, outline the response of the applicant, the comments of the State, and the reply of the applicant.

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

[83] Subsection 190B(2) provides:

> The Registrar must be satisfied that the information and map contained in the application as required by Subsections 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.

[84] I note that it is my understanding that this issue of the identification of the area subject to the claim and the Registrar's reaching of satisfaction that the information provided about the boundaries of land and waters covered by the claim is to be decided within 'the general rubric of "reasonable certainty" used in s 190B(2)' and that what are already technical requirements of registration are not to be elevated to the impossible — *Strickland v Native Title Registrar* (1999) 168 ALR 242.

[85] The delegate was of the opinion that:

> In summary, I am satisfied as to the sufficiency of the details in the application that comprise a technical description of, and a map showing, the boundaries of the area covered by the application. I am also satisfied that part of the written description of areas within the boundaries that are not covered by the application is sufficient. However, the concluding Paragraph 5 of Schedule B raises uncertainty in my mind as to whether the application covers an area in the northern section shown on the map in Attachment C (Page 3/[7]).

[86] Paragraph [5] of Schedule B is as follows: '[n]otwithstanding anything contained elsewhere in this application (including the attachments to it), the applicant excludes from the area of land and waters covered by the application those areas of land and waters that were excluded from the area of land and waters included in the original applications WAG 76 of 1997 (WC 95/11), WAG 63 of 1998 (WC 94/03) and WC 98/20.'

[87] (Name deleted) responded on behalf of the applicant to the delegate's findings in Paragraph [4] of his submission provided on 13 September 2014:

> It is submitted that the information in Paragraph (5) of Schedule B was not contradicted by the order made by the Court dismissing part of combined application WAD76/1997. What is stated in Paragraph 5 of the application is not uncertain. The current application clearly refers to what is stated in 'the original applications' (emphasis added). What is stated in those applications concerning the land and waters is ascertainable with 'reasonable certainty': Daniel v Western Australia [1999] FCA 686. It is unaffected by what may have subsequently occurred in the course of determining those applications (following the combination into application WAD76/1997) by way of an order made in Harrington-Smith & Ord v State of Western Australia & Ors (No 9) [2007] FCA 31, in the context of the Court also determining the now dismissed application WAD6005/1998.

[88] The State, in its correspondence dated 1 October 2014, says that it shares the view expressed by the delegate that there is uncertainty due to paragraph [5] of Schedule B in the application and that it was not apparent to the State that the submissions provided by the applicant dated 13 September 2014 directly addressed the uncertainty identified by the delegate.

[89] In reply dated 6 October 2014, the applicant disagreed with the State's final comment, and added the following:

> The delegate misled herself by going beyond the content of the applications referred to in paragraph 5 of Schedule B of the application and taking into account a matter not referred to in the description of the area in paragraph 5 of Schedule B of the application, i.e., an order made by the Court in relation to those applications.
>
> The delegate needed to read only the content of the paragraph. It defined the area by reference to land and waters as they were described in prior applications.

[90] As mentioned at [85] above, the delegate was satisfied as to the sufficiency of the details in the application that comprise a technical description of, and a map showing, the boundaries of the area covered by the application. I have reached the same conclusion.

[91] The delegate at [85] above was also satisfied that part of the written description of areas within the boundaries that are not covered by the application is sufficient. The delegate at Page 5 of her reasons for decision was of the view that paragraphs [1] to [4] (Schedule B) of the description of internal excluded areas meets the condition of s 190B(2). Again, I have reached the same conclusion.

[92] In relation to paragraph [5] of Schedule B, it is my view that read in isolation it may be understood to mean exclusions identified in the original applications identified as WAG 76 of 1997 (WC95/11), WAG 63 of 1998 (WC94/3) and WC 98/20. That is to say not the applications as combined by the Federal Court and then partially dismissed, but the original applications unaffected by subsequent events. I believe that the deliberate use of the qualifying term 'original' puts this beyond doubt.

[93] Had the applicant intended to exclude the areas subject to the partial dismissal of application WAD 76/1997 I can see no logical reason why the applicant would not have made that clear by referring specifically to the combined application. While the delegate took into account information obtained from the extract from the Registrar's 'Schedule of Native Title Applications' database chronicling the subsequent history of the applications, it was that information which led to confusion about the intended area of claim rather than the wording contained in Schedule B itself.

[94] In forming my view here I have also considered the geospatial assessment dated 6 May 2014 in which the Geospatial Services team member opines that the description and map provided in the application identifies the application area with reasonable certainty. This assessment takes account of the information in Schedule B, Attachment B and Attachment C.

[95] Ultimately, it is my view that the reference in paragraph [5] of Schedule B does not render the description uncertain such that it cannot satisfy the condition at s 190B(2).

[96] I am satisfied that the information and map contained in the application are sufficient for the purpose of s 190B(2) in that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

[97] The condition at s 190B(2) is satisfied.

s 190B(5) - Factual basis for claimed native title

[98] Subsection 190B(5) provides:

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

[99] The general principles applicable to the operation of s190B(5) are neatly described by Deputy President Sosso in Swan River People #2 (WAD24/2011; WC2011/002), [66] – [72] and in Tjiwarl (WAD228/2011; WC2011/007) at [124] – [131]. I agree with that analysis and repeat it now:

General principles

The Registrar's task pursuant to s 190B(5) is relatively narrow. The Registrar is to consider the asserted facts and, assuming they are true, assess whether they support the claimed assertions.

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 be ultimately adduced to establish the asserted facts'* — Mansfield J in *Northern Territory v Doepel* at 120/[17] endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 at 338/[83].

Prior to the Full Court's decision in *Gudjala*, there was a series of Federal Court judgments that suggested that the Registrar would need to be presented with some additional information or evidence to support the assertions, and that the assertions alone in the application may not suffice. Further, those judgments also suggested that whilst there was a correlation between s 190B(5) and s 62(2)(e), the latter provision only referred to a "*general description*" whereas the former provision *"may require more, for the Registrar to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not some summary of it"* per Kiefel J *Queensland v Hutchison* (2001) 108 FCR 575 (*Hutchison*) at 584/[25] and *Wulgurukaba People #1 v Queensland* [2002] FCA 1555 (13 December 2002).

The correct approach to interpreting s 190B(5) has now been determined by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. The Full Court considered the interaction between ss 62 and 190A, the former mandating the requirements for commencing an application and the latter establishing the registration test regime. The Full Court held (at 340/[90]) that:

> *"… the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit."*

The Court then dealt with the nature and quality of the information required by s 62, and in particular the details required by s 62(2)(e). It should be noted that the matters referred to in s 62(2)(e)(i), (ii) and (iii) are worded almost identically to s 190B(5). The Full Court said (at 340-341/[92]):

"The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more

than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim."

The Full Court (at 341/[93]), went on to observe that if the primary Judge "*approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim … then it involved error*."

Nonetheless, a delegate or Member on reconsideration, must be provided with more than mere restatements of the claim. This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* (2009) 182 FCR 63 (*Gudjala (2009)*), 71/[29] as follows:

"… 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."

Materials considered

[100] Deputy President Sosso in Swan River People #2 (WAD24/2011; WC2011/002), [73] also observed that a delegate, or Member on reconsideration, is not limited to considering material contained in the application. In *Doepel*, 119/[16] Mansfield J said: 'section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant.'

[101] Thus, in undertaking my assessment of the requirements of s 190B(5) I have had regard to the material outlined by the delegate in her reasons for decision. In addition I have also had regard to the Addendum of (Anthropologist 1) dated 30 August 2014, the additional material provided by (Name deleted) on 13 September 2014 on behalf of the applicant, the comments of the State Solicitor's Office on behalf of the State of Western Australia dated 1 October 2014, and the reply to the comments by the State of Western Australia provided by (Name deleted) and dated 6 October 2014.

[102] The delegate was of the opinion that:

a. although there is a sufficient factual basis for the assertion that the native title claim group have an association with the area, the factual basis is not sufficient to support an assertion that their predecessors had an association with the area (the second part of the assertion found in s 190B(5)(a));

b. the factual basis is not sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests (the assertion of s 190B(5)(b)); and

c. the factual basis is not sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs (the assertion of s 190B(5)(c)). (Page 10/[43])

Subparagraph 190B(5)(a)

[103] This sub-condition of s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the application area. Generally, this would require that the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. I do not take this to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) (*Gudjala*) [52].

[104] More recently in *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013) [39], Siopis J affirmed the principles stated by French J (as the Honourable Chief Justice then was) in *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) (*Martin*) that the factual basis must be sufficient to support the assertion that the native title claim group and the predecessors of those persons have an association with the whole area covered by the application [31].

[105] The delegate at Page 12-13 ([51]) says that:

> Although I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group has an association with the area, I am not satisfied that the factual basis is sufficient to support an assertion that the predecessors of those persons had an association with the area.

Claim group's association with the area

[106] Although the delegate was of the view that the general description of the factual basis on Schedule F is a mere restatement of the assertion of s 190B(5), she concluded that this was ameliorated by what was contained in Schedules G and M which in turn lent support to the sufficiency of the factual basis for the assertion of current association by the native title claim group with the area. At page 13 ([54]) the delegate says:

> The (Anthropologist 1) and (Anthropologist 2) reports address the factual basis for the assertion that the native title claim group have an association with the area and provide further substance to the assertions in Schedules G and M on this topic. The reports provide information that chronicles the life histories of the claimants and those in the generation above them, as relates to places within the application area. In my view, the information I have considered is overall sufficient to support an assertion that the persons in the native title claim group have an association with the area.

[107] Based on my assessment of the material I have reached the same view.

Predecessors association with the area

The delegate's view of the factual basis material

[108] As discussed above, the delegate at Page 14 was satisfied that the materials speak in sufficient detail about the descendents of Kitty Bluegum having an association with the area. She says that '... particularly when I consider the information in Schedules G and M of the application and the life histories of the persons in the claim group presented in the (Anthropologist 1) and (Anthropologist 2) reports. In my view, the persons discussed and the places named speak of an association by the native title claim group as a whole and that is of a sufficiently broad compass in relation to the whole area' (Pages 14-15 ([58]).

[109] While not specifically addressed in its material it would seem to me that the applicant would support this conclusion, but perhaps for different reasons i.e. the applicant might say that based on the same details at Page 15 and 16, rather than the 'descendents of Kitty Bluegum', it is the 'predecessors of the claim group' who have the association with the whole area.

[110] Although the delegate did not consider the association of the predecessors with the whole of the area as necessary for the purposes of 'current association', she did conclude that the information provided in the (Anthropologist 2) and (Anthropologist 1) reports did not provide a sufficient factual basis for the assertion that the predecessors of the native title claim group had an association with the whole of the area covered by the application. In the delegate's view '[i]t does not in my view, assist to provide a sufficient basis for the assertion that the predecessors of the native title claim group had an association beyond the areas discussed above. In fact it appears to show that the predecessors of the claim group were, at the time of settlement in the early to mid 1890's, a local descent group with a particular association around Edjudina' (Pages 23/[91]).

[111] The delegate at Page 17 ([66]) refers to the date of sovereignty in Western Australia and the assertion that sustained contact in the region did not take place until the early to mid 1890's. The delegate observes from the factual basis material that the known predecessors alive around the time of sustained contact are the group's apical ancestor, Kitty Bluegum, her father (Name deleted) and her siblings (Name deleted) and (Name deleted), with the assertion being that these predecessors had an association with the whole area covered by the application at this time and that an inference is that 'the situation before sovereignty in 1829 would not have been materially different.'

[112] Thus, the delegate notes that '[a]t best, it is my opinion that the information is only supportive of an assertion that the predecessors had an association with the northerly and easterly reaches of the application area around Edjudina, extending south and southwest to Pinjin and Kanowna respectively' (Page 19/[74]).

[113] The delegate also considered the sufficiency of the historical sources and material, such as the reference to Tindale's work and whether that information provided a factual basis that supported the assertion the predecessors were associated with a wider area beyond those such as Edjudina and Pinjin.

[114] The delegate says that the claimants assert that Tindale's map matches their own understanding of Maduwongga boundaries (except for the strip of country from Lake Raeside to Londonderry). In relation to that 'strip of country', at Page 20 the delegate observes that 'Tindale's notes indicate that Pinjin is a place where the Maduwongga had an

association. Pinjin lies within the north of the strip of country outside Tindale's southern boundary, proximate to Edjudina.'

[115] The use of the adjective "proximate", in my view, suggests that Tindale is referring to Edjudina and Pinjin stations, rather than fixed locations.

[116] The delegate, again at Page 20 ([82]), says that information regarding the association with these stations 'lends support to an assertion that the predecessors of the native title group had an association in the north-east of the application area, around Edjudina and Pinjin and Mulgabbie, which continued in the generations after Kitty.' Accordingly, the sufficiency of these facts to support the association of the predecessors with that strip of country seems to have been accepted by the delegate and it is accepted by me.

[117] The delegate made observations about the lack of any specificity in the facts 'about (Name deleted) and Kitty's asserted association with areas between Kanowna and Menzies' (Page 22/[85]). After setting out Tindale's notes as they relate to (Name deleted) and country around Kanowna, Ora Banda, Callion, Davyhurst and Coongarrie, the delegate states that '[t]hese places are all in the west of the application area, for which there is no detailed information to support that the group's predecessors, Kitty and (Name deleted), had an association' (Page 22). In the delegate's view, even were Tindale's notes sufficient to support an association with country around Kanowna in the south to Menzies, 'there are still tracts of country west of the line from Kanowna to Menzies, for which there is no information to support an assertion that the predecessors of the native title claim group had an association there' (Page 22/[84])).

The applicant's submissions about the sufficiency of the factual basis in support of s 190B(5)(a)

[118] The applicant in the submission dated 13 September 2014, asserts that as 'the delegate found that the (Anthropologist 1) and (Anthropologist 2) reports provide information that 'chronicles the life histories of the claimants and those **in the generation above them**' then it follows that '[t]hat finding could be regarded as sufficient in itself to reach a conclusion that the predecessors' of the native title claim group had an association with the area' ([7] to [8]).

[119] The applicant emphasised the words 'in the generation above them' as a 'finding [which] could be regarded as sufficient in itself to reach a conclusion that the predecessors of the native title claim group had an **association with the area, for** the purposes of s 190B(5)'.

[120] The applicant in its submission dated 13 September 2014 suggests that for s 190B(5)(a), predecessors need be no more than the 'generation above' to satisfy the requirement and that it would not be reasonable to require that the predecessors be interpreted as all predecessors. The applicant, in their material of 13 September 2014, say: 'It is open for the delegate to have concluded that one generation of predecessors with an association with the area is sufficient to satisfy the requirements of s 190B(5)(a).

[121] The applicant argues that the native title claim group's apical ancestor Kitty Bluegum had an association with the area of the application. At paragraph [18] the applicant says:

The delegate identified, at [42], that the assessment process is to 'address the quality of the asserted factual basis for [the] 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' and 'it is not for the Registrar 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' (emphasis added): Mansfield J in *Doepel*, 120/[17]; approved in *Gudjala FC, 338*. However, the delegate has failed to correctly apply that test, in that the delegate has –

(a) failed to take into account in her conclusion facts which **can** support the existence of the claim of an 'association with the area' of 'the predecessors' of the native title claim group, i.e.,

(i) the presence of Kitty Bluegum in the vicinity of the north-west boundary of the claim, in Kalgoorlie and in Kanowna at the times of the birth of her respective children;

(ii) the presence of Kitty's father (Name deleted) in Coolgardie when he first met (Name deleted) and (Name deleted) subsequent introduction of Walter Newland to Edjudina;

(iii) the possible presence of Kitty's sibling, (Name deleted) in Coolgardie; and

(iv) the factual basis of the association with the whole of the claim area of the native title claim group **and their immediate forebears** (being the descendents of Kitty Bluegum and 'predecessors' of the native title claim group), which the delegate found to be the case at [52] to [62], and from which an inference ought to have been drawn that the generation immediately above had the same association with the whole of the claim area.

(b) made an assessment, at [90], of the **strength** of **some only** of competing evidence which may ultimately be adduced to establish the asserted facts, when, at [90], she weighed the evidence of the Tindale maps and the evidence of information passed down from the generation above the current applicant group (without considering whether an inference might be drawn that the immediately prior generation is more likely than not to have obtained the information from a preceding generation) against information in Tindale's notes which the delegate found, at [85], lacked detail as to certain areas and, at [86], Tindale's journal entry that: 'It is **possible** therefore that the Kala:maia boundary of my map [1940] should be placed a little further to the south-east' (emphasis added); and

(c) declined, at [89], to take into account evidence of the possible presence of (Name deleted), a sibling of Kitty Bluegum, in Coolgardie as evidence of association of a predecessor with the area has acted unreasonably, in the sense identified by the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [76], i.e., it lacked an evident and intelligible justification.

[122] However, the applicants submission dated 13 September 2014, suggests that the apical ancestor Kitty Bluegum had an association to certain areas but not necessarily the whole of the area. In particular Kitty's association with Edjudina; Kitty's father (Name deleted) who met (Name deleted) in Coolgardie (in the south west of the application area) and guided him to Edjudina soaks (in the north east) where (Name deleted) was granted the first lease in the area; and, the birth of Kitty's children in Menzies (just beyond the northern border) and in Kalgoorlie and Kanowna in the south mid-western portion of the claim area.

The State's submissions about the factual basis of the claim

[123] The State makes brief submissions about the factual basis of the claim, the delegate's decision and the additional material provided by the applicant.

[124] In the State's view, it does not consider that the applicant has 'identified any legitimate difficulty with the delegate's conclusion that the Applicant does not provide sufficient evidence that the predecessors of the claim group had an association with the whole of the claim area'. Accordingly, the applicant's factual basis 'does not support a conclusion that Kitty Bluegum, (Name deleted) or any other predecessor of the claim group had an association with land or waters other than in the north-easterly portion of the claim area' (Page 2).

[125] In respect to the Addendum provided by (Anthropologist 1), the State submissions assert that this 'merely restates her original opinions about Kitty Bluegum's likely membership of a local descent group whose territory may have been located near Edjudina. (Anthropologist 1) is heavily devoted to addressing (but, with respect, not resolving) the difference between her and (Anthropologist 2), with respect to whether or not the claim area is or not subject to Western Desert law and custom' (Page 2).

[126] The State submissions also refer, specifically, to Page 31 of the Addendum of (Anthropologist 1), referring to these as 'wildly speculative' (Page 2).

The factual basis in the (Anthropologist 1) and (Anthropologist 2) Reports (including the (Anthropologist 1) Addendum dated 30 August 2014)

[127] There are 3 written descriptions of Maduwongga locations, and Tindale's 1940 map referred to in the materials:

a. Genealogy sheet 118 for Kitty Bluegum (handwritten note): 'Madu wongga, Linden, Mulline, Pinjin, Kanowna and nearly to Menzies. Came from East. See also sheet 110'
b. Field journal note 1938-39: 'The Maduwongga are around Kanowna, extending to Pinjin, Linden in the north occasionally to Murrin Murrin and nearly to Menzies (recently). They originally came from the Spinifex country to the east of the present location. They drifted in at the time of the first gold rush (middle 1890's).
c. Tindale (1974:246) described the distribution of the Maduwongga as follows: 'From Pinjin on Lake Rebecca west to Mulline; from a few miles south of Menzies to Kalgoorlie, Coolgardie, Kanowna, Kurnalpi and Siberia. Statements suggest a protohistoric movement to the east displacing Kalamaia people west to beyond Bullabulling. Their language was called ['Kabul'] and it was understood as far west as Southern Cross.'
d. The 1940 map is similar to the claim map, but for the area in the south east from Lake Raeside to Londonderry.

[128] The written description in the genealogy sheet and the field journal are similar and might suggest the 4 corners of country being in the vicinity of Menzies, Linden, Pinjin and Kanowna. They differ in their references to Mulline (on the genealogy sheet) and Murrin Murrin (in the field journal). Mulline is near the north west corner of Tindale's (and the

claimants') map approximately 68km west of Menzies, while Murrin Murrin is a significantly further distance north of the northern claim boundary.

[129] The 1974 description refers to 'the distribution of the Maduwongga' and the places referenced do not appear in a sequence which would allow them to represent the coordinates of a particular area.

[130] All written descriptions are in the nature of place names (mostly towns associated with gold mining, except for Pinjin which may be a place name and also a pastoral station) rather than coordinates. Curiously, none of them refer to Edjudina. (Anthropologist 1) at Page 16 of her Addendum says that 'The place names (above) represent the area where these people were living at the time of interview.'

[131] The only locations within the claim boundary 'west of a line from Kanowna to Menzies' which appears in the written descriptions are Siberia (Tindale 1974:246) and perhaps Mulline (Genealogy sheet 118).

[132] In the 13 September 2014 submissions the applicant says it is not for the (delegate), and presumably a Member in reconsidering the claim, to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may be adduced to establish the asserted facts, and concluded that the delegate failed to correctly apply the test because of:

a. the presence of Kitty Bluegum in the vicinity of the north west boundary of the claim, in Kalgoorlie and in Kanowna at the times of the birth of her respective children;
b. the presence of Kitty's father (Name deleted) in Coolgardie when he first met (Name deleted) and (Name deleted) subsequent introduction of (Name deleted) to Edjudina;
c. the possible presence of Kitty's sibling, (Name deleted) in Coolgardie; and,
d. the factual basis of the association with the whole of the claim area of the native title claim group and their immediate forebears (being the descendents of Kitty Bluegum and 'predecessors' of the native title claim group), which the delegate found to be the case at [52] to [62] and from which an inference ought to have been drawn that the generation immediately above had the same association with the whole of the claim area.

[133] In relation to the birth of Kitty's children, (Name deleted) was born in 1900 in Menzies, (Name deleted) was born in 1902 in Kalgoorlie, and (Name deleted) was born in 1910 in Kanowna. Menzies is a short distance north of the northern boundary and approximately 68km ('as the crow flies') from the north-west border as indicated on the map. Apart from Tindale's reference to Mulline on genealogical sheet 118 and his 1974:246 reference, there is no other reference to that area in any of the material.

[134] Accepting, for the moment, the presence of Kitty's father (Name deleted), and possibly her sibling (Name deleted) in Coolgardie, and, the birth of (Name deleted) in Kalgoorlie, as sufficient to be satisfied of the requisite association, apart from Tindale's map there is no material to support an association by identified Maduwongga predecessors with a large part of the north-western portion of the claim.

[135] In her 30 August 2014 Addendum, (Anthropologist 1) addresses this issue.

> Area 'west of a line from Kanowna to Menzies' (as described by the delegate, Page 22)

[136] This area might best be described as the area within the claim boundary west of the Kalgoorlie to Leonora Road, the southern reaches being approximately the relevant point of latitude of Kalgoorlie.

[137] Within this area are places referred to in the reports of (Anthropologist 1) and (Anthropologist 2), and the notes and field journal of Tindale. In particular, Mulline (near the north west corner), Callion, Daveyhurst, and Goongarrie in the northern half of this area, and, Siberia and Ora Banda in the south central part of this area.

[138] The delegate at Page 22-23 ([87]) in reference to this area says:

> The point I make is that Tindale spoke to Kalamaia informants in 1939 (presumably around a similar time that he spoke to Kitty and others who informed his genealogical entries for her and her kin) and then again in 1966. These Kalamaia informants identified Kalamaia places in the westerly reaches of the Maduwongga application area. These places are found in that part of the application area north and west of Kanowna for which there is no detailed information to support an assertion that the predecessors of the Maduwongga claim group had an association there at the time of sustained contact in the early to mid 1890's.

[139] (Anthropologist 1) at Page 21 of her 30 August 2014 Addendum accepts that the point made by the delegate is valid and important.

[140] According to (Anthropologist 1), (Name deleted), who is referred to as a Kalamaia informant, told Tindale in 1966 that his grandfather claimed a territory between Kanowna, Ora Banda, Callion, Davyhurst, and Goongarrie. (Anthropologist 1) says this area 'possibly touched onto the Kalamaia boundary west of Callion'. (Anthropologist 1) said the area is contiguous to (Name deleted)'s estate as it shares a boundary at Kanowna, and overlaps (Name deleted)'s territory which extended north to somewhere near Siberia (from Gnarlbine near the south west corner of the claim boundary and east to Carr Boyd's waterhole).

[141] (Anthropologist 1) at Pages 27-28 of her 30 August 2014 Addendum, after presenting certain information says that 'we now have three sets of independent factual data with which to establish the boundaries and overlaps of four estates contained within the Claim Area: (Name deleted) grandfather's, (Name deleted)[1], (Name deleted), and the totemic estate of (Name deleted) mother Kitty and her father, (Name deleted).

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[1] [1] It is suggested that (Name deleted) had an association with some of the north west of the claim area, namely Siberia and the swamp west of Coongarrie (Tregurtha 1996; (Anthropologist 1), 2012:44). There is an account by Tregutha in 1893 of (Name deleted) then aged around 60 years old being unwilling to travel beyond Carr Boyd's waterhole to the east – an area wholly within and towards the centre of the claim area. This it is suggested was (Name deleted) tribal district of his patrilocal descent group – but wholly within the claim area. As a younger man it was said he travelled much further. If it was accepted that (Name deleted) was a member of a Maduwongga patrilocal descent group, the extent of country in the west, perhaps reaching Siberia, is not so extensive as to associate his descent group with the whole of the north west.

(Name deleted)'s grandfather

[142] (Anthropologist 1) in her 30 August 2014 Addendum, Page 21, writes that:

> In 1939, Tindale identified (Name deleted)'s mother, (Name deleted), as Kalamaia and his father (Name deleted) as being from Coolgardie (sheet 117). In the 1966 interview, however, (Name deleted) explained to Tindale that his father was raised in Fraser Range and that he had moved to Coolgardie after his marriage, and that his father's father's country was located around Kanowna, Ora Banda, Callion, Davyhurst, and Goongarrie (Tindale, 1966, 229-233; cited in (Anthropologist 2) - Hales, 1998, 25).

[143] (Anthropologist 1) also discusses issues around language. In summary, (Anthropologist 1), refers to Tindale notes that (Name deleted) spoke Kabul. (Anthropologist 2) considered Kabul to be a derivative of Kabun which (Name deleted) called Gabrun – an alternative tribal name for Kalamaia; and that his (Name deleted) father's father spoke Kalamaia. This was in 1966, the boundaries of Maduwongga country were mapped by Tindale in 1940 (Page 22).

[144] Of this, (Anthropologist 1) notes that 'Tindale did not alter his boundaries. He simply concluded that (Name deleted)'s grandfather was Maduwongga, and that the Maduwongga therefore spoke Kabul' (Page 22). In that regard, (Anthropologist 1) deduces that 'Tindale had more confidence in his geographical than his ethnographic data. Therefore, Tindale accepted (Name deleted)'s information but he concluded that his grandfather was Maduwongga' (Page 23).

[145] According to (Anthropologist 1) there are two most likely explanations, which can account for (Name deleted)'s grandfather speaking a Kalamaia language and claiming country in Maduwongga territory – that he was a Maduwongga man who spoke Kabul because he resided among Kalamaia as a child, or, that he was a native Kabul speaker and therefore a Kalamaia man who married into the Maduwongga. (Anthropologist 1) said that she is inclined towards the second explanation – despite the assumptions regarding Tindale's conclusions in the paragraph above (Page 26).

[146] (Anthropologist 1) presents an argument based on the presentation of genealogies prepared by Tindale that there are examples of persons who married into the Kalamaia, moved into Kalamaia country and their descendents become Kalamaia[2]. In genealogy sheet 117 next to the name of (Name deleted)'s father (Name deleted) is written 'Coolgardie' and no tribal identification is given. (Name deleted)'s grandfather is not listed in this genealogy. (Anthropologist 1) suggests that this "implies that (Name deleted) was the first paternal

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[2] The example (Anthropologist 1) provides is that of (Name deleted) who was an Inggarda man from the region of Shark Bay (Tindale sheet 116) who was born circa 1864, married into the Kalamaia and remained in Kalamaia country – and all (Name deleted) descended from (Name deleted) have since claimed 'country' in Kalamaia territory and all descendents identify as Kalamaia (page 25 (Anthropologist 1), Addendum). (Anthropologist 1) says that the genealogy of the Champion family shows that inter-tribal marriage could lead to an individual's naturalisation into his affinial group.

ancestor to connect to the Kalamaia, and that he did so through his marriage to (Name deleted), (Name deleted)'s mother".

[147] The suggestion put forward by (Anthropologist 1) appears to be that although Kalamaia, (Name deleted)'s grandfather married into the Maduwongga and, like (Name deleted), subsequently claimed country in Maduwongga territory. However, unlike (Name deleted) in relation to Kalamaia country, (Name deleted)'s grandfather did not remain in Maduwongga territory. (Name deleted) grandfather's ancestors including (Name deleted) identified as Kalamaia to Tindale and he is identified as Kalamaia by his ancestors and other Kalamaia persons today (Page 26-27 (Anthropologist 1) Addendum). The factual basis material does not suggest that (Name deleted) grandfather's descendents do not identify as Maduwongga.

[148] (Anthropologist 1) states that that '[i]t is possible that (Name deleted)'s father ((Name deleted)'s grandfather) moved from Maduwongga country at the time of the gold rush, and on account of the gold rush'. This (Anthropologist 1) further suggests saw (Name deleted) raised in Fraser Range among the Kalaago for traditional reasons. Fraser Range is to the east of Norseman, a distance to the south east of the Maduwongga claim area, an even further distance from Kalamaia country (Page 24).

[149] There is nothing in the material by which to identify (Name deleted) grandfather's wife – or if she was or identified as Maduwongga. The Kabul language, it appears, is a Kalamaia language and not a Maduwongga language. Tindale misattributes the Kabul language to the Maduwongga – as spoken by (Name deleted)'s grandfather whom he 'concluded' was Maduwongga. (Anthropologist 1) suggests that through marriage he may have been 'naturalised' Maduwongga thereby explaining his fluency in Kabul and his claim to Maduwongga territory. (Anthropologist 1) does not argue that the territory in the north west of the claim might be Kalamaia, nor supportive of theories that the Maduwongga were from the east displacing Kalamaia people to the west. (Anthropologist 1) notes that having considered these possibilities Tindale did not alter his boundaries as seen in the 1940 map.

[150] (Anthropologist 1)'s Addendum (Page 7) refers to Aboriginal laws and customs where a man may claim totemic birth territory (associated with his father's totemic estate), he also has territorial claims to an initiation territory, and he has hunting rights in his wife's estate as well as hunting rights in the estates of his maternal grandmothers and other predecessors. The position regarding (Name deleted)'s grandfather (as a Kalamaia man claiming an interest in Maduwongga country) suggested by (Anthropologist 1) seems to be the 'naturalisation' theory, rather than a usufructory right based on marriage.

[151] It would appear from the factual basis material that no descendent of (Name deleted) or his grandfather claim to be Maduwongga, and accordingly, (Name deleted)'s grandfather is not included as an apical ancestor for the purposes of Schedule A to the Native Title Determination Application. Accordingly, it is not suggested that (Name deleted)'s grandfather is himself a predecessor of the claim group. The applicant's argument would appear to be that despite being Kalamaia, he was a 'naturalised' Maduwongga man, and that the north west of the claim area was at the time of substantial contact Maduwongga country, and that this is supported by the Tindale map. Further, the fact that no members of the claim

group who are descended from predecessors physically associated with that part of the claim area are members of the claim group matters not.

(Name deleted) and the factual basis to support the assertion that the group's predecessors had an association dating back to sovereignty

[152] As discussed at paragraphs [140] and [141] above, (Anthropologist 1) suggests that there are at least four parti-local groups which can be established across the entire claim area. (Name deleted) grandfather's, (Name deleted), (Name deleted), and the totemic estate of (Name deleted) mother Kitty and her father, (Name deleted) (Page 28 of ADDENDUM).

[153] (Anthropologist 1) in her Addendum speaks to the concept of the tribe as it applies to the Maduwongga, which she asserts is significant to understanding the extent of the Maduwongga tribal boundaries. Accordingly, (Anthropologist 1) concludes that 'any given individual member in such a tribal society has access to large parts (if not all) of the entire territory, subject to certain traditional restrictions in some specific locations' (Page 9). This links in with (Anthropologist 1)'s assessment of the 'patrilocal group' (such as the one with Kitty Bluegum as its apical) and the extent of country.

[154] (Anthropologist 1)'s Addendum (Page 8) talks of the collective territories organised on the basis of internal boundaries forming zones of exclusivity. Birth rights, ritual rights and marriage connections give rise to traditional territorial claims the borders of which lie at the linguistic, topographic, ecological, and endogamous 'tribal' limits. A patri-local group, such as that to which Kitty Bluegum belonged, 'would not account for the whole tribe (or equate to the whole society) because it is an exogamous unit'. She says '[t]he system demanded that marriage exchanges take place between at least two patri-local groups, whose own members will therefore have claims to various territorial rights in two or more estates'. Thus, '[i]n other words, women born into an estate holding group must marry out to men who belong to other patri-local groups, who belong also either to the correct moiety classification system (Maduwonga, Kalamaia, and Kalaago) or the correct skin group (the section system of the western desert)' (Page 9).

[155] On the basis of the above, (Anthropologist 1) concludes in the Addendum that 'if the claimants' predecessors could name their totemic estate at Edjudina, in the eastern region of the claim' then it follows that 'they necessarily had social, economic and ritual ties to territories in the western, southern and central regions of their own 'country', regions established on the basis of the various connecting ties (common language, degrees of kinship, affinal ties and descent) with members of co-tribal patri-local groups' (Page 10).

[156] So, if it is accepted that Kitty's local descent group were a patri-local group of the Maduwongga, and (Name deleted)'s grandfather (or at least his Maduwongga wife) was a member of a patri-local group of the Maduwongga, then that is sufficient to satisfy, Kitty, as a predecessor of the claim group, had an association with the whole of the area – even though she may have identified as a person from the eastern region of the claim area.

Consideration

[157] I note that the State's submissions may be taken to suggest that I have a rigorous role in examining the material as 'evidence' and its accuracy to support the actual conclusions that are set out in (Anthropologist 1)'s report.

[158] The task, as I understand it, is more confined than that. The law that must guide my consideration has been referred to above. Generally, I understand that it is not my task here to weigh and assess the applicant's factual basis as if it were evidence before the Court – *Doepel*, 120/[17].

[159] Rather, I am to consider whether, if the facts are true, they are sufficient to support the assertions at s 190B(5). The task, however, does require me to consider whether the information provided is more than merely assertive and that there are sufficient and specific facts which support the assertions. In *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (7 November 2012), [48] in considering the contents of a report prepared for the purpose of the claimant's factual basis, Cowdrey J observed that the contents of that expert report were largely assertive providing limited facts to support the actual claimed conclusions, and thus did not assist in providing sufficient facts to support the assertions in s 190B(5).

[160] Having reviewed the material myself I have similar to the delegate formed the view that the factual basis is sufficient to support the assertion that the predecessors had an association over the eastern portion of the claim area (including the strip of country from Lake Raeside to Londonderry not seen in Tindale's map), extending in a westerly direction. I accept that, at least through their association with Edjudina and Pinjin stations, the eastern boundary, and the north east and the south eastern extremities are areas for which there are sufficient facts to support that the predecessors may be said to be associated.

[161] The delegate at Pages 20 to 21 also said that the material was supportive of an assertion that the predecessors association could extend to Kanowna (in the southern portion towards the west, north east of Kalgoorlie). The delegate notes that Tindale's records refer to Kanowna as a place associated with Maduwongga and that Kitty gave birth to (Name deleted) there. Accordingly, the delegate formed the view that 'this lends support to an assertion that Kitty had an association which stretched west of Edjudina and Pinjin to Kanowna' and that it could be inferred that this association dated back to the settlement era (Page 21/[83]). Again, I have reviewed the material and I am of the view that the factual basis is sufficient in this regard.

[162] However, as the delegate notes in her reasons for decision 'an association by Kitty from Edjudina to Kanowna still encompasses a part only of the overall area covered by the application' (Page 21/[83]).

[163] As noted above, the applicant submits that it is not reasonable to interpret predecessors in s 190B(5)(a) as being 'all predecessors' and asserts that claim group members may have predecessors from other areas not included in a particular claim (applicant's submissions dated 13 September 2014, Page 2). I accept that in some instances that may be the case.

[164] The applicant also asserts that it is open to conclude for the purpose of s 190B(5)(a) that if one generation of predecessors has an association with the area, this will provide a sufficient

factual basis to support that assertion. Further, as the delegate found that the children of Kitty Bluegum were born in areas around the north-west boundary, in Kalgoorlie and Kanowna the applicant asserts 'the delegate ought to have concluded that the native title claim group's apical ancestor Kitty Bluegum had an 'association' with the area of the application' (applicant's submissions dated 13 September 2014, Page 2).

[165] I don't consider that the delegate made such findings for the purpose of s 190B(5) as this condition does not permit the making of any findings of fact by the Registrar, his or her delegate, or a Member of the Tribunal in reconsideration. The task is simply confined to assessing whether the facts, if they are true, are sufficient to support each of the assertions at s 190B(5). The delegate formed the view that the factual basis was sufficient to support that Kitty Bluegum's children were associated with parts of the north-west boundary.

[166] (Anthropologist 1)'s report and Addendum set out that under the traditional laws and customs of the claim group there were multiple pathways to acquiring rights and interests in land. This is emphasised in the Addendum, where (Anthropologist 1) states that 'patrilocal subgroups are *exogamous*, and territorial claims are therefore dynamic: beginning in the birthplace (father's estate), extending in space through marriage (wife's estate) and upholding in time through descent and reciprocity (mother's estate and other predecessors'). In addition to the land claims obtained through kinship, there are also rights obtained through initiation and ritual' (Page 7).

[167] As I understand from the factual basis in (Anthropologist 1)'s report and Addendum, the most pertinent facts that are said to support the assertion that the predecessors of the group were associated with the whole claim area appear to be those that relate to the birth place of Kitty's two daughters. Beginning on Page 31 of her Addendum, (Anthropologist 1) asserts that 'we are now in a position to confirm the traditional and customary processes that can establish the Claimant's predecessor's own territorial claims across the entire Claim Area' (Addendum, Page 31). Following this, (Anthropologist 1) sets out the facts as they relate to Kitty's assumed marriage to an Aboriginal man of another patrilocal group who held title to another estate (presumed to be within the western region of the claim area where Kitty gave birth to two daughters). Kitty gave birth to her daughters in the western regions of the claim in the early 1900s (1900 and 1902) and, according to (Anthropologist 1), there is no question that this was a period of time in which the Aboriginal people in the area were still engaging in traditional cultural life, and thus this supports the assertion that the predecessors were associated with the whole area (Addendum Pages 31 to 32). Accordingly, this is said to support the position that all of Kitty's descendants have legitimate rights over the entire Claim Area.

[168] This appears to link to the applicant's submissions of 13 September 2014 that as the delegate had been satisfied of the generation above the current claimants and their association (i.e. the association of (Name deleted) and his sisters) then clearly predecessors of the claim group had an association with the claim area (Page 2).

[169] I note that in outlining the facts about the association of Kitty's children, the delegate placed this in her summary of the current association of the claim group rather than her outline of the association of the predecessors. Upon my understanding, whilst the facts around the

association of Kitty's children do reflect in some regard the historical nature of the association, I similarly am of the view that these asserted facts do not go to supporting the association of the 'predecessors' to which s 190B(5)(a) refers.

[170] In my view, the relevant 'predecessors' that are identified in the factual basis, being those in the area around or close to the period of sovereignty or contact are (Name deleted) and his children, including Kitty Bluegum, (Name deleted) and (Name deleted). In that regard, there is a dearth of material that supports the assertion that these and/or other predecessors of the native title claim group were associated with the whole claim area.

[171] In the 13 September 2014 submissions the applicant says that the delegate failed to correctly apply the test in s 190B(5)(a) because of the presence of Kitty Bluegum in the vicinity of the north west boundary of the claim, in Kalgoorlie and in Kanowna at the times of the birth of her respective children; the presence of Kitty's father (Name deleted) in Coolgardie when he first met (Name deleted) and (Name deleted) subsequent introduction of (Name deleted) to Edjudina; the possible presence of Kitty's sibling, (Name deleted) in Coolgardie. However, there is no material sufficient to support the association of these predecessors to the north west of the claim area.

[172] I note that (Anthropologist 1)'s Addendum does not provide any additional information about the association of these persons (being the identified 'predecessors') with the whole claim area, but rather appears to focus on the Kitty's children and what inferences can be reasonably made around their association. Even accepting those as true, which I do, these facts for the reasons noted above are not sufficient to support the assertion that the predecessors were associated with the whole area.

[173] Whilst (Anthropologist 1)'s Addendum provides additional information in relation to the laws and customs of the tribal and patrilocal unit and how rights and interests were acquired in land – such as acquiring rights and interests over areas extending from birth country to marriage (wife's estate) initiation country– there are no or insufficient facts to support that this was the case with the group's predecessors. That is, that Johnny married someone connected with the western region of the claim area or that he was initiated outside Edjudina, or similar asserted facts in relation to his children. I do acknowledge that (Anthropologist 1) does suggest that Kitty married a man associated with the western regions of the claim where her two daughters were born, at least near Menzies and Kanowna.

[174] The person referred to in the material most strongly associated with the north west of the claim area is (Name deleted)'s grandfather. (Anthropologist 1) suggests that the most likely scenario is that (Name deleted) was Kalamaia and that his association with the area in the west comes from him being married to a Maduwongga woman – however, there appear to be no facts to support this assertion.

[175] The other person whom it is suggested had an association with some of the north west of the claim area, namely Siberia and the swamp west of Coongarrie, is (Name deleted) (Tregurtha 1996; (Anthropologist 1) 2012:44). There is an account by Tregutha in 1893 of Jacky then aged around 60 years old being unwilling to travel beyond Carr Boyd's waterhole to the east – an area wholly within and towards the centre of the claim area. This it is suggested was (Name

deleted) tribal district of his patrilocal descent group – but wholly within the claim area. As a younger man it was said he travelled much further. If it was accepted that (Name deleted) was a member of a Maduwongga patrilocal descent group, the extent of country in the west, perhaps reaching Siberia, is nevertheless not so extensive as to associate his descent group with the whole of the north west.

[176] I accept that the factual basis is sufficient to support the assertion that Kitty's local descent group were a patrilocal group of the Maduwongga. It necessarily follows that a possible favourable inference is that there must be other patrilocal groups of the Maduwongga for the structure to exist. The information relating to the location of the birth of Kitty's children places her at other points within Maduwongga country, some distance from Edjudina, but not in the north west. I accept that the factual basis is sufficient to support the assertion that the association of Kitty with areas to the east of the Kalgoorlie to Leonora Road, which includes areas into which it is suggested (Name deleted) and (Name deleted) were particularly associated. I also accept that the factual basis is sufficient to support the assertion of an association with the areas in and around Coolgardie for the same reasons.

[177] However, the material to support the assertion that there was an association by the predecessors to the claim group with the remainder of the area, in the north west, in my view is not sufficient.

[178] Accordingly, I am not satisfied that the factual basis provided is sufficient to support the assertion in s 190B(5)(a).

Subparagraph 190B(5)(b)

[179] I repeat and adopt paragraphs [103] and [104] of the reconsideration decision of Deputy President Sosso in Swan River People #2 (WAD24/2011, WC2011/002) which is identical to Tjiwarl (WAD228/2011, WC2011/007) [203] and [204]:

> It will be noted that the wording of s 190B(5)(b) is almost identical to paragraph 223(1)(a) which is part of the section defining native title rights and interests. In undertaking a s 190B(5)(b) assessment, therefore, close attention needs to be placed on the relevant authorities explaining the operation of s 223(1)(a). Of most significance in this regard is the decision of the High Court in *Yorta Yorta Community v Victoria* (2002) 214 CLR 422. I adopt for the purposes of this reconsideration the statements of law found at paragraphs [46] – [47] and [86] – [87] of the lead judgment.
>
> Of further assistance is the useful summary of the *Yorta Yorta* principles by Dowsett J in *Gudjala,* [26]. This analysis was not overturned by the Full Federal Court on appeal, and I adopt it for the purposes of this aspect of the reconsideration. I have also found helpful the following summation by Dowsett J in *Gudjala* (2009), 70 of what is required to demonstrate traditional laws and customs for the purposes of the definition of 'native title' and 'native title rights and interests':
>
> - *"a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;*

- *that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and*
- *that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs."*

[180] Deputy President Sosso also notes that the Full Federal Court in *Gudjala FC*, 343, did indicate that it is necessary for a delegate to be satisfied that at sovereignty there was an Indigenous society in the claim area observing identifiable laws and customs. The Full Court also held that it would be an error to approach a s 190B(5) assessment 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim' — 341.

[181] Thus, as I understand from the above I need to be satisfied, pursuant to s 190B(5)(b), that I have material before me that is sufficient to support the assertion that the traditional laws and customs currently acknowledged and observed by the claim group are rooted in the traditional laws and customs of a society in existence at sovereignty over the area of the claim and which has continued in existence in a substantially uninterrupted form since sovereignty to the present day.

[182] Plainly it is not the role of a Member reconsidering a claim made in an application to engage in a 'second guessing' exercise or to impose on an applicant too high a burden. Instead all I need do is look at the material, whether positive or prejudicial, and form a view in accordance with the statutory mandate. In doing so I should not analyse material with a view to ascertaining its probative strength or weakness.

[183] The delegate says that, in her view, the factual basis is not sufficient to support the assertion of s 190B(5)(b) (Page 24/[92] of the delegate's reasons). In that regard, she refers to 'a common refrain' throughout the (Anthropologist 1) report and other factual basis material provided by the applicant as being 'that the particular area or country within the overall Maduwongga tribal area with which the claim group have a connection is that of their father's local descent group in the east around Edjudina.' Thus, in the delegate's view, the deficiency in the factual basis to support the assertion at s 190B(5)(b) is that the factual basis, specifically in the (Anthropologist 1) report, does not contain sufficient facts to link (Name deleted) and Kitty's local descent group with the whole of the area and concludes that 'the accounts to which she refers [(Anthropologist 1)] do not provide a sufficient factual basis to support an assertion that these accounts relate to action under law and custom operating in the area whereby there was a wider Maduwongga territorial owning entity in relation for [sic] the whole application area' (Page 29/[113]).

[184] The delegate observed that in her view the factual basis was not sufficient to support the assertion that the relevant traditional laws and customs gave rise to a local descent group (such as (Name deleted) local descent group) as having rights and interests in country that was outside the boundaries of that patrilocal group. For instance, the delegate noted the absence of sufficient facts to support that the laws and customs of the Maduwongga 'permit a local descent group, such as that to which (Name deleted) and Kitty belonged, to enter or traverse without permission the estate of a neighbouring local descent group, such as belonging to (Name deleted)'s group, whose country started at Kurnalpi, well to the west of Edjudina.' (Page 31/[120]).

[185] In some respects (Anthropologist 1)'s Addendum addresses in part the issues identified by the delegate by providing additional facts in this respect. Significant to this are the relevant facts that (Anthropologist 1) records in the Addendum that explain how the patrilocal group fit within the tribe and what access or rights those members of the patrilocal group would have to the whole of the tribal territory. This is summed up by (Anthropologist 1) as being that 'any given individual member in such a tribal society has access to large parts (if not all) of the entire territory, subject to certain traditional restrictions in some specific localities.' For instance, (Anthropologist 1) talks about how a woman could name her totemic state in one part of the tribal region but could also have rights in other parts of the tribal region via social or ritual ties, such as through marriage. Also, another example being that a man could claim rights not only his birth territory but also his initiation territory or his wife's estate. This links in with (Anthropologist 1)'s conclusion that 'patrilocal subgroups are *exogamous*, and territorial claims are therefore dynamic' (Pages 7, 9 and 10).

[186] As detailed above in my reasons for s 190B(5)(a), the factual basis does not support the assertion that the predecessors of the native title claim group were associated with the whole claim area, specifically the north western parts of the claim area. The factual material supports that (Name deleted) was associated with this area. This area, according to (Anthropologist 1), was his grandfather's country or estate. (Anthropologist 1)'s view is that (Name deleted) was Kalamai but that he may have married a Maduwongga woman. As I indicated above, there are no or insufficient facts to support that (Name deleted) married a Maduwongga woman. Further, there are insufficie*nt facts* to support the assertion that under the traditional laws and customs Kitty Bluegum's patri-local group had rights in this part of the claim area.

[187] In that regard, the wording of s 190B(5)(b) is quite specific. The factual basis must be sufficient to support the assertion that there exist traditional laws and customs, acknowledged and observed by the claim group and that give rise to the claimed native title rights and interests. This concluding part of s 190B(5)(b) is a reference to the area of the claim. In that regard, the factual basis material remains insufficient to support the assertion that under the traditional laws and customs of the Maduwongga, that the members of the claim group (being the descendants of Kitty Bluegum) had rights in the north western parts of the claim area.

[188] I refer to my conclusions in relation to s 190B(5)(a), in relation to the factual basis not being sufficient to support an association by the claim group and its predecessors to all of the application area (in particular the north west of the claim area). Accordingly, I maintain that the applicant does not provide any factual basis to support an assertion that the claim group's traditional laws and customs exist in relation to the north west of the claim area.

[189] I find that the factual basis is not sufficient to support the assertion in s 190B(5)(b).

Subparagraph 190B(5)(c)

[190] The final paragraph of s 190B(5) requires a consideration of whether there is a factual basis that the native title claim group have continued to hold the asserted native title in accordance with their traditional laws and customs.

[191] In *Martin*, [29] French J (as the Honourable Chief Justice then was) held that if a delegate was not satisfied that the factual basis supported the assertion in s 190B(5)(b), then a delegate could not be satisfied pursuant to s 190B(5)(c). Similarly, in *Gudjala (2009)*, 83 Dowsett J held that this result necessarily flowed if the factual basis was not sufficient to support the assertion at s 190B(5)(b).

[192] As stated above I have formed the view that the material before me does not provide a sufficient factual basis to support that the native title claim group and its predecessors had and have an association with all of the claimed area. Consequently traditional laws and customs continue to be acknowledged and observed by the claim group and which give rise to the claimed native title rights and interests over only part of the area claimed.

[193] I am consequently, not satisfied that the factual basis provide is sufficient to support the assertion described by s 190B(5)(c).

Combined result for s 190B(5)

[194] The application does not satisfy the condition of s 190B(5) because the factual basis provided is insufficient to support the assertions in s 190B)(5)(a) – (c) as set out in my reasons above.

s 190B(6) - Prima facie case

[195] Subsection 190B(6) provides:

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.
>
> Note: If the claim is accepted for registration, the Registrar must, under Subsection 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a "right to negotiate" process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a "right to negotiate" process).

[196] In her reasons for decision, the delegate noted that:

> In the absence of a sufficient factual basis to support the assertions set out in s 190B(5)(a)-(c), it must follow that I cannot consider that, prima facie, at least some of the native title rights and interests can be established (Page 33/[130]).

[197] (Anthropologist 1)'s Addendum did not respond to the delegate's decision in relation to s190B(6).

[198] (Name deleted)'s submission of 13 September 2014 responded to the delegate's reasons in relation to s 190B(6) at Paragraph [30] as follows:

> The delegate's conclusion, at [130], in relation to this Subsection follows from her conclusion in relation to Subsection 190B(5)(a)-(c) and the submissions above and the further information and explanation provided in that regard are sufficient upon a reconsideration, applying the test of what information '**can** support'**,** to come to the conclusion that s 190B(6) is satisfied.

[199] However, taking into consideration all the material before me I was also of the view that the application does not satisfy the condition of s 190B(5) because the factual basis provided is insufficient to support the assertions in s 190B(5)(a) – (c).

[200] The following explanation by Mansfield J in *Doepel,* 145/[126]-[127] is of assistance:

> Clearly the requirements upon registration imposed by s190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.
>
> On the other hand, s190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s190B(6).

[201] As Deputy President Sosso observed in Swan River People #2 (WAD24/2011, WC2011/002), [127] there is a logical nexus between s 190B(5) and s 190B(6). It follows as a matter of course that if the factual basis for the claimed native title cannot be satisfied pursuant to s 190B(5), then a delegate would not be able to be satisfied that, prima facie, at least some of the native title rights and interests can be established – *Gudjala* ,[87].

[202] Section 190B(6) requires the delegate, or Member on reconsideration, to engage in an exercise of weighing the factual assertions. I must be satisfied prima facie, that each of the claimed native title rights and interests can be established.

[203] Given the conclusion I reached on the insufficient nature of the factual basis in s190B(5), it therefore follows that I am not satisfied that there is a prima facie case for the establishment of the claimed native title rights and interests.

s 190B(7) - Physical connection

[204] Subsection 190B(7) provides:

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

a. currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
b. previously had and would reasonably have been expected currently to 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 land or waters) by:
    i. the Crown in any capacity; or
    ii. a statutory authority of the Crown in any capacity; or
    iii. any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[205] In her reasons, the delegate noted that:

> Dowsett J indicated that an application which fails to satisfy the requirements of s 190B(5) will likewise fail this condition due to the requirement for material showing a 'traditional physical connection.'...
>
> In my view, the phrase 'traditional' physical connection means a physical connection in accordance with the particular traditional laws and customs relevant to the native title claim group, with 'traditional' having the meaning discussed in Yorta Yorta.
>
> The claim must therefore fail this condition as a result of my finding that it does not satisfy s 190B(5)(b) and (c) (Page 34/[134]-[136]).

[206] (Anthropologist 1)'s Addendum did not respond to the delegate's decision in relation to s 190B(7).

[207] (Name deleted)'s submission of 13 September 2014 responded to the delegate's decision in relation to s 190B(7) at Paragraph [31] as follows:

> The delegate's conclusion, at [135], in relation to this Subsection follows from her conclusion in relation to Subsection 190B(5)(b) and (c) and the further information and explanation provided in that regard is sufficient upon a reconsideration, applying the test of what information '**can** support'**,** to come to the conclusion that s 190B(7) is satisfied.

[208] Taking into consideration all the material before me I am of the view that the application does not satisfy the condition of s 190B(5) because the factual basis provided is insufficient to support the assertions in s 190B(5)(a) – (c).

[209] In my view all that s 190B(7) requires is for the delegate, or the Member on reconsideration, to be satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

[210] While the delegate concluded at Page 32 ([121]) that the explanation provided by (Anthropologist 1) as to the asserted content of the laws and customs said to have been acknowledged and observed by the traditional or classical Maduwongga society, does not fit with the laws and customs said now to be acknowledged and observed by the native title

claim group, that conclusion was delivered in the context of the whole of the area, rather than any part of the claim area.

[211] In this matter both the delegate and I have been presented with detailed material regarding the factual basis for the assertion that the claim group and their predecessors had and have a traditional association with the eastern portion of the claim area.

[212] In the material provided by the applicant dated 6 October 2014 while addressing s 190C(2) and the factual basis required by s 62(2)(e)(i), (Name deleted) says as follows:

> In Members of the *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 the High Court said, at [46]: '"traditional" is a word apt to refer to a means of transmission of law or custom. 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.'
>
> The application makes explicit that it is providing information about the association of the predecessors of claim group with the area when (as found by the delegate at [53](b)) the application referred to the fact stated in Schedule M that –
>
> The members of the native title claim group have on a regular basis throughout their lifetimes travelled across the land comprised in this application, camping and hunting and gathering the traditional foods and medicines and visiting places of significance about which they have been taught by their ancestors.

[213] (Anthropologist 1) in her 2012 report Section 6 discusses law and custom giving rise to native title in the contemporary period. In the report, she writes:

> (Name deleted) and (Name deleted) possess an extensive knowledge of the country they are claiming: its physiographic features, its ecology, its water, its fauna, and flora: its ritual sites (including the ritual places which as women they are to avoid) – a knowledge which was passed to them in an uninterrupted line, and which they obtained from "the old people", from their aunts and father and which they have maintained through a lifelong association with the area. This knowledge they have also passed on to the next generations (Page 94)
>
> (Name deleted) and (Name deleted) and their female descendents, however, have knowledge of the Women's sacred sites in their own country. (Person) has told me that she has also participated in Women's ritual dances conducted with women from neighboring people." (Page 96).

[214] (Anthropologist 1) also discusses funeral rites and rituals at Pages 96 and 97.

[215] (Anthropologist 2) in his 1998 report at Section 5 provides, amongst other information, a table describing 'Maduwongga resource usage – identification of flora' and 'Maduwongga resource usage – identification of fauna'. There are detailed descriptions of locations, avoidance and use of land by reference to 'old people' (parents and grandparents generation) and 'really old people' (people who lived prior to colonisation).

[216] In his conclusion at Section 6, (Anthropologist 2) says that '[t]he traditional social life that existed at the time of initial European contact has been greatly modified by the colonial process. Nevertheless, the Claimants continue to occupy and use their land in accordance to Maduwongga tradition and custom.' And later he indicates that '[a]lthough modified, the relationship of the Maduwongga people to country is still governed by traditional law and custom. These rights and interests the Maduwongga claimants are asserting in their country.'

[217] Finally, the information contained in Schedule M further supports a conclusion that that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

[218] I am satisfied that at least one member of the claim group has traditional physical connection with land and waters covered by the application. Accordingly the requirement of s 190B(7) is satisfied.

[219] The following conditions of 190C were not met:

s 190C(2) - Information etc. required by sections 61 and 62

[220] Subsection 190C(2) provides:

> The Registrar 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.

[221] The delegate decided that the following requirements mandated by ss 61 and 62 were met:

Provision	*Requirement*
61(1)	Applications that may be made
61(3)	applicant's name and address
61(4)	Application authorised by persons
62(2)(a)(i) & (ii)	Information about the boundaries of the area covered by the application and any areas within those boundaries not covered
62 (2)(b)	Map of the boundaries of the area covered
62(2)(c)	Searches of non-native title rights and interests
62(2)(d)	Description of native title rights and interests claimed in relation to particular land and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.
62(2)(f)	Activities
62(2)(g)	Other applications
62(2)(ga)	s 24MD(6B)(c) notices
62(2)(h)	s 29 notices

[222] The delegate was of the view that the claim did not satisfy s 19C(2) because:

a. the application does not contain a general description of the factual basis, as required by ss 61(2)(b) [sic] and 62(2)(e); and
b. the affidavit by the applicant which accompanies the application under s 62(1)(a) does not contain the statement required by Subsection (iv) of s 62(1)(a).

[223] I note that the delegate mistakenly refers to 61(2)(b), however the relevant provision is s 62(1)(b).

The statement required by s 62(1)(a)(iv) in the affidavits that must accompany the application

[224] Section 62(1)(a)(iv) provides that a claimant application must be accompanied by an affidavit sworn by the applicant that the applicant is authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it.

[225] The requisite statement in the affidavits of Ms. Strickland and Ms. Nudding sworn 6 October and 9 October 2013 respectively, says: 'We are authorised by all persons in the native title claim group who were born in 1995 or earlier to make the application and to deal with matters arising in relation to it.' The delegate was of the view that this does not follow the wording of s62(1)(a)(iv), meaning that the applicant is authorised by something less than all the persons in the native title claim group.

[226] The delegate notes that the authorisation process took place in July 2013. Persons born in or prior to 1995 would have been under the age of 18 years.

[227] The applicant in the material provided on 13 September 2014 says that there is nothing deficient about the affidavit in merely drawing attention to the fact that persons born before 1995 and under the age of 18 years at the time of making the authorisation decision would not have had legal capacity to authorise the application.

[228] The State says that it does not consider that the appeal to the beneficial intent of the Act also made in the Application's submissions is sufficient to disturb the delegate's decision with respect to the applicants compliance with s 62(1)(a). The State submits that the fundamental nature of the authorisation obligations in the Act supports their strict and consistent interpretation.

[229] The note to s 62(1)(a)(iv) says: 'Section 251B states what it means for the applicant to be *authorised* by all the persons in the native title claim group.'

[230] Section 251B provides that all the persons in a native title claim group authorise a person or persons to make a native title determination application if (where there is no traditional decision making process) the persons in the claim group authorise person/s to make the application with a process of decision making agreed to and adopted by the claim group for that purpose.

[231] Schedule R to the application describes the native title claim group's agreed decision making process which was said to include a process of a written form of endorsement of the authorisation of the applicant to make the claim by all adult members of the claim group not present at the meeting. By inference, the decision making process was also restricted to adult members of the claim who were present at the meeting.

[232] The significance of age varies across a wide variety of aspects of life, for example, criminal responsibility, motor vehicles, liquor, marriage and voting. There is no age prescribed in relation to the authorisation or the making of a native title claim. An age restriction for the purposes of authorisation does not affect the minor's status as a native title holder nor his or her entitlement to recognition as a native title holder.

[233] For a claim group to impose an age limit into their authorisation process, in my view, is valid.

[234] The delegate in her reasons cited the decision of French J (as the Honourable Chief Justice then was) in *Martin*, [10], noting that in her view the use of the words 'who were born in 1995 or earlier' was more than a 'slip or error' of the kind referred to in the decision. In the decision, His Honour inferred that something may be regarded as being more than a slip or error if it was indicative of the deponent or deponents having failed to direct his or her mind to the matters which must be established. In that instance, the failure to refer to being authorised by all the persons in native title claim group was considered such an error — *Martin,* [12].

[235] In my view, however, the use of the words employed in the affidavits is not indicative of the deponents having failed to direct their minds to the matters they must establish. Rather, they speak to the matters which they must establish in words that reflect the particular requirements of their authorisation but which also essentially reflect the wording that is prescribed by s 62(1)(a)(iv).

[236] Further, to read s 62(1)(a)(iv) so literally could lead to absurd outcomes.

[237] I am of the view that the application satisfies the requirement of s 62(1)(a)(iv).

The general description of the factual basis required by ss 62(1)(b) & 62(2)(e)

[238] Subsections 62(1)(b) and 62(2)(e) require that the application must contain:

> a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:
>
> i. the native title claim group have, and the predecessors of those persons had, an association with the area;
> ii. there exist traditional laws and customs that give rise to the claimed native title; and
> iii. the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. (Page 37-39)

[239] In her reasons, the delegate said at Page 39 ([153]):

> In my reasons above for the condition in s 190B(5), I provide the details of the general description of the factual basis for the assertions outlined in s 62(2)(e). I am of the view that the details and information at paragraph (i) of Schedule F and the statements in Schedules G and M amount to a general description of the factual basis for the assertions of ss 62(2)(e)(ii) and (iii). The information provided is brief in the extreme but it is nonetheless of a kind that meets this procedural condition, noting the decision by Mansfield J that I am not to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2); that is the task for the merit condition of s 190B – see NT v Doepel at [16] and also at [35] to [39].

[240] This aspect of the delegate's decision which the applicant refers to at paragraph [33] of their 13 September 2014 submissions as "current association" is not contested by the applicant.

[241] The State in its material dated 1 October 2014 does not directly address this aspect of the delegate's decision.

[242] I have independently considered the material on this aspect and have come to the same view as the delegate that the details and information at paragraph (i) of Schedule F and the statements in Schedules G and M amount to a general description of the factual basis for the assertions of ss 62(2)(e)(ii) and (iii).

[243] The delegate at Page 39 ([154]) also noted that 'that there is a second element to the general description required by s 62(2)(e)(i), namely, a general description of the factual basis for the assertion that the predecessors of the persons in the native title claim group had an association with the area.'

[244] In relation to this second element to which the delegate refers she sets out in her reasons for decision that '[t]he relevant statement, in para (ii) of Schedule F, is that 'the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area.' This, according to the delegate, is no more than a re-statement of that part of s 62(2)(e)(i) dealing with the association of the group's predecessors with the area. The delegate cites the decision of Kiefel J of *Hutchison* as establishing that merely restating the relevant part of s 62(2)(e) is not sufficient for a claim to meet the condition of s 190C(2) (Page 39 -40)

[245] The delegate concluded that paragraph (ii) of Schedule F fell short of the details required by s 62(2)(e) and consequently the claim did not satisfy the condition of s 190C(2) in so far as it concerned that part of s 62.

[246] The applicant in the material provided on 13 September 2014 says that the delegate ought to have taken account of the fact (as noted by the delegate) that the claim group: 'travelled across the application area, camping and hunting and gathering the traditional foods and medicines and visiting places of significance about which they were taught by their ancestors.' The applicant says that: 'The delegate failed to recognise that those Schedules provided information about the factual basis for the

assertion in Schedule F(ii) as to the association of the groups predecessors with the area.' And, at [35] of their 13 September 2014 material the applicant says: 'The delegate ought to have found that the facts asserted in Schedules G and M were sufficient to satisfy s 62(2)(e)(i), not only with reference to the native title claim group, but also with reference to their predecessors.'

[247] The State, in their material dated 1 October 2013, say that they do not consider the brief reference in Schedule M as identified by the applicant constitutes information sufficient to satisfy s 62(2)(e).

[248] In *Hutchinson* (2001) 108 FCR 575, 583-584 whilst Kiefel J held that merely re-stating the assertions would not meet the requirements of s 62(2)(e), Her Honour did consider that s 62(2)(e) and s 190B5) do not 'entirely correspond', with the former requiring a general description be provided in the application, whereas the latter 'may require more, for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion' and is suggestive of a 'wider consideration.'

[249] In that regard, I understand that Her Honour was making a distinction of the task at s 190C(2) and that at s 190B(5) rather than assessing s 62(2)(e) in the context of s 190B(5), which was what the Full Court did in *Gudjala FC*. For the purpose of s 190C(2), I consider that the requirements at s 62(2)(e) must be something more than a repetition of the assertions, but may be something less than what is required to satisfy the Registrar for the purpose of s 190B(5).

[250] I have independently considered the material and take the view that in the same way that I have concluded that the details and information at paragraph (i) of Schedule F and the statements in Schedules G and M amount to a general description of the factual basis for the assertions of ss 62(2)(e)(ii) and (iii), the details and information at paragraph (ii) of Schedule F and the statements in Schedule G and M amount to a general description of the factual basis for the assertions of ss 62(2)(e)(i).

[251] That is, I am satisfied that the details and information at paragraph (ii) of Schedule F and the statements in Schedules G and M amount to a general description required for the purposes of s62(2)(e)(i).

Conclusion

[252] I reaffirm that this is a fresh and original decision as to whether or not, in my view, the claim meets all the conditions for registration specified in ss 190B and 190C of the Native Title Act 1993.

[253] I concluded a reconsideration of the claim made in this application against each of the conditions contained in ss 190B and 190C in accordance with s 190E of the Native Title Act 1993.

[254] In particular, I have formed the view that the Native Title Registrar should not accept the claim for registration because I am not satisfied pursuant to the provisions of s 190B(5) and s 190B(6).

James McNamara
Member