National Native Title Tribunal

Registration test decision

Application name	Wilyakali #2
Name of applicant	Maureen O'Donnell, Janet Crowe, Beverley Bates, Richard Edge, Elizabeth Hunter, Brian Bates
NNTT file no.	SC2015/003
Federal Court of Australia file no.	SAD417/2015
Date application made	25 November 2015

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

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

Date of decision: 2 February 2016

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 2016 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the native title determination application made on behalf of the Wilyakali People (the application) for registration pursuant to s 190A of the Act.

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

Application overview

[3] The application was filed with the Federal Court of Australia (the Court) on 25 November 2015 and the Registrar of the Court gave a copy of the application to the Registrar that day pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 25 November 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[5] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s 190A(6B), I must not accept the claim for registration. This is commonly referred to as the registration test.

Requirements of s 190A

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

[7] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

Information considered when making the decision

[8] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of

information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2015/2343) prepared by the Tribunal's Geospatial Services on 2 December 2015 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

[9] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act. Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any claimant application.

Procedural fairness steps

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

- On 30 November 2015, the case manager for this matter sent a letter to the State of South Australia (the State) which informed the State that any submission in relation to the registration of this claim should be provided by 18 December 2015.
- The case manager, also on 30 November 2015, wrote to inform the applicant that any additional information should be provided by 18 December 2015.
- On 14 December 2015, the State advised that it had reviewed the application and did not wish to make a submission in relation to it.
- On 18 December 2015, the applicant's representative advised that no additional material would be provided at that time.

Procedural and other conditions: s 190C

Subsection 190C(2)
Information etc. required by ss 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

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

[12] In coming to this conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2) — see observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) at [37] and [39]; see also [16], [35] and [36]. Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

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

[14] I now turn to each of the particular parts of ss 61 and 62:

Native title claim group: s 61(1)

[15] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant at [1]. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[17] Part B of the application contains the name and address for service of the applicant's representative.

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

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

[19] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[21] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits are identical and contain the statements required by s 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant — at [3] – [6].

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

Details required by s 62(1)(b)

[23] Subsection 62(2)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[24] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. That Attachment specifically excludes the Malyankapa Peoples (SAD359/2015) native title determination application. Attachment B1 contains information of areas within those boundaries that are not covered by the application.

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

[25] Attachment C contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[26] Schedule D provides that the applicant has not undertaken any searches to determine the existence of any non-native title rights in relation to the land and waters covered by the application.

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

[27] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Attachment E. The description does not consist only 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.

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

[28] Attachment F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[29] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[30] Schedule H provides details of two applications, namely Adnyamathanha (SAD6001/1998) (Adnyamathanha No. 1) and Ngadjuri #1 (SAD147/2010) (Ngadjuri) native title determination applications, that have been made in relation to part of the area covered by this application.

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

[31] Schedule HA states that the applicant is not aware of any notifications given under s 24MD(6B)(c).

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

[32] Schedule I states that the applicant is not aware of any notices issued under s 29 of the Act.

Conclusion

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

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

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

[34] In my view, the requirement that the Registrar be satisfied that there are no common claimants arises where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[35] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[36] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied. I consider this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[37] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[38] The geospatial assessment identifies the Adnyamathanha No. 1 application and the Ngadjuri application to cover part of the area covered by the current application.

[39] My search of the Register revealed that the Adnyamathanha No. 1 application was accepted for registration and added to the Register on 26 March 1999 whilst the Ngadjuri application was not accepted for registration. At the time the current application was made, only the

Adnyamathanha No. 1 application was on the Register. In my view, the Adnyamathanha No. 1 application meets the conditions specified under subsections (a) and (b).

[40] The condition at subsection (c) is met when an entry was made, or not removed, as a result of the previous application being considered for registration under s 190A. I have accessed the Register and find that the entry for the Adnyamathanha No. 1 application has not been removed from the Register. I am satisfied that this application was entered on the Register as a result of it being considered for registration pursuant to s 190A.

[41] As the Adnyamathanha No. 1 application meets all of the criteria for a 'previous application' stipulated by s 190C(3), I am therefore required to consider whether there are any members of the claim group for the previous application in common with the claim group for the current application.

[42] Schedule O of the current application states the following:

> The applicant and members of the native title claim group have not been members of other applications that have [been] made in relation to the whole or part of the area covered by the application.

[43] I have accessed from the Register, a description of the native title claim group for the Adnyamathanha No. 1 application. That description provides that the Adnyamathanha native title claim group comprises the named persons, and '[a]ll those Adnyamathanha people presently alive' who are named in the 'Adnyamathanha Genealogy', or the biological and adopted descendants of those persons named in that genealogy.

[44] In order to be satisfied that no person named in the claim group description for the Adnyamathanha No. 1 application is also a member of the claim group for the current application, I consider it necessary that I have regard to the contents of the Adnyamathanha Genealogy from that application. I consequently requested the case manager to access that document from the Tribunal file for the Adnyamathanha No. 1 application and provide me with a copy for my consideration of s 190C(3).

[45] The Adnyamathanha Genealogy provides that Adnyamathanha persons are comprised of seven primary family groups, and subsequently sets out the family trees for each of those family groups. I have turned my mind to the entire contents of the Adnyamathanha Genealogy and in my view there does not appear to be any persons named within that document that also appear within the claim group description for the current application, or that possess any similarity to persons named in that description. Further, I note that I consider there appears to be no similarities in the names of any of the apical ancestors specified for each of the applications, and that the information pertaining to those apical persons provided in each of the applications also suggests that there are no common apical ancestors between the applications. For this reason, I have formed the view that I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous application.

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

Subsection 190C(4) Authorisation/certification

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

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

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

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

Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

[48] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

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

[49] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[50] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[51] Attachment R is titled 'South Australian Native Title Services Limited [SANTS] – Certificate in Relation to Wilyakali #2 Native Title claim' (certification). It is dated 24 November 2015 and signed by the Chief Executive Officer of SANTS.

[52] The certificate states that SANTS performs all of the functions of a representative body for South Australia and therefore certifies the application pursuant to s 203BE of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

[53] The geospatial assessment identifies SANTS to be the only representative body for the area covered by the application.

[54] Having regard to the above information, I am satisfied that SANTS was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

[55] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

[56] Accordingly, I must consider whether the certification meets the requirements of s 203BE, the relevant subsection being (4).

Subsection 203BE(4)(a)

[57] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[58] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[59] The certification contains the statement required by s 203BE(4)(a) — at [3].

Subsection 203BE(4)(b)

[60] Pursuant to s 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s 203BE(4)(a).

[61] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- SANTS has worked closely with the members of the Wilyakali community for a number of years — at [4].
- Notice of the authorisation meeting was advertised in the print media and letters were sent to members of the Wilyakali community whose contact details were recorded on the SANTS database — at [5].
- The notice and letters contained information about the meeting including, the purpose, date, time, venue, named apical ancestors, map of the proposed claim area, and 'that the proposed claim area will overlap with Adnyamathanha claimants and Ngadjuri claimants' — at [5].
- The authorisation meeting was held on 15 November 2015 and was attended by Wilyakali representatives. In accordance with an agreed to and adopted decision making process, there being no applicable traditional decision making process for these types of matters, the persons comprising the applicant were authorised to make the application — at [4].

- SANTS is satisfied that there was a clear decision making process — at [3].
- For the above reasons, SANTS is of the opinion that all persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group — at [3].

[62] I am of the opinion that the certificate meets the requirement of s 203BE(4)(b).

Subsection 203BE(4)(c)

[63] This subsection applies where the application area is covered by an overlapping application for determination of native title. Subsection 203BE(3) sets out the steps that a representative body must take if there are overlapping applications. In short, a representative body must use reasonable efforts to achieve agreement between competing claimants and minimise the number of applications being made. That subsection further provides that a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[64] As indicated earlier in my reasons, the Adnyamathanha No. 1 application overlaps the current application. Accordingly, ss 203BE(3) and 203BE(4)(c) are applicable.

[65] The certificate states that:

> SANTS have been working, and continues to work with representatives of the Wilyakali, Ngadjuri and Adnyamathanha native title claimants with a view to resolve the overlap between the groups. Thus SANTS is of the opinion that SANTS continues to make reasonable efforts to comply with the requirements of section 203BE(3) of the [Act] — at [6].

[66] I consider that the statement above briefly sets out what the representative body has done to meet the requirements of s 203BE(3). Even if this is insufficient, in my view, failure by SANTS to comply with this subsection does not render the certification invalid.

[67] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and accordingly find that the criteria under s 190C(4)(a) have been met. Having been so satisfied, I am not required to address the remaining conditions of s 190C(4).

[68] The application **satisfies** the condition of s 190C(4).

Merit conditions: s 190B

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

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

[69] Attachment B is a written description prepared by the Tribunal's geospatial services on 9 January 2015 and contains a metes and bounds description of the external boundaries of the application area, referencing lot on plans, the Barrier Highway and geographic coordinates. It excludes the Malyankapa Peoples application. Attachment B1 lists general exclusions.

[70] Attachment C is a copy of a map titled 'Wilyakali' prepared by the Tribunal's geospatial services on 12 January 2015. The map includes:

- the application area depicted by a bold outline;
- State borders;
- topographic background;
- scalebar, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[71] The geospatial assessment identifies a typographical error with the written description, namely Latitude 32.836398° South should read Latitude 32.536398° South. Despite this, the geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment. In my view, the error is minor in nature which does not create uncertainty around the description of the application area. As the court in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 commented at [73], the Act is remedial in character and should be construed beneficially.

[72] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

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

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

[74] Schedule A contains the following description of the native title claim group:

> The individuals who comprise the Wilyakali native title claim group are the biological descendants of the following apical ancestors:
>
> - Jack Tyler born in South Australia in 1857.
> - Outalpa Dick
> - Crancey.
> - Minnie Crozier
>
> **See Attachment "A"**

[75] Attachment A provides further detail regarding the claim group description, including information regarding the descendants of the named ancestors.

[76] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Nature of the task at s 190B(3)(b)

[77] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[78] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[79] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the

> passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

[80] The description of the native title claim group is such that it comprises those persons who are the biological descendants of the apical ancestors identified in Schedule A.

[81] Describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

[82] I consider that requiring a member to show biological descent from an ancestor identified in Schedule A provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[83] In my view, as indicated by the information contained in Attachments A and F, that fundamental basis for membership to the Wilyakali native title claim group involves descent from a named ancestor — Attachment A at [1] – [2] and Attachment F at 55. I understand that these ancestors were associated with and in occupation of the application area and surrounds and were the owners of this country — Attachment F at 1 and 12. It follows that, in my view, membership is inherently linked to the recognition of one's biological descent from a named ancestor. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

[84] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

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

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

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

[86] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[87] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

> 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 interests that may exist, or that have not been extinguished, at law …

[88] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[89] Attachment E provides the following description of the claimed native title rights and interests:

1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply, members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

2) Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

    a. the right to access and move about the application area;

    b. the right to hunt on the application area;

    c. the right to fish (including yabbies) on the application area;

    d. the right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;

    e. the right to use the natural water resources on the application area;

    f. the right to live, to camp and to erect shelters on the application area;

    g. the right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;

    h. the right to share or exchange subsistence resources or other traditional resources obtained from the application area;

    i. the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;

    j. the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;

    k. the right to maintain and protect sites and places [of] significance under traditional laws and customs on the application area;

    l. the right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice;

    m. the right to be accompanied on to the application area by those people who, though not members of the native title claim group, are:

i. spouses of members of the native title claim group;

ii. people required by traditional law and custom for the performance of ceremonies or cultural activities on the application area; and

iii. people required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.

3) The rights described in paragraphs 2(b), (c), (d), (e), (f) and (i) are traditional rights exercised in order to satisfy personal, domestic, or communal needs.

4) The native title rights and interests are subject to:

a. the valid laws of the State of South Australia and the Commonwealth of Australia; and

b. the rights (past and present) conferred upon persons pursuant to the law of the Commonwealth and the laws of the State of South Australia.

Consideration

[90] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[91] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified.

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

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

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

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

The requirements of s 190B(5) generally

[94] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[95] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the

particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

[96] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[97] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[98] The factual basis material is contained in Attachment F. I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

The requirements of s 190B(5)(a)

[99] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- that the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- that there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

Information provided in support of the assertion at s 190B(5)(a)

[100] The factual basis contains the following relevant information about the claim group's association with the application area:

- Traditional Wilyakali country extends from Yunta in South Australia through the Barrier Ranges and into New South Wales — Attachment F at 1. The application area is formed by the Warooneee Range and Yunta as the southwestern boundary, Manna Hill and Outalpa along the mid-southern boundary, Cutana and Mingary along the southeastern boundary, Mundi Mundi Plains around the eastern boundary, the Adnyamathanha No 1 (Stage 2) native title determination forming the northern and northwestern boundary and Waukaringa around the southwestern and mid-western boundary.
- Early ethnographic and historic records refer to a body of people in the lands and waters of the application area at the time of European contact — at 2-6. In particular, the predecessors were reported to have been seen residing at, performing ceremonies or other practices around the middle, southern, eastern and northeastern regions of the application area and its surrounds.

- Research undertaken in 1926 in the southeastern region showed numerous artefacts and relics of Aboriginal occupation including rock paintings in cave shelters, campsites and evidence of ceremonial activity — at 3. The geographic features of the area provided sufficient water resources, which, together with caves for shelter and game, would have been sufficient to support ongoing occupation. The physical features of the landscape would have enabled migration and travel over the country, from the northeast to the southwest, by the predecessors — at 3.
- In 1930, a Wilyakali man, who was born around 1870 and married to the granddaughter of apical ancestor Outalpa Dick, informed an anthropologist that Wilyakali country included Mannahill, Cockburn (proximate to southeastern boundary), Mundi Mundi, Silverton (proximate to eastern boundary), Broken Hill (outside and east of application area), Stephens Creek (along eastern boundary) and went north to Poolamacca (outside and east of the application area) — at 4.
- Anthropological and ethnographic research from the 1940s indicates that the Wilyakali land and waters encompass a vast area which includes the application area — at 4-5.
- Fieldwork from 1944 record important genealogical and mythological information from a Wilyakali man. The research indicates he was born in 1864 in the middle region of the application area and lived there until the early 1900s with members of 14 Wilyakali families, indicating that the predecessors of the claim group occupied the application area at sovereignty and early contact — at 6. Some of the predecessors were recorded as having been born around the early 1800s — at 7. The genealogies reveal complex kinship networks and geographic association with the southwestern, southern, middle and southeastern regions of the application area as well as with areas proximate to the western boundary. The apical ancestors were recorded in the genealogies as well as other predecessors, some of whom were born around 1800 — at 7.
- The genealogical and kinship information identifying Wilyakali occupation of pastoral stations within the application area corresponds with research conducted in the 1930s and 1950s — at 8. The research from 1950 also indicates that Wilyakali traditional country extends from the southwest boundary of the application area and eastward into New South Wales.
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - Outalpa Dick was born in 1820 in the middle region and was associated with the pastoral stations around the middle and mid-southern regions — at 7, 13 and 15. His son was born around 1851 proximate to the eastern boundary and was associated with the mid-southern region like his father and would travel and live in country between these areas — at 15. His son was reported as having been removed, with 50 other Wilyakali People, from the mid-southern region to east of the application area around 1898. He died in 1907. The granddaughter of Outalpa Dick was born around 1889 within the southwestern region of the application area — at 11.
  - Jack Tyler was born in 1860 in the middle region and was associated with the pastoral stations there — at 7 and 13. His mother was born in 1824 in the middle region. The

father of one of his wives was born in 1803 and was associated with the southeastern region — at 11-12.

  - Minnie Crozier was born in 1882 within the middle region and was associated with the pastoral stations there — at 7 and 13. She was the daughter of ancestor Jack Tyler's sister — at 13. Her mother died in 1887 within or proximate to the eastern boundary of the application area.
  - Crancey was born in 1880 and was associated with the pastoral stations in the middle region — at 7. Crancey's mother was the daughter of apical ancestor Outalpa Dick's sister — at 9. The brothers of Crancey's mother died near the eastern boundary in 1888 and 1892 — at 9. The father of Crancey's spouse was born in 1801 and is associated with the southwestern region — at 13. Crancey's son was raised by ancestor Minnie Crozier and Crancey's granddaughter was shown sites within the application area and the surrounding Wilyakali country by her brother, who only revealed parts of the stories due to her age and gender — at 16. As she grew older, he continued to teach her about the country by showing her particular sites. Her brother, Crancey's grandson, has also shared his knowledge of sites and stories with his and his sister's sons, namely Crancey's great grandsons, when they were working on stations around the middle region and the eastern boundary of the claim area. They would camp out, hunt kangaroo for food and had knowledge of the tracks that ran from the north to the southwestern boundary. Crancey's descendants would visit and stay for extended periods with family in the southwestern region in the 1970s and 1980s. They went hunting and camping in the southwestern and mid-southern regions and around the southeastern boundary.

- Current claimants continue to identify with their country, including the application area and the wider traditional Wilyakali country, through being taught by their elders who continue to maintain and pass on their traditional knowledge in accordance with their traditional laws and customs — at 26.
- The claim group members speak of feeling a spiritual connection to Wilyakali country whenever they travel or camp on country — at 16-17. For instance, one claimant says she feels a special connection to the southwestern region. They also continue to observe a system of kinship and social classification and have knowledge of their totems — at 20-26.
- The claimants have knowledge of myths that are associated with the application area — at 26-29. For instance, the claimants are told by their parents, siblings and elders the story about the ancestral being that travelled from outside but proximate to the western boundary through the southwestern region of the application area — at 26-28. The myth travels further east into New South Wales and then northwest towards Lake Eyre (outside and north of the application area) — at 27. The claim group members also know of another story with sacred sites along or proximate to the eastern boundary — at 28.
- The claim group maintain knowledge about traditional laws and customs, which give right to the group's claim to hold rights and interests in relation to the application area — at 30. The rights and interests in land and waters are based on recognition of common ancestors that were associated with Wilyakali country. Rights and responsibilities are recognised through a parent or grandparent with a connection to the Wilyakali country

and those rights and responsibilities are acquired through a long-term geographical and/or spiritual association with the country. The claimants continue to follow rules and practices in relation to their country, such as those involving gender restrictions with respect to places of significance on Wilyakali country, and say that they are able to 'feel' when they should not be in a place — at 43. These laws and customs are passed down the generations, from siblings, parents, grandparents, and other elders, through the learning of stories and physical culture of Wilyakali people including information relating to sites and associated ceremonial observances — at 42-45. By learning the stories and physical culture of Wilyakali people, claimants are able to 'own' country — at 43. The claim members speak of caring for and protecting significant sites. For instance, once claimant says he tried to prevent damage to a particular site proximate to the southeastern boundary — at 45.

- The claim members have knowledge of traditional hunting grounds on the application area — at 30-33. The claimants regularly visit the application area, including camping, travelling across, hunting and gathering the natural resources. For instance, the granddaughter of apical ancestor Crancey says that they were mainly grown up camping within the application area — at 37. She says her father and brothers would hunt kangaroos and emus whilst her mother showed her how to cook in a traditional manner. Another claimant says that his father and grandfather would work at stations in the application area and they would take him camping and hunting at places including within and proximate to the eastern regions of the application area — at 37. Another claim group member speaks of hunting and camping within the southern region and near the eastern boundary — at 37-38.

Consideration

[101] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Wilyakali People have with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of traditional Wilyakali land and waters including traditional hunting grounds and tracks as well as sacred sites associated with the ancestral beings.

[102] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European contact, which I understand from the factual basis to have occurred around the mid-1800s. For instance, genealogical research indicates that some Wilyakali predecessors were born around

1800s and were associated with the application area. Apical ancestor Outalpa Dick, his son and his granddaughter were all born in the application area around 1820, 1851 and 1889 respectively. Jack Tyler was born in 1860 in the application area and his mother in 1824. The father of one of his wives was born in 1803. Minnie Crozier was born in 1882 within the middle region and her mother died in 1887 within or proximate to the eastern boundary of the application area. Crancey was born in 1880 and the brothers of Crancey's mother died near the eastern boundary in 1888 and 1892. The father of Crancey's spouse was born in 1801. I understand each of those persons were associated with the application area. There are also references to the descendants of the apical ancestors, including their children, grandchildren and great grandchildren, being present on the application area and surrounding areas. Subsequent generations of Wilyakali families all have knowledge of the boundaries of their traditional country and they have all been present on the application area at various times. For instance, Crancey's grandson has shared his knowledge of stories and shown sites to Crancey's great grandsons in the southern, southeastern, southwestern and surrounding regions of the application area.

[103] The factual basis is also sufficient to support the assertion that the Wilyakali People have a spiritual association with the application area and is sufficient to show the history of that association. For instance, the claimants speak of a spiritual connection to Wilyakali country and have knowledge of their totems. The claim members speak of following practices involving gender restrictions on certain sites and being able to 'feel' when they are in a place they should not be. The Wilyakali People have knowledge of the ancestral being, and the associated stories, that travelled over the application area. The claimants also have knowledge of another story with significant sites along or proximate to the eastern boundary. The claimants are taught traditional laws and customs from their immediate predecessors by being told stories and shown sacred sites so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Wilyakali People have with the application area.

[104] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. Anthropological, genealogical and historical accounts record the predecessors of the claim group, including the apical ancestors, being from or associated with areas located in or proximate to the eastern, southeastern, southwestern, southern and middle regions of the application area. Some of the predecessors died around the eastern region. Ancient tracks ran from the north to the southwestern region of the application area. The factual basis material refers to the descendants of the ancestors having been born, camping, hunting and travelling around the southwestern, southern, middle and eastern regions. There are also references to an ancestral being travelling from west of the application and over to east of the application area before travelling northerly. There are also associated sites of another ancestral being located proximate to the eastern boundary.

[105] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[106] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

The requirements of s 190B(5)(b)

[107] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

[108] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[109] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

[110] The identification of a pre-sovereignty society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Wilyakali People belong to the regional Paakantji language group — Attachment F at 17. The Paakantji language extends 'over a wide area into the dry lands away from the River, as far as the Willandra to the east and a long way into South Australia to the west, to the Canegrass and further north past Olary' — at 9. Research in relation to the Paakantji language group reveals that the language 'could date back to as much as a thousand years before 1788' and shows that the 'Paakantji were in full possession of Paakantji country before 1788 by looking at place names and "the network of linguistic interaction and diffusion of linguistic features which must have taken many centuries to become established' — at 10.
- The Paakantji language group is made up of several dialect groups, each possessing their own stretches of country — at 17. The Wilyakali language group has country over the application area and to the west near the South Australian and New South Wales border — at 2.
- The groups are distinct but share common laws and customs, such as the same moiety and kinship system — at 5 and Attachment A. The groups used much the same kinship terminology and were organised into matrilineal totemic clans and moieties — Attachment F at 20.

Traditional laws and customs

[111] The factual basis contains the following relevant information about the traditional laws and customs of the Wilyakali native title claim group.

[112] The native title claim group hold rights, responsibilities and interests in relation to land within the application area pursuant to their traditional laws and customs — at 1 and 30. These laws and customs have been held continuously by the claim group and have been passed down the generations through oral transmission and traditional teachings — at 1 and 43-45.

[113] The claim members continue to follow a landholding system which defines a boundary for country within Wilyakali land where country and rights and interests in relation to it are transmitted and inherited through group membership rules, namely on the basis of descent — at 12 and 30; see also Schedule A and Attachment A. Rights and responsibilities are recognised through a parent or grandparent who are associated with Wilyakali country and those rights and responsibilities are acquired through a long-term geographical and/or spiritual association with the country. The Wilyakali People have a spiritual connection to their country and feel a special connection to certain parts of country — Attachment F at 14. By learning the stories and physical culture of the group, the claim members are able to 'own' country — at 43. The claimants continue to protect and care for country and follow rules and practices in relation to their country

such as those involving gender restrictions with respect to places of significance on Wilyakali country and say that they are able to 'feel' if they should not be in a place — at 43.

[114] The claim members continue to believe in the Dreamtime and have knowledge of myths that are associated with the application area — at 26-29. For instance, the claimants are told by their parents, siblings and elders the stories about the travels, actions and associated sites of the ancestral beings within and around the application area.

[115] The Wilyakali follow a system of social organisation and kinship. Membership to the claim group involves direct descent from the apical ancestors who are believed to have 'owned' Wilyakali country — at 13. The asserted facts provide that Wilyakali continue to 'raise up' (adopt or foster) children from extended families and include examples of Wilyakali claim members who have been raised by members of their extended family — at 13. The 'custom of raising children who are kin-related serves to maintain strong familial bonds between extended families [and] has continued uninterrupted pre-sovereignty, thereby maintaining the intricate web of relationships which bind Wilyakali society today' — at 13. The claimant's continue to follow a system of kinship which dictates patterns of behaviour. For instance, the younger generation address their older kin in prescribed ways or do chores, such as provide them with firewood or wild meat — at 14 and 39. Current claimants also speak of having a strong sense of belonging to country through kin and birth on country of themselves and their ancestors — at 21.

[116] The claimants continue to observe the matrilineal moiety system where claimants inherit totems which serve to regulate relationships and marriage — at 22-26. Ethnographic records refer to the moiety and totems of apical ancestors Outalpa Dick and Jack Tyler. The factual basis also states that the '[m]atrilineal moieties and social clans were paramount in their influence on Wilyakali Paakantji kinship and social life and was crucial in the performance of ceremonial activities' — at 24. For instance, a rainmaking ceremony was said to provide an example of laws and customs regulating marriage and ceremonial rites. Current claimants refer to their own totems which they receive from their mother and which regulates who they are allowed to marry.

[117] The claimants maintain their identity as Wilyakali People through birth on country of their ancestors as well as their own birth on Wilyakali country — at 14. Those who were not born on country are grown up on country and therefore are able to maintain that connection. The factual basis contains references to some of the predecessors, including the apical ancestors, and their descendants being born on country. There are also references to claimants having been grown up on country whilst out hunting and camping — at 37.

[118] The claim group members maintain they have the right to use the land, waters and other resources of their country in accordance with their traditional laws and customs. An account from 1858 refers to the predecessors as having their traditional hunting activities — at 34. The current claimants continue to hunt emus, kangaroos, goannas, lizards and yabbies, which they cook the same way as their predecessors showed them — at 34-35 and 37-38. The claim group members are told by their parents about the plants that they can collect and eat, such as the wild oranges, wild bananas and quandongs, and the plants that they should stay away from — at 36.

[119] The Wilyakali People continue to teach the Wilyakali language to their children, grandchildren and great-children and also take them on country to tell them stories and show significant sites — at 17-18.

[120] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

[121] In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include factual details of:

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[122] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[123] My understanding of the factual basis material is that the pre-sovereignty society, being the Paakantji language group, encompasses a wide area of land which is held at a localised level by various groups, including the Wilyakali People. I understand that these landholding groups share common spiritual beliefs, social organisation and kinship systems and have common laws and customs. However, the groups have distinct territorial domains, the boundaries of which are recognised by the other groups, and there is differentiation in the practice of laws and customs.

[124] In my view, the factual basis indicates that the Wilyakali country is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the Wilyakali are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[125] The factual basis reveals that the laws and customs currently observed and acknowledged by the Wilyakali People are based on common principles of kinship and moiety and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.

[126] In my view, the factual basis demonstrates that the apical ancestors were living within Wilyakali country, or were amongst the generation born to those who were living within Wilyakali country, at the time of European contact. In this sense, I understand that the information supports the assertion that the apical ancestors were born into the Wilyakali claim group of the Paakantji language group that existed at and prior to European contact — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of these ancestors.

[127] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Wilyakali People observe a landholding system in which rights,

responsibilities and interests are exercised by the descendants of the ancestors named in Schedule A. The factual basis demonstrates that the claimants continue to have knowledge of their ancestral country and have knowledge of gender specific sites, tracks on country as well as sites associated with the ancestral beings. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Wilyakali gain rights to country on the basis of cognatic descent, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before settlement. I consider that there is a sufficient factual basis that the landholding system held by the current claimants are derived from and rooted in customary laws and practices.

[128] The factual basis contains information which speaks to the way the claim group continues to perform traditional practices such as hunting and gathering natural resources for various purposes, speaking language, cooking in a traditional manner, observing their kinship system and having knowledge of their totems. This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of European contact, and that they have been passed down the generations to the claimants today.

[129] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of myths, the ancestral beings and associated sites. They also have knowledge of avoidance places on country such as gender specific sites.

[130] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and traditional teaching, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants, for instance hunting in and utilising the application area and its resources, speaking language, having knowledge of their totems and observing their kin relationships, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of contact.

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

Reasons for s 190B(5)(c)

[132] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[133] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[134] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[135] In addressing this aspect of the test, in *Gudjala 2009*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

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

Consideration

[136] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[137] Attachment F states that:

> The transmission of knowledge including language is an important feature of Wilyakali people's involvement with their children, grandchildren and great-grandchildren. As [one claimant] says, "we are always learning and encouraging our children to learn language for future generations" — at 18.

[138] Wilyakali parents, grandparents, aunts and uncles pass on knowledge of Wilyakali country through camping and hunting on country and teaching the younger generation traditional practices, such as how to hunt and cook, which they learnt themselves from their own parents and grandparents — at 14-17.

[139] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Wilyakali People in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[141] The application **satisfies** the condition of s 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)
Prima facie case

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

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

The requirements of s 190B(6)

[143] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[144] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

[145] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[146] I also understand that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[147] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[148] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights

and interests set out in Attachment E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

[149] I also note that I consider that Attachments B1 and E and Schedule L of the application sufficiently address any issue of extinguishment, for the purpose of the test at s 190B(6).

[150] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

Rights prima facie established

2) Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

a. the right to access and move about the application area;

f. the right to live, to camp and to erect shelters on the application area;

[151] The claim group members speak of their regular use of country, visiting family and sites, camping, working and travelling over the application area for cultural purposes such as hunting within it — at 30-34.

[152] The factual basis indicates that some of the apical ancestors and other predecessors resided on country, accessed country for various traditional purposes such as hunting and taking the natural resources, and some were born within the application area.

[153] It is my view that the factual material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

b. the right to hunt on the application area;

c. the right to fish (including yabbies) on the application area;

d. the right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;

g. the right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;

[154] The factual material indicates that the predecessors and current claimants hunt emus and kangaroos and cook them by digging a hole and cook them in the ashes — at 34 and 37-39. One claimant says:

> We would get Goanna's, lizards and all sorts and we would gut them and cook them in ashes in the creek … After the big rains we go out to them creeks and get yabbies — at 38.

[155] Another claimant speaks of taking his children camping, fishing, hunting, and showing them how to hunt for emu eggs, scale fish and skin kangaroo — at 40. He says that he would fish for cod and speaks of the rules related to hunting, fishing and gathering on country including that if the fish is too small, you throw the fish back — at 40.

[156] The claim group members are told by their predecessors the plants they can collect and eat, such as wild oranges, wild bananas and quandongs, and the plants they should avoid — at 36.

[157] In my view, these rights are prima facie established under traditional laws and customs.

e. the right to use the natural water resources on the application area;

[158] The factual basis contains references to the claim group members gathering yabbies and wild onions at creeks and swimming at waterholes — at 36-38. They catch porcupines and use boiling water to pull the quills out — at 38. I also infer that water would be taken and used by the claimants whilst camping.

[159] I consider that this right is prima facie established under traditional laws and customs.

h. the right to share or exchange subsistence resources or other traditional resources obtained from the application area;

[160] The factual basis indicates that the claimants continue to follow their traditional kinship system from which their rules regarding relationships and obligations are derived. For instance the factual material contains references to the claimants sharing kangaroo and emu meat that they obtained whilst hunting in the application area with certain kin, such as the older members of their family — at 39-40.

[161] In my view, this right is prima facie established under traditional laws and customs.

i. the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;

j. the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;

[162] The claimants speak of their predecessors showing them how to hunt and fish, how to clean their food and how to cook in a traditional manner. The claimants are told stories about the boundaries of their country, mythical beings and associated sites as well as shown sites of significance. The asserted facts also indicate that claimants are shown edible plants — at 36.

[163] The factual basis material, in my view, prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

k. the right to maintain and protect sites and places of significance under traditional laws and customs on the application area;

m. the right to be accompanied on to the application area by those people who, although not members of the native title claim group, are:

(i) spouses of members of the native title claim group;

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the application area; and

(iii) people required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.

[164] In respect of the right described in (m), I note that the Court allowed by consent a similarly worded right in *King v Northern Territory* [2011] FCA 582 — see order [8].

[165] The factual basis indicates that this right is observed by members of the claim group. For instance, the asserted facts indicate that claimants have shown non-native title holders a number

of sites on Wilyakali country to participate in cultural heritage surveys to ensure protection of sites and objects on country — at 46-47. There is also a reference to a claimant taking a geologist on to country — at 43.

[166] In my view, these rights are prima facie traditionally based.

Rights prima facie not established

[167] I note that the provisions of s 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include rights that are not prima facie established on the Register.

1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply, members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

[168] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]' — at [89]. The High Court further noted that the expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

[169] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178, the Full Court, whilst exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

> the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added] — at [71].

[170] I also note the Full Court's observations in relation to control of access to country that:

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

[171] The factual basis refers to the native title claim group as 'owning' country once they learn the stories and physical culture of the group — at 43. There are current references to outsiders requiring permission to enter Wilyakali land — at 33. The asserted facts also indicate that certain areas within Wilyakali country, such as gender specific sites, may physically affect those who

should not be there — at 43. I do not, however, consider there are sufficient examples that show the members of the claim group, particularly the predecessors, excluding people who are not part of the claim group.

[172] In light of the above, I am not satisfied that this right has been prima facie established.

2) l. the right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice;

[173] I consider that the factual basis provides insufficient examples of observance of this right by both the predecessors of the native title claim group and current members.

[174] In my view, the factual basis material is not sufficient to indicate that this right is one that is held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that this right is prima facie established.

Conclusion

[175] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, the application **satisfies** the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (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.

[176] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[177] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area — *Doepel* at [18].

[178] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Wilyakali People acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[179] I note that the factual basis contains relevant information that describes a traditional physical association of the Wilyakali People with the application area, including travelling, working, hunting, and camping on country. For instance, one claimant says she:

> … was shown sites within the Application area and the adjoining registered Wilyakali native title claim by her brother …
>
> [Her brothers] worked for most of their lives around stations within and around the Application area including Mulyungarie, Wompinie, Kalkaroo, Bimbowrie and Boolcoomata … [Her nephews] recall times working and camping when they were shown sites and told stories by their father … [Her nephew] says they always camped out, hunting kangaroos for food and that his father knew all the old back tracks — Attachment F at 16.

[180] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

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

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

(4) However, subsection(2) and (3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s 61A(1)

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

[184] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Reasons for s 61A(2)

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

[187] Attachment B1 states that the application area excludes any land or waters that is or has been covered by a previous exclusive possession act — at [1].

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

Reasons for s 61A(3)

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

[190] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Attachment B1 at [3] and [5].

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

Conclusion

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

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Reasons for s 190B(9)(a)

[194] Schedule Q provides that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown within the application area.

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

Reasons for s 190B(9)(b)

[196] Schedule P indicates that the native title claim group does not claim exclusive possession over all or part of the waters in an offshore place within the application area.

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

Reasons for s 190B(9)(c)

[198] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished. Attachment E indicates that the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished — at [6]. The application also claims the protections afforded by ss 47, 47A and 47B — see Attachment E and Schedule L.

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

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wilyakali #2
NNTT file no.	SC2015/003
Federal Court of Australia file no.	SAD417/2015

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

25 November 2015

Date application entered on Register:

2 February 2016

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications except include the following as the last paragraph:

> To avoid doubt, the application excludes any areas subject to:
>
> Native Title Determination Application
>
> - SAD359/2015 Malyankapa Peoples

Persons claiming to hold native title:

As appears on the extract from the Schedule of Native Title Applications

Registered native title rights and interests:

As appears on the extract from the Schedule of Native Title Applications except remove the right and interest at (1) and (2)(l)

[End of document]