National Native Title Tribunal

Registration test decision

Application name	Wutha
Name of applicant	June Rose Ashwin, Geoffrey Alfred Ashwin, Raymond William Ashwin, Ralph Edward Ashwin
NNTT file no.	WC1999/010
Federal Court of Australia file no.	WAD6064/1998
Date application made	19 January 1999
Date application last amended	22 August 2016

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 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 13 January 2017

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Lisa Jowett

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 2015 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 (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Wutha native title determination application (WAD6064/1998) to the Native Title Registrar (the Registrar) on 2 September 2016 pursuant to s 64 of the Act[1]. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[3] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include a change to Schedule A (the description of the native title claim group) that is not of a type contemplated in s 190A(6A) and does not therefore meet the requirements of that condition. I have considered the claim made in the amended application in accordance with s 190A.

[5] I have reached the view that the claim in the amended application must be accepted for registration and this document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act.

Application overview and background

[6] The Wutha native title determination application was first made on 19 January 1999 as a result of a combination of two Wutha claims lodged with the Tribunal in 1996 – Wutha People

[1] 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.

(WAD6064/1998) and Wutha People No. 2 (WAD6071/1998). The combined application was accepted for registration on the Register of Native Title Claims (RNTC) on 15 June 1999.

[7] In 2002 the claim was included in the proceedings in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*). When Justice Lindgren dismissed the Wongatha claim the subject of those proceedings, he also dismissed those parts of the Wutha claim that overlapped it. The area covered by the Wutha claim was thus reduced to 5 disconnected areas.

[8] On 8 March 2016, leave to amend the application was granted by the Court. I provided a preliminary assessment of the amended application's capacity to meet the requirements for registration in which I identified a number of issues where it would fail to satisfy certain conditions for registration. As a consequence, the applicant sought leave of the Court to make a further amended application in order to address the issues identified in the preliminary assessment. Leave to do so was granted by the Court on 2 September 2016. This is the amended application I consider for registration and is the subject of the reasons for decision that follow.

Information considered when making the decision

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

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

[10] As required by s 190A(3)(a), I have had regard to the information in and accompanying the amended application. I have also considered the earlier amended application and documents provided by the applicant to the Registrar on 22 August 2016, comprised of the following:

Attached to the amended application filed 8 March 2016

Affidavit of Ralph Ashwin, sworn 13 January 1999

Provided as additional information prior to the filing of further amended application:

Affidavit of Geoffrey Ashwin, 21 August 2015

Court Order of Justice Barker, 21 December 2015

Anthropology Connection Report, Volume 1 – Restricted Evidence Redacted, 30 November 2015 (Draper Report)

Anthropology Connection Report, Volume 2 – Genealogies

Court Order of Justice Jagot, 4 July 2013

Judgement of Justice Siopis, 23 December 2010

Statement of Raymond William Ashwin, filed 21 October 2002

Statement of [claimant name 1 removed], filed 11 June 2002

Transcript evidence of [claimant name 1 removed], 12, 15 and 16 June 2002

Witness statement of [claimant name 2 removed], filed 12 June 2002

Transcript evidence of [claimant name 3 removed], 17 July 2002

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

[11] There is no information before me of the kind identified in s 190A(3)(b).

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

[12] The State of Western Australia (the state government) made submissions in relation to the earlier amended application on 18 April 2016. It was of the view that the then amended application failed to satisfy a number of the requirements specified by s 190C. Whilst I have had regard to the submissions, I do not specifically address in these reasons the points made in the submissions. In my view, they are relevant only to the earlier amended application and its composition, and the further amended application has remedied the failures submitted by the state government.

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

[13] I have considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 20 September 2016 (the geospatial report).

[14] On 11 April 2016 Central Desert Native Title Services (CDNTS) provided submissions in respect of the conditions for registration in relation to the earlier amended application. I do not consider it appropriate to have regard to these submissions in my consideration of the further amended application for registration. In my view, the points raised in the submissions have been addressed, and remedied, by the further amendments to the application and the applicant's provision of additional information.

Procedural fairness steps

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

[16] The state government was provided an opportunity to comment on the application of the registration test to the earlier application on 4 April 2016 and the further amended application on 22 September 2016. It made submissions in respect of the earlier amended application only. The applicant was provided an opportunity to comment on the submissions of the state government and CDNTS in relation to the earlier amended application on 11 April 2016 (prior to the filing of

the further amended application). The applicant did not made any submissions in reply to either body's submissions.

[17] As noted above, I have considered additional material provided by the applicant. On 16 December 2016, I wrote to the state government advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 3 January 2017. I received no submissions from the state government in relation to the additional material and as such the procedural fairness processes in relation to it were concluded.

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.

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

[19] I note that I am considering this claim against the requirements of s 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

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

[21] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s 61(1)

[22] This section provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title

claim group'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

> If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[23] In my view, there is nothing on the face of the amended application that suggests that it is not brought on behalf of all members of the native title claim group.

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

Name and address for service: s 61(3)

[25] Part B of the application states on page 16 the name and address for service of the persons who are the applicant.

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

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

[27] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[29] Three of the four persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section. All are dated during the month of July 2016. I understand from the affidavit of Mr Geoffrey Ashwin that Mr Raymond Ashwin is deceased, which explains the absence of the fourth affidavit.

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

Details required by s **62(1)(b)**

[31] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[32] Schedule B provides a list of general exclusion statements for those areas not covered by the application and refers to Attachment B2 for the description of the external boundaries of the area covered by the application. Attachment B2 provides a description of the application area in a metes and bounds, referencing cadastral parcels, native title determination applications and coordinate points to six decimal places.

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

[33] Schedule C refers to Attachment B1 being a map showing the external boundaries of the area covered by the application.

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

[34] Schedule D refers to Attachment D which is a list prepared by the Tribunal's geospatial services of non-freehold tenure overlapping the area covered by the Wutha application.

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

[35] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

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

[36] Schedule F refers to Attachment F which provides a general description of the factual basis for the claim made in the application.

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

[37] Schedule G identifies activities the claim group currently carries out in relation to the area covered by the amended application.

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

[38] Schedule H refers to 1 application that also seeks a determination of native title in relation to the area covered by the Wutha claim – Yugunga-Nya (WAD6132/1999).

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

[39] Schedule I refers to Attachment I which is a list of such notices as at July 2016 prepared by the Tribunal's geospatial services.

Conclusion

[40] 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)[2].

[2] I note that the Form 1 application includes a Schedule HA which requires information in relation to the issuing of notices under s 24MD(6B)(c). As the application amends an application originally made before 1 September 2007, I need only consider the application against the requirements of the Act as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007*. The information stipulated by Schedule HA was not required by the Act as it stood prior to that date.

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.

[41] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c)—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made.

[42] The Tribunal's geospatial report confirms that one native title determination application falls within the external boundaries of the current application: WC1999/043—Yugunga-Nya People—WAD132/1998. This application was made on 9 December 1999 and accepted for registration on 12 June 2000. Schedule O of the amended Wutha application states that the area covered by the application is overlapped in part by the Yugunga-Nya application. It also states that no member of the native title claim group is a member of the Yugunga-Nya native title claim group.

[43] The Yugunga-Nya People application was not on the RNTC on the date when the Wutha application was first made (on 19 January 1999). Therefore the requirement to consider the issue of common claim group members between the current Wutha application and the Yugunga-Nya People application is not necessary.

[44] 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 of the Act by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

> Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar/delegate cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:
> (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
> (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[45] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, and as the application does not purport to be certified pursuant to s 190C(4)(a), it is necessary to consider if the application meets the requirements set out in s 190C(4)(b). That is, whether the applicant is a member of the native title claim group and is authorised by all the other persons in the claim group to make the application and deal with matters arising in relation to it.

[46] I must also consider the requirements as set out in s 190C(5). That is, that the application includes a statement to the effect that the requirement of paragraph 4(b) has been met and briefly sets out the grounds on which the Registrar should consider that it has been met.

The law

[47] The importance of the proper authorisation of an application has been considered by the courts on many occasions. For instance, in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*), Justice French said:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…—at [43].

[48] Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways. That this section is relevant to the inquiry is confirmed by the note following s 190C(4)(b), which refers to the definition of the term 'authorise' in s 251B. In summary, an applicant can only be authorised by one of two processes:

- by a process of decision-making that is mandated by the traditional laws and customs of the native title claim group in relation to authorising things of that kind (in accordance with s 251B(a)); or
- where there is no traditionally mandated process, by a decision-making process agreed to and adopted by the native title claim group (in accordance with s 251B(b)).

[49] The second of the two processes under s 251B (an agreed and adopted process) may only be employed where there is no traditional process mandated for authorising things of that kind—see *Evans v Native Title Registrar* [2004] FCA 1070 at [7] and [52].

Information considered

[50] Part A of the amended application makes the following statement and refers to affidavits at Attachment A to the application:

> The applicants are members of the native title claim group and are authorised by the claim group to make the application.

[51] Schedule R of the amended application includes the following statement:

> Each of the persons comprising the applicant, Ms June Ashwin (aka June Harrington-Smith), Mr Geoffrey Alfred Ashwin and Mr Ralph Edward Ashwin are members of the native title claim group 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.

[52] Schedule R also includes reference to the affidavits accompanying the application at Attachment A and other documents provided to the Registrar as additional material on 22 August 2016.

[53] Specific to the authorisation condition I have considered the following documents, included at Attachment A of the application and in the additional material provided by the applicant:

- Affidavit of Geoffrey Alfred Ashwin, dated 30 July 2016,
- Affidavit of Ralph Edward Ashwin, dated 30 July 2016
- Affidavit of June Rose Ashwin, dated 30 July 2016, and its annexures:
  JRA1—copies of authorisation notices
  JRA2—a copy of the authorisation meeting attendance record and the resolutions passed at that meeting
- Affidavit of Geoffrey Alfred Ashwin, sworn 21 August 2015

[54] Although the information contained in it does not go beyond general assertions, I have also had regard to the earlier filed amended application.

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

[55] The application states at Part A and Schedule R that the persons who comprise the applicant are members of the native title claim group. Each of the affidavits at Attachment A sworn by the persons comprising the applicant attest to being a member of the native title claim group. The material provided in relation to the factual basis condition (as summarised extensively below for the purposes of my consideration at s 190B(5)) provides information as to the basis on which the applicant persons are members of the native title claim group.

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

Second limb of s 190C(4)(b)—is the applicant authorised by all the other persons in the native title claim group

[57] Each of the 2016 affidavits sworn by the persons comprising the applicant contain the statement that they are 'authorised on the grounds that pursuant to the traditional laws and customs of the native title claim group a process of decision-making that must be complied with

authorising things of this kind has occurred and been complied with'. Each person attests to that authorisation being made pursuant to s 251B(a) – that is in accordance with a traditional decision-making process.

Traditional decision-making

[58] Mr Geoffrey Ashwin attests in his 2016 affidavit to the following in relation to traditional decision-making that must be complied with under the native title claim group's traditional laws and customs.

- the eldest living male descendent of [ancestor name 1 removed][3] and [ancestor name 2 removed] can speak and has responsibility for traditional Wutha country and traditional authority for making decisions concerning traditional rights and interests of the kind claimed in Schedule E … including decisions relating to this native title determination application'—at [10];
- Mr Ashwin is the eldest living male descendent, having succeeded [claimant name 4 removed] and Raymond Ashwin, and now has that traditional responsibility for country and decision-making authority—at [11]-[12].

[59] For the purposes of authorising persons to comprise an applicant to make and deal with a native title determination application such traditional decision-making involves:

- decisions made in consultation with families of Wutha people, and
- decisions made by Mr Ashwin in consultation with his fellow applicants and with members of the native title claim group meeting together (at a meeting held for that purpose)—at [13].

Amended description of the native title claim group

[60] Included with the additional material provided by the applicant is an affidavit sworn by Mr Ashwin on 21 August 2015 attesting to matters relating to the inclusion of further descent lines in the description of the Wutha native title claim group[4]. Based on anthropological research of Professor Draper[5], three further lines of descent were accepted by Mr Ashwin to comprise the Wutha native title claim group – in accordance with his traditional authority as the eldest surviving male. Each of the senior descendants are said to confirm Mr Ashwin's traditional authority 'to make decisions about matters of cultural and native title importance to the Wutha People'—at [7]-[9]. Each of the senior descendants also confirmed the applicant continue to be comprised of the same persons.

Decision-making process to authorise

[61] Mr Ashwin attests in his 2016 affidavit to the following steps having ensued in accordance with the Wutha people's traditional decision-making process:

[3] Daughter of named apical ancestor Darugadi (aka Thurraguddy)
[4] The original description the native title claim group being those biological descendants of [ancestor name 1 removed] and [ancestor name 2 removed].
[5] Author of the Draper Reprt.

- on 30 July 2016 a meeting was held at Leonora to consider amending the Wutha application, which he attended;
- attendees were all members of the native title claim group descended from the named apical ancestors;
- he and those in attendance authorized the persons comprising the applicant to make the amended application and to deal with all matters arising in relation to it in accordance with the claim group's traditional decision-making process—at [14]-[17].

[62] For the purpose of the required consultation and the authorization meeting, notices advertising the meeting were placed in the West Australian newspaper on 13 July 2016 and the Kalgoorlie Miner on 14 and 21 July 2016 inviting members of the native title claim group to attend the authorization meeting in Leonora on 30 July 2016. Copies of these notices are annexed to the affidavit of June Rose Ashwin and include the following information:

- the purposes of the meeting being to authorize the making of an amended Wutha application;
- meeting place, date, time;
- that the proposed amended form 1 was available to be viewed at the offices of the Wutha People, and the address provided;
- invitation was to Aboriginal persons who are biological descendants of the apical ancestors listed at Schedule A of the Form 1, adopted by the biological descendants, and those persons who consider they may hold native title in relation to the Wutha Peoples native title claim area; and
- a contact number was provided for any queries.

[63] No map of the Wutha People's claim area was included in the notice, nor any indication of the proposed amendments to the application. Presumably this information could be sought in the viewing of the Form 1.

[64] Annexed to Ms Ashwin's affidavit is a list of 18 names and signatures of the persons who attended the 30 July 2016 authorisation meeting and a record of the resolutions reached. Two resolutions were reached:

1. The applicant group of the Wutha People …. are authorized by the traditional decision-making by Geoffrey Alfred Ashwin to amend the Wutha Peoples native title determination application as proposed and presented at this meeting and to make and deal with matters arising in relation to it.
2. The applicant group of the Wutha People … so authorized by the traditional decision-making by Geoffrey Alfred Ashwin do amend and lodge the amended native title determination as explained and presented at this meeting …

[65] Ms Ashwin and Mr Ralph Ashwin both attest in their affidavits to having read Mr Geoffrey Ashwin's affidavit and 'confirm the traditional decision-making authority of Geoffrey Alfred Ashwin and the traditional decision-making process of the native title claim group for authorizing this amended application … as described by Geoffrey Alfred Ashwin in his said affidavit'—at [9].

190C(5)

[66] For the purposes of s 190C(5)(a), the application must contain a statement to the effect that the requirement set out in paragraph (4)(b) has been met, and, for the purposes of s 190C(5)(b), must also briefly set out the grounds on which the Registrar should consider that the requirement has been met.

[67] These statements are provided at Schedule R and Attachment A and I am satisfied that they meet the requirements of s 190C(5).

Conclusion

[68] I am satisfied that Mr Geoffrey Ashwin, Ms June Ashwin and Mr Ralph Ashwin, the persons comprising the applicant[6], are each members of the Wutha native title claim group.

[69] I understand that authorisation of the applicant is derived through Mr Geoffrey Ashwin who has the authority under Wutha traditional laws and customs to make decisions of the kind that would authorize persons (an applicant) to make and deal with a native title determination application. The decisions (to authorize the applicant and to amend the current claim) have been made through his authority and through his consultation with members of the native title claim group. He has explained the basis of his authority and evidence of his consultation is demonstrated in the affidavit material.

[70] I am satisfied that all the material before me demonstrates that the applicant is authorized in accordance with s 251B(a) to make this application and to deal with all matters arising in relation to it:

- the information before me sufficiently describes the traditional decision- making process that must be complied with by the Wutha native title claim group;
- that sufficient notice of the meeting was given to the claim group;
- there is sufficient detail to evidence that the traditional decision-making process (described above) was followed to authorise those persons identified at Part A of the Form 1 to make and deal with the application;
- each of the persons now comprising the applicant have affirmed or sworn to the decision-making authority of Mr Ashwin;
- there is no information before me contesting the traditional authority of Mr Ashwin to make such decisions; and
- there is no information before me that would bring into doubt the veracity of the resolutions of the native title claim group and its support of Mr Ashwin to authorise the applicant.

[71] I am satisfied that the requirements set out in s 190C(4)(b) are met.

[6] The fourth person, Raymond Ashwin, being deceased (2012).

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.

Description of the area covered by the application

[72] Schedule B refers to Attachment B2 for a description of the external boundaries of the area covered by the amended application. Schedule B lists general exclusions and states that where there is a discrepancy between the map provided at Attachment B1 and the written description contained in Attachment B2, the latter prevails. Attachment B2 describes the application area as consisting of 5 discrete areas. Each area is described by a metes and bounds description referencing cadastral parcels, native title determination applications and coordinate points to six decimal places. The description was prepared by the Tribunal's geospatial services on 2 May 2016.

[73] Schedule C refers to Attachment B1 which contains a poor black and white copy of a colour map prepared by Landgate, titled 'Wutha Native Title Application WAD6064/98 (WC1999/010), 'With Topography', dated 18/11/2013. A colour version of the map was sourced from Landgate and shows the application area depicted by purple hachured areas; topographic features such as towns, roads, homesteads and waterbodies; scalebar, coordinate grid, and locality map; and notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[74] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries and to be reasonably certain of the area on the earth's surface. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described, and thereby be excluded from the application. The more specific exclusions allow a greater level of detail about those areas not covered by the application.

[75] The geospatial report identifies a minor typographic error for a co-ordinate in the description of Area 2 – "… boundaries of that pastoral lease to a corner at Latitude 26.635686° South, again …". It should read - "… boundaries of that pastoral lease to a corner at Latitude 28.635686° South, again …"

[76] Notwithstanding the typographical error, the geospatial assessment is that the description and the map are consistent with each other such that the area covered by the application is

readily identifiable. I agree with that assessment. The geospatial assessment also confirms that the area covered by the application has not been amended and not reduced, and that the area does not include any areas which have not previously been claimed in the original application.

[77] I am therefore satisfied that the external boundary of the area covered by the application is identifiable and, along with the general exclusions that serve to identify the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[78] 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.

[79] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments of Mansfield J in *Doepel* that the focus of s 190B(3)(b) is:

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

[80] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that 'it 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'—at [67].

[81] The description of the native title claim group at Schedule A is as follows:

> The Wutha people, being those persons (including the applicants) who identify themselves as Wutha and are:
>
> 1) the biological descendants of:
>
> (a) Darugadi (aka Thurraguddy), his affine Murni and her mother Matjika
>
> (b) Julia Sandstone ("Old Julia")
>
> (c) Billy
>
> (d) Inyarndi
>
> and

> 2) those persons adopted by those biological descendants in accordance with Wutha tradition and customs. (Adoption refers to the situation where a child is 'grown up' by a relative or someone without a biological relationship, either because they have been gifted to them, or left in their care, as the biological parents are not in a position to care for them. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system).

[82] In my view, the description of the group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by biological descent from the persons named in the description. The final paragraph in respect of the principle of adoption is also sufficiently clear and does not, in my view, detract from the clarity of the preceding descent based description. It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or their adoption, but that would not mean that the group has not been sufficiently described.

[83] 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.

[84] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

[85] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s 62(2)(d):

> 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 of the Native Title Act 1993 (Cth) applies), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the native title application determination are [sic] (application area) as against the whole world ("exclusive possession area").

2. Over areas where a claim to exclusive possession cannot be recognised ("non-exclusive possession area"), the native title claim group claim the following rights and interest exercisable in accordance with the traditional laws and customs of the native title claim group:
(a) The right of access to the application area;
(b) The right to camp on the application area;
(c) The right to erect shelters on the application area;
(d) The right to live on, use and enjoy the resources of the application area;
(e) The right to move about the application area;
(f) The right to hold meetings on the application area;
(g) The right to hunt on the application area;
(h) The right to conduct ceremonies on the application area;
(i) The right to participate in cultural activities on the application area;
(j) The right to maintain and protect places of significance under traditional laws and customs in the application area;
(k) The right to control access to, and use of, the application area by other Aboriginal People who seek access to or use the lands and waters in accordance with traditional laws and customs.
The native title rights are subject to:
1. The valid laws of the State of Western Australia and the Commonwealth of Australia, including the common law;
and
2. The rights (past of [sic] present) validly conferred upon persons pursuant to the laws of the State of Western Australia and the Commonwealth of Australia

[86] When read together with the exclusion statements in the description of those areas not covered by the application, I am of the view that the native title rights and interests claimed can be 'properly understood'. I understand that the application claims possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims the listed non-exclusive rights where the exclusive right cannot be recognised. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[87] 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.

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

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

[89] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[90] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*[7], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5) and his approach in *Gudjala 2009* was in accord with this.

[91] The above authorities establish clear principles that guide the Registrar when assessing the sufficiency of a claimant's factual basis. In summary, they are:

- The applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92].
- The nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92].
- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- The Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at ss 190B(5)(a) to (c)—*Doepel* at [17].

[92] The Full Court in *Gudjala FC* held that a 'general description' (as required by s 62(2)(e)) could be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. However 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala FC* at [92].

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[7] See *Gudjala FC* [90] to [96].

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

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

Factual basis information considered

[94] The applicant has provided information additional to that which accompanies the amended application. I have considered the following information specifically in relation to the factual basis provided to support the assertion that the claimed native title rights and interests exist:

- Anthropology Connection Report Volumes 1 and 2[8], Assoc. Prof. Neale Draper, 30 November 2015 (Draper Report)
- Amended Statement of Facts, Issues and Contentions (SFIC) filed in the Court 29 June 2016 and orders made by Jagot and Barker JJ
- Attachment F
- Witness statement of [claimant name 3 removed], 18 September 2015
- Witness statement of [claimant name 2 removed], 19 September 2015
- Witness statement of [claimant name 1 removed], September 2015
- Witness statement of Geoffrey Alfred Ashwin, 22 September 2015
- Witness statement of June Rose Harrington-Smith, 22 September 2015
- Witness statement of [claimant name 5 removed], 22 September 2015
- Witness statement of [claimant name 6 removed], 22 September 2015
- Statement of Raymond William Ashwin, filed 21 October 2002
- Statement of [claimant name 1 removed], filed 11 June 2002
- Transcript evidence of [claimant name 1 removed], 12, 15 and 16 June 2002
- Witness statement of [claimant name 2 removed], filed 12 June 2002
- Transcript evidence of [claimant name 3 removed], 17 July 2002
- Affidavit of Ralph Ashwin, sworn 13 January 1999

Area of the application (traditional boundaries v native title claim boundaries)

[95] The area covered by the Wutha application consists of five discrete and disconnected areas[9], the configuration occurring after the Court's dismissal in *Harrington-Smith* of those parts of the original combination application that overlapped the Wongatha native title claim. The Draper Report contends that the traditional boundary of the Wutha people extends well beyond the native title claim in some areas, and that the current 'area is clearly defined as a result of modern legal considerations, and does not represent the entire landscape over which the Wutha claimants profess to have rights and interests—at [315].

[8] Volume 2 comprised a set of genealogies of each of the named apical ancestors.
[9] Draper Report at [315].

[96] Although considering that rights and interests may exist across a larger landscape, the Report's findings also acknowledge an overlap with neighbouring groups in recognition that Wutha people are not the only Aboriginal people with traditional connection to "transition zones"—at [316]-[320].

[97] To this end the Report includes a number of maps which track the native title claim group's and its predecessors' movements through and oral history of the region in which the 5 discrete claim areas lie:

- Map 5-1: Wutha People on Country, pre 1900—at page 34;
- Map 5-2: Wutha People on Country, 1900-1950—at page 35;
- Map 5-3: Wutha People on Country, 1951-2000—at page 36;
- Map 5-4: Wutha People on Country, 2000-2015—at page 37;
- Map 5-5: Wutha People on Country, undated—at page 38;
- Map 5-6: Wutha People on Country, Travels of [ancestor name 1 removed], [ancestor name 3 removed], and [ancestor name 4 removed]—at page 43;
- Map 5-7: Wutha Country - Family and Individual Examples of Inhabited Country—at page 46.

[98] These maps show a region characterized by consistent and complex ancestral links, travel, residence, birth and death, cultural and traditional knowledge and connection and the dispersal and transition of people caused by European settlement. In my view, despite the inherent complexities, there is sufficient factual basis to support the assertion that Wutha people have and continue to have an association with the lands and waters beyond the boundaries of the discrete areas covered by application. I have therefore considered all of the information before me against the backdrop of the Wutha people's asserted traditional connection to a wider area of country and cultural landscape.

'Wutha' / society / apical ancestors

[99] The material before me refers to variant naming of the native title claim group - other group names for the native title claim group known as Wutha include Tjupan, Pini, Koara (or Kuwarra) and more recently 'the Darlot Mob'[10]. 'Tjupan' has long been considered as an alternate name for the Wutha Claim, having also been found by Tindale as an acceptable variant name for the Pini people.

[100] The current term 'Wutha', derived from the traditional name of a wild potato or yam, and its variations, is discussed by claimants in their 2015 witness statements. For example:

- [claimant name 3 removed] refers to the Darlot people, including her father ([ancestor name 5 removed]), who are the Tjupan mob, also called the Pina (Bini) mob—at [22]-[24];
- Geoffrey Ashwin refers to Tjupan and Wutha synonymously—at [30];
- June Ashwin (Harrington-Smith) speaks of her father born in 1908 who called himself Tjupan and Pini—at [15]

[10] Draper Report—4.3 Wutha and other group names

[101] The Draper Report explains, and this is borne out in the witness statements, that 'the name 'Darlot People' originates from a permanent camp of Aboriginal people in the Darlot area'. Evidence and oral history is said to support 'the equivalence of Darlot people with Tjupan people' and 'suggests that the Darlot People maintained traditional Tjupan socio-cultural relationships between individuals, which would have relied on existing and understood kinship systems and familial relationships extant prior to settling in Darlot'—at [92]-[102][11].

[102] The geographical and historical context in which groups of Aboriginal people existed in this region is also an important consideration in relation to the relevant society of which the native title claim group is and its predecessors were a part. The Draper Report explains, 'Aboriginal groups surviving in arid or semi-arid areas necessarily travelled large distances to reach water and scarce food supplies. As a result, the traditional lands of Aboriginal people tend to be large'—at [115].

[103] The Draper Report also considers the relationship of Wutha people to and with other tribes and groups in the region, acknowledging that 'the continuation of familial ties has made the distinction between the groups particularly complicated'—at [107]. This continuation is evidenced in the witness statements and shows the close hereditary and geographical interconnections of groups with each other. In my view it is not for me to make any assessment of such complex anthropological issues and I am satisfied for the purposes of my registration decision with the overarching view reached in the Draper Report:

> Through the reference to both the Tjupan and Wutha levels of Aboriginal social organisation, this suggest that there is both a coherent larger tradition of law and culture for the whole Tjupan group, as well as local variations between those "known as Wutha now" and other subgroups—at [87].

Reasons for s 190B(5)(a)

[104] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. It is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary that the material before the Registrar shows cumulatively an association between the whole group and the whole area of the claim—*Gudjala* (2007) at [51] and [52]. Further, Dowsett J also observed:

> Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

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

[105] Attachment F to the amended application asserts that anthropological and ethnographic studies, archeology, historical records and oral history evidence that the predecessors of the

[11] Darlot is located north of Leonora. It is not covered by the application but is just east of Area 5.

native title claim group had an association with the area covered by the application. The ancestors named at Schedule A, and their predecessors, are said to have been living on and in relation to the claim area prior to and at the time that British sovereignty was asserted in the area in 1829 and at the time of European settlement in the 1890s. Support for this assertion is found in the claimant witness statements and the additional material, principally the Draper Report.

[106] The Draper Report set outs, and the witness statements illustrate this in their personal accounts, that prior to 1900, the named apical ancestors 'were living, travelling and carrying out their everyday lives in their traditional country, which includes the Wutha native title claim area'—[132]. Further, the genealogical information provided in all of the information before me details the approximate birth dates and locations which accord with locations in either the claim area or proximate to it:

(a) **Darugadi (aka Thurraguddy)**, his affine **Murni** (- 1955) and her mother **Matjika** (1847-); b. Wingara Soak / Thurraguddy Creek

- **Matjika** – came from Kalyaltcha – southern side of Lake Carnegie (within the boundary of traditional country for Telpha);
- [ancestor name 1 removed] (1887 - 1938) at Wingara Soak (outside claim area)
- [ancestor name 5 removed] (brother to [ancestor name 1 removed]) (1889 - 1968) at Lake Carnegie (Thurraguddy Creek)

(b) **Julia Sandstone ("Old Julia")** b. 1880/90

- [ancestor name 3 removed] (1912 - 1990) at Sandstone and [ancestor name 6 removed] (1908 - 1979) at Darlot

(c) **Billy**, b. 1889 at Darlot

- [ancestor name 7 removed] (1909 -) at Darlot

(d) **Inyarndi**[12]

[107] The Draper Report presents oral evidence from Wutha claimants that both the southern margin of Lake Carnegie and the traditional gathering place around a permanent water source at Darlot were part of the traditional country and round of the Wutha group. Wutha people inhabited the Darlot area prior to the foundation of the township—at [115]. The Report's maps and findings point to a combined traditional country of all the apical ancestors. In particular, the map illustrating the areas of country inhabited by a family or individual, illustrate the extent and interactions of 'runs' in relation to the claim area. That is:

> a recorded sample of how a native title claim area within a traditional 'country' defined by the claimant group actually is populated and utilised by its inhabitants. Temporally, the pattern shown on the map is a composite, as the examples which could be found span a period of more than a century. Some of the examples represent a specific person's lifetime, while others refer to a cumulative record for more than one generation of a particular family.

[12] Neither the Draper Report nor the genealogies provide a birth or death date for this ancestor, However, the Report infers that one of her 5 children, [name removed] (on the basis that his child [name removed] was born in the 1920s), could have been living and travelling in his identified traditional country around or before 1900—at [181].

[108] The Report considers the evidence in relation to the named apical ancestors and their traditional country. For example:

- Durugadi: 'evidence points to long-term use by Wutha ancestors of the traditional boundary described by [ancestor name 1 removed] [his daughter] to Tindale. These activities occur on or around the easternmost portion of the Wutha native title claim. The reported dates and places of [ancestor name 1 removed]'s and [ancestor name 5 removed]'s (her brother) births indicate that they and their mother were living within or on the border of traditional Pini country prior to 1900 … it is reasonable to assume that the country [ancestor name 1 removed] described was broadly similar to the traditional country of her parents and grandparents, which takes the connection back well before first contact with Europeans and at least close to the date sovereignty was assumed'—at [153];
- Julia Sandstone: the recorded births of her children in Sandstone show she was in or around the Sandstone area in the early 1900s; suggesting that the central portion of the Wutha native title claim area lies within Julia Sandstone's traditional country—at [165]; [ancestor name 3 removed] (her daughter) told her children she travelled regularly to the places in that traditional country (plotted onto Map 5-6) and 'it is reasonable to assess her mother's regular travel routes as being established prior to 1900'—at [162]; 'the locations chosen to represent [ancestor name 3 removed]'s travels, and extrapolated to represent her mother's traditional country, consist of Sandstone, Windsor, Payne's Find, Youanmi Downs, Cashmere Downs, Perrinvale, Mount Ida, Menzies, Niagara, Kookynie, Tower Hill near Leonora (mapped as Leonora), Sturt Meadows, Chain of Waterholes at East Terraces (mapped as East Terraces), Laverton, Salt Soak near Mulga Queen (mapped as Mulga Queen), Weebo and Lawlers—at [163].

[109] The Report reaches conclusions about the association of these preceding generations, finding that '[t]he routes people travelled from place to place would have varied according to the availability of resources … are likely to have varied according to seasons, water and food availability … camps, meeting places and ceremonial grounds were usually away from a town or station homestead —at [193]-[194]. Further:

> Wutha people did reside on and work across pastoral stations which extend well inside this area, but for which we have only shown station homestead locations (such as Yelma Station in the north), so that the picture is incomplete. Oral history also says that Wutha people in the early 20th century moved from the south of Lake Carnegie to Darlot spring (which was there before the township) via a network of rockhole and soak water sources which were known to them from experience and the Thukurr Dreaming Tracks they knew through this area—at [210].

[110] [claimant name 3 removed], speaking of her ancestry in the Wongatha hearing transcript (17 July 2002) and in her 2015 statement, has detailed knowledge of her predecessors association with the area:

- the 'migration' from the north of people to the Darlot area – the 'Darlot mob', with many families and persons interlinked by this move from Wongawol to Darlot at the time it was a 'ration place' – people who were the 'sister cousins' of her father, numerous families, [ancestor name 1 removed] her father's 'cousin-sister', cousins, uncles - moving around,

working on stations, marrying in accordance with law and custom, gathering for meetings and ceremony at Darlot, Mt Grey and Mt Sir Samuel;
- she speaks of people's moving around being dictated by the violence of shootings and the removal of children by 'welfare';
- she recalls corroborees at Leonora during her childhood which people from all over the region attended, camping for days or a week – singing dancing, trading ochre for seed—at [65]-[73].

[111] [claimant name 1 removed] demonstrates that her own association with the claim areas and those locations proximate to them is borne of inter-generational transfer, having the full knowledge of her forebears' and their families' association with Wutha country:

- she was told by her mother [ancestor name 7 removed] (daughter of apical Billy); that her family came from Wongawol (north of Area 5);
- she came with her sisters and cousins down to Darlot—[4]-[5];
- she knows that her country is 'all the places her mother's people lived in and walked around and where she has been living all her life – Darlot, Weebo, Tarmoola, Wilson's Patch, Marshall's Pool, Sturt Meadows and Ida Valley—at [59].
- she speaks of sites where big camps of the old people were located, aunties and uncles who were born at Darlot, Kudjelan Creek/Mt Step – 'nearly all that generation was born in the bush'—at [32].

[112] [claimant name 2 removed]'s knowledge and understanding of the significance of her country is defined by the association of her predecessors:

- her grandmother ([ancestor name 7 removed]) told her that they were Koara people—at [10];
- the Tarmoola areas, Sturt Meadows and Weebo, Wilson's Path and Mr Ida and Ida Valley are special to her and her family because her old people were born there, worked there – they are places that are *parna* or *manta* for her—at [39]-[41].

[113] Geoffrey Ashwin's recollections illustrate the association of his predecessors with Wutha country:

- his father was born in 1908 and his mother in 1911; his mother was from Sandstone and her mother is one of the named ancestors – Julia Brown (Sandstone). His father was from around Darlot whose mother was [ancestor name 1 removed] (daughter of named ancestor Darugadi)—at [1]-[7];
- he speaks of being taught to hunt by his father and 'the old people' – going through Tarmoola, Nambi, Mertondale, Weebo, Wilgarra and other stations throughout the claim area'—at [9]-[15];
- he can recall when he was a boy ceremonies being held at the 'back of Leonora'; boys undergoing initiation; and people bringing wood from the scrub to make spears and boomerangs—at [20]-[21];

[114] The Draper Report's view is that the claimant statements 'reflect occupation by the predecessors of the claimants of 'differing ranges, with multiple intersections around important places which [were] utilised by many people… defining the territory which the group has collectively inhabited over the years—at [195]. The mapping shows a record of what people have

done, the places they have been, lived and practiced their culture over more than a century—at [206].

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

[115] The witness statements support the Draper Report's assessment that Wutha people have 'constant and consistent presence maintained through activities such as residence, travel, work, camping, hunting, food gathering, prospecting, taking 'care of country', cultural practices, ceremony, and preservation of historically and culturally significant places, practices and stories—at [132].

[116] [Name deleted] in his 1999 affidavit details the following:

- he was born in 1945 east of Area 3 at Leonora hospital;
- although he does not live on the claim area, he continues to care for his country that is his responsibility – he regularly visits the waterholes, participates in site inspections involved in mining activity;
- that he must fulfil his responsibilities is important to keeping the stories that are connected with the land protected—at [6]-[8]

[117] [claimant name 1 removed] provides similar detail:

- her parents worked on Tarmoola, Ida Valley, Sturt Meadows, Weebo Stations – all west of Leonora and east of Areas 2 and 3—[18]; her and other Aboriginal families lived and worked on the stations in the Darlot area [20]; she grew up on and later worked on Tarmoola and Sturt Meadows stations in the 1950s [27]; regularly camping and moving between places like Marshalls Pool, Goanna Patch, Wilsons Patch—[24]-[32]; she has lived since the 1980s in Leonora spending most of her time out in the bush, camping and prospecting with other families, at Wilson's Patch, Marshall's Pool, Doyles, Tarmoola, Weebo, Darlot, Goanna Patch—at [37];
- she shares 'this country with the rest of the Darlot mob'—at [60];
- she speaks of protecting their country – looking out for possible harm to country, conducting site clearance surveys, cleaning rockholes and soaks, conserving wildlife, camping in proper places and looking after those areas—at [62]-[64];
- she states that she has a *manta* because she spent time in those areas as a girl and shares this country with all of her tribe – Leonora, Darlot, Weebo, Banjawarn, Runggui, Wingara, Kudjelan, Mulga (next to Milyari…), Yuldarl, Mr Vernon, Wudarra, Kunabulla (Mt Von Meuller), Milyari—at [27];
- she still goes out bush to places like Marshall Pool, Doyle's Well and Weebo - they are places she was shown by her mother and her aunties and uncles; she was taught how to get food and to hunt – things her mother taught her who was taught by her mother; she takes her own children and grandchildren to these places and teaches them the same things she was taught—at [29]-[33].

[118] [claimant name 2 removed] speaks to the same matters as her mother ([claimant name 1 removed]) in relation to her family's association with locations in and proximate to the claim areas:

- she lives in Leonora, she grew up with her family on the stations of Tarmoola, Weebo and Sturt Meadows—at [1]-[9];
- she has lived in many towns and communities across the region – Meekatharra, Kalgoorlie, Goanna Patch, Warburton, Blackstone, Wiluna, Leonora and speaks of the interconnectedness of families, language and law and custom in this region—at [13]-[20].

[119] [claimant name 3 removed] has an abiding knowledge of the connection of her ancestors to the claim areas and areas proximate to their external boundaries. Her knowledge includes details of the dispersal of people due to the incursions of white settlement in the region – of where Wutha people fled to and how they continued to maintain their connection to their country:

- she spent her childhood moving around the stations of the region with her parents – Leinster, Yakabindie, Weebo, Melrose (all proximate to the claim area); and later during the holidays while she was at Mt Margaret Mission (south of Laverton, east of the claim area), her parents would bring her and her sisters back to places like Darlot, Weebo, Wildara, Leinster, Yakabindie Kaluwiri and Depot Springs – in this way she came to know the country – its rockholes and bush and its stories;
- later in life she moved closer to Leonora – Wilson's Patch, Marshall Pool, Tarmoola and Weebo;
- she remembers large gatherings of people for corroborees – the last at the Leonora Reserve in the 1960s;
- her country 'is where her brother and sisters were born and where she and her sister have always lived – her *manta* is Wildara where she was born;
- she still goes bush with her family—Lawlers, Agnew, Marshall Pool, Goanna Patch, Wildara and Leinster, Booylgoo Spring, Darlot Springs, Pinnacles – she shows her children these places;
- her knowledge of her country shows her close association with it - she knows the best places to get particular bush foods – bardi, honey ants, emu, kangaroo, goanna, the country that is good for cooking, where and how to find water—at [56]-[62];
- she knows the dreaming stories for the creation of the lakes and the sites and names of dreaming tracks in the region; which sites have restricted access—at [74]-[84];
- she knows intimately where people were born and brought up, where they travelled and the country that is theirs – her siblings, parents, uncles and aunts – all the 'Darlot mob'.

[120] Geoffrey Ashwin was born at Mount Morgans (between Leonora and Laverton)—at [1]. He lived and worked on Weebo Station as a young man - he would take the old people out to find seed, grinding stones, trees marked for boomerangs and spears—at [19]; he has lived in Leonora for much of his life, returning there after absences to hunt and cook in the bush, teaching his children how to 'live off the land in the Aboriginal way'—at [21]-[29].

[121] Leonora, though outside of the boundaries of the areas covered by the claim remains a significant area to Wutha people. Many people are now born and are buried in Leonora, which is within the overall traditional boundary, but outside the native title claim areas (Leonora was in the previous claim boundary). However, it is the Report's view that overall, 'for the people

shown, the cultural preference for birth within their identified, traditional country is demonstrated—[212]-[213].

Consideration

[122] I consider that the material before me is sufficient to demonstrate the association with the area covered by the application of members of the claim group and their predecessors. The Draper Report and personal detail in the claimants' statements illustrate a continuing connection to the land and waters of the application area through birth, descent, long term association and/or ancestral connection.

[123] Descendants of the apical ancestors are shown to have maintained a constant presence on their overall traditional country with the frequency of their multiple activities tracked on the maps contained in the Draper Report. The claimants witness statements and affidavits (ranging from 2002 to 2015) repeat the story of people fleeing Wongawol (north of the claim areas) in the late 1800s after a shooting – which resulted in people spreading out to Wiluna to the west and Darlot to the south. Connections between people and families have been retained across the region for this reason – meaning that people move around for meetings, funerals and maintaining kinship ties. The maps in the Report show the networks of current and historical association across the region by Wutha people and families as relayed in the Report – from Lake Carnegie in the north east to Meekatharra in the west and Leonora in the south. They illustrate a wide association with numerous towns, sites and pastoral stations that clearly overlap and connect together the separate claim areas.

[124] [claimant name 3 removed] details her knowledge of and practice of traditional law and custom, showing that her close association with the area and region of the Wutha claim areas is both historical and contemporary. She has a detailed knowledge of where Wutha/Tjupan travelled and resided as a consequence of the dispersal effects of European settlement – and how people maintained their connection to country.

[125] Attachment F and Draper Report sets out the historical record and early ethnographic observations that evidence association of Wutha people at the time of first European contact within the acknowledged boundaries of Wutha country. The continuing association of the native title claim group and its preceding generations is evidenced in the information relating to the group's spiritual beliefs and cultural activities and its rights and responsibilities, all of which are grounded in specific locations and sites within and proximate to the claim area.

[126] There is, in my view, a factual basis that goes to showing the history of association that members of the claim group have, and that their predecessors had, with the application areas—see *Gudjala 2007* at [51]. To this extent, the material before me supports the existence of a link between the current claim group and its predecessors and their association with the application areas and the wider region in which they lie. The information supports the claim group's

connection to the land and waters of the application areas and that this connection has its origins in the preceding generations' association with those areas.

[127] This is sufficient for me to be satisfied that the Wutha native title claim group has, and its predecessors had, an association with the area.

Reasons for s 190B(5)(b)

[128] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests it claims.

[129] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate[13]:

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

[130] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala 2007* at [62] and [63]. In my view, there is sufficient factual account in the application, accompanying claimant statements and additional material to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

The relevant society

[131] Attachment F to the application provides the following general assertions to explain the normative society that governs the acknowledgement and observance of traditional laws and customs by the Wutha native title claim group:

- the predecessors of the native title claim group acknowledged and observed a systemic body of traditional law and custom containing cultural norms shared today by the claim group—at [20];
- there is considerable historical and contemporary evidence and an oral history showing the continuing relevance of these cultural norms for members of the native title claim group,

[13] This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

including the traditional laws and customs as they were practiced, acknowledged and observed by their predecessors—at [21];

- the ancestors named at Schedule A were tribal people practicing traditional law and custom at the time of sovereignty and first contact—at [22];
- their descendants remained tribal people during European settlement through such practices as traditional marriage and skin grouping rules, travel through traditional country for law business and ceremony, living in the bush using traditional resources and food gathering and preparation methods, acknowledging and observing laws and customs relating to male initiation, women's dreaming stories, the Dreamtime ('Thukurr'), and transmitting this law and custom to the younger generations—at [23].

[132] The applicant's Statement of Facts Issues and Contentions also draws a concluding assertion:

> The Claim group members and their predecessors (sometimes referred to as "Tjupan" or of the "Pini" tribe, and "Koara") are a society associated with the claim area connected to it by and observing traditional law and customs relating to the claim area. The name Wutha, meaning a bush potatoe or yam found in the claim area, was taken by the Claim group to identify them from other claiming groups in the context of Native Title. Tindale recorded this "yam" eating activity as the main defining feature of the "Pini" tribe of [ancestor name 1 removed] —at 2(d).

[133] Support for these assertions is to be found in the witness statements and affidavits that accompany the application, and in particular the Draper Report.

[134] The Draper Report expresses the view that the evidence (in the historical record and from informants[14]) is strongly suggestive of Western Desert law and culture with little modification. Stories of Dreaming tracks illustrate an adherence to western desert culture 'dreaming' and that the native title claim group's 'old people' followed 'their widely dispersed habitable lands along their dreaming tracks which identified and linked water sources, according to climatic conditions'—at [393]. The Report presents oral and anthropological evidence in relation to the Wutha systemic knowledge of 'Thukurr' (Dreaming) that goes to demonstrating a systemic body of traditional laws and customs shared by the Wutha group.

[135] Attachment F and the Draper Report set out information about the apical ancestors that points to long-term use in accordance with traditional law and custom by Wutha predecessors of the lands and waters in the region of the current claim. The identification of the ancestors in relation to their traditional country shows that they were living, travelling and carrying out their everyday lives in their traditional country, which includes the Wutha native title claim areas, prior to the 1900s. The factual basis material as a whole contends that the predecessors of the native title claim group were members of a society that existed in the area at and prior to the assertion of sovereignty (1829), and certainly at the time of European settlement in the 1890s.

[136] While the Draper Report acknowledges that the detail is not a 'body of evidence', in my view, there is sufficient factual basis to support the assertion that the laws and customs currently

[14] Including testimony and transcripts of interviews with claimants recorded during the Wongatha proceedings.

acknowledged and observed by the native title claim group have their source in a pre–sovereignty society. The apical ancestors and their descendants were able to maintain a direct connection to these areas through settlement in the ration camps, towns and work on the pastoral stations and this allowed them to continue to use the land and its resources in accordance with their traditional law and customs.

[137] The report reaches the conclusion that the evidence, collated at this stage only in outline, indicates 'that Wutha traditional law and customs and their basis for claiming rights and interests in their claim area appear to be consistent with the broad precepts of Western Desert Culture, while expressing some distinctive local characteristics. This is exactly what I would expect a cultural group on the margin between Western Desert and non-Western Desert cultural groups to look like [based upon previous research experience with other known WDCB groups]—at [755].

[138] In my view, the factual basis materials sufficiently support that the members of the pre-sovereignty society and their descendants have continued to live, move about and meet throughout the claim area. In this way Wutha people have continued to exercise their rights in relation to country, hunting and gathering, performing ceremonies, maintaining and protecting areas of importance and passing on their traditional laws and customs from one generation to the next. The members of the native title claim group by virtue of their descent from their Wutha ancestors continue to be united in and by their observance and acknowledgment of a body of law and customs.

Traditional law and custom

[139] The Draper Report asserts that '…Wutha custom incorporates possessory rights in relation to their traversed and used lands and waters; that possessory connection is shared by all members and passed on down the generational line'—at [132]–[137]. Attachment F refers to the Report and its detailing of the traditional laws and customs acknowledged and observed by the Wutha people. The report sets these out in two parts: evidence relating to the systemic knowledge of 'Thukurr' (Dreaming), which defines Wutha country; and evidence relating to a systemic body of traditional law and customs shared by the Wutha.

Thukurr

[140] The Report considers evidence and examples of Wutha people engaging with law and custom in accordance with 'Thukurr' or Dreaming stories and song/story lines, and how this defines Wutha traditional boundaries.

[141] Examples of Dreaming tracks and sacred sites in Wutha Country was documented throughout the testimony provided by Wutha people during the Wongatha proceedings in 2002: (Dog) Tjukurrpa; Seven Sisters Dreamtime story; Mallee Hen Dreaming. Oral history of important sacred and mythological sites and 'songlines' are also part of the claimants' knowledge of their traditional country, forming the basis of their traditional law and custom—at [371]. Activities relating to heritage surveys, site identification and protection are a contemporary

expression of native title claimants' knowledge of country and of those sites and their connections within a cultural landscape through 'Thukurr'—at [372]. Cultural norms relate to the protection of sacred places, including the avoidance of prohibited places, which have their origin in the Thukurr—at [373].

Systemic Body of Traditional Law and Customs shared by the Wutha claimant Group.

[142] The Draper Report presents claimant evidence and considers the particular laws and customs all of which are said to be acknowledged and observed by the native title claim group:

- ceremonial life and caring for sacred sites—at [367] to [371];
- law business and male initiation: some Wutha men 'go through the law' and become 'Watis', but some do not; both groups of men have been active in learning and teaching about sacred sites and associated Dreamings and caring for those places—[394];
- hunting and food preparation: knowledge of particular and traditional methods of hunting and food preparation evidencing the practice of traditional customs—[398];
- skin groups and marriage rules—[408];
- funeral rites—[411];
- traditional medicine and healing—[416]
- interrelation of areas within the Wutha claim: the existence of Wutha rights and interests to the exclusion of and superior to those of other groups—[417]-[430].

[143] It is the Report's view that 'there is a consistent body of traditional law and culture' and it is under this law and culture that the rights and interests claimed by the Wutha claimants arise—at [431].

[144] The claimants' witness statements and affidavits illustrate acknowledgement and observance of the traditional laws and customs under which the claimed rights and interests of the native title claim group are possessed, along with examples of the activities the group undergoes in exercise of those rights.

[145] Both of Ralph Ashwin's parents spoke language and taught him that he had responsibilities for country under their traditional laws and customs – in relation to hunting and camping, caring and protecting sites of importance.

[146] [claimant name 1 removed] claims her country under traditional law and custom through her mother – *parna* is her 'ground', *manta* meaning 'our home'—at [26]; she and her sister [name removed] know their skin group to be Karimara, from her mother [name removed] – she grew up knowing this, stating that it is still very important so people know how you fit in; their children and grandchildren know their skin group; skin groups prescribe who, what and how you can talk to people, what is taught to young girls, what is discussed—[38]-[41]; she and her sister were taught by their mother and relatives where they were allowed to go, the spirits that watch over people and warn of danger and not to 'mess around' with prohibited places – this is what they now teach their children—at [40]-[47]; she has been taught all about the different bush foods,

what they are called in language, where to get them and how to prepare them, in accordance with the seasons and their traditional laws and customs—at [48]-58].

[147] [claimant name 2 removed] knows her skin group which is the same as that of her grandmother; she knows the protocols that regulate kinship relationships based on skin groupings – as they relate to funerals and burials, ceremony, hunting, cooking and teaching girls about growing into women—at [21]-[28]; she speaks of her knowledge of bush foods – finding and collecting according to the seasons and supply, their different purposes, preparation and conservation, the stories and language associated with the various resources; she states that people continue to follow the norms which govern marriage relationships and ceremonies such as burials, funerals and other cultural activities—at [29]-[42]; she knows the stories for the area – the 'Thukurr' – the songlines and where 'the law passes through' country, that it still passes through Leonora—at [48]-[50] and [52]-[55]; she states that traditional law still operates in the Leonora area – initiated men still conduct men's business 2 or 3 times a year; women still conduct their own business (though less formally); stories, song and dance continue to provide guidance and support; looking after traditional country remains a priority for 'Koara' people, restricted women's sites, places significant under their traditional law and custom, historically important as places where important ceremonies were conducted—at [56]-[62].

[148] [claimant name 3 removed] acknowledges the rules and responsibilities she has been taught throughout her childhood in relation to prohibited places and access permissions and protocols – teaching her children and grandchildren where not to go for their safety, she and her sister are people who can grant access to country—at [81]-[84]; she knows the language and significance of her skin grouping and the line it must be carried through, its significance in the ordering of groups at meetings (and in the past at corroborees)—at [63]-[65]; she has traditional knowledge about the resources of the area covered by the claim - where to find particular bush foods, to recognise signs for the presence of water; how to catch and prepare food – all of which she has been taught by her forebears and which she has taught her children and grandchildren—at [50]-[62]; she is involved in preserving the cultural heritage of her country because she knows the dreaming tracks and stories associated with its landscape and key geographic markers—[85]-[88].

Consideration

[149] It is not the purpose of the registration test to come to definitive conclusions about what in fact was the society at sovereignty, only whether the factual basis can support the assertion that the society at sovereignty has continued a vital existence (largely uninterrupted) since that time to the present. In my view, the material I have considered is sufficient to support this.

[150] The historical information, oral history and anthropology provide evidence of the society as it existed at the time of sovereignty in the area of the application. The claimants have provided extensive examples of the continuing exercise of rights and interests by the claim group, the practice of which has been passed down to members of the claim group by their elders and

predecessors in accordance with their traditional law and custom. The Draper Report documents aspects of Wutha traditional law and custom, in respect of the area of the application as well as the wider vicinity that is the group's traditional country. This information pertains to family and ancestors, the rules in relation to land and the holding of rights in that land, special places and stories, spirits, hunting, fishing and foraging and the passing on of traditional and cultural knowledge.

[151] The witness statements and transcripts quoted in the Draper Report demonstrate an inter-generational transmission of traditional law and custom that has occurred between the native title claim group and its predecessors. The claimants' statements and research findings together contain information to provide the link between the named apical ancestors and the areas covered by the application, and identify those predecessors of the native title claim group who, at the time of European settlement, acknowledged and observed the laws and customs of a Western Desert culture. This is, in my view, sufficient to invite an inference that there has been continuous existence of the laws and customs of the wider society of which the Wutha people are a part.

[152] In my view, there is sufficient articulation that members of the claim group possess rights and interests under the traditional laws and customs of the Wutha people by virtue of those laws and customs being handed down to them by their predecessors. The material supports the assertion that there was a society at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived—see *Gudjala 2009* at [33], [66] and [72].

[153] Therefore, the application and additional material provide a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Reasons for s 190B(5)(c)

[154] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala* 2007 at [63], [65] and [66] (as summarised above).

[155] The Draper Report has found that Wutha people 'have been born, died and buried in the overall traditional country of Wutha people, or near the identified boundaries over time—at [207]. It is the view of the Report that there exists a 'combined knowledge and memory of Elders as to the extent of their collective, agreed hegemony over sacred sites, water sources and their associated 'Thukurr' or Dreamings, over traditional camping places and resource patches for hunting and gathering of foods, medicines and other resources. In the absence of written records, title deeds, maps and fence lines, a hunter-gatherer heritage dictates that identification of country must be held and passed inter-generationally in such a manner—at [205].

[156] The Report acknowledges that the 'evidence certainly suggests cultural adaptation to changing circumstances, but in my opinion it also speaks strongly of continuity, and that most important of confirmations of cultural integrity and authenticity - peer recognition and approval from neighbours who are demonstrably practicing Western Desert law and culture in depth with little modification—at [384]. This is, in my view, borne out in the claimants' statements and affidavits.

[157] [claimant name 2 removed] has an abiding knowledge of the sites and restricted areas in her country, of the songlines and dreaming stories and a continuing association with the areas in and proximate to the claim boundaries through living and working on the stations – remembering all the places of her forebears' association. She continues to maintain her traditional connections and practice her cultural heritage accordingly, despite having lived away from her country during various times in her life.

[158] Despite being moved on by authorities, [claimant name 1 removed] includes many examples of her and her people continuing to find places on their country where they could live, camp and hunt and maintain their traditional connection—at [14]. She speaks of a trip taken in 1983 to an area of the Wutha claim with members of previous generations – 'The old people wanted to show the younger ones and to say goodbye before they were too old to travel, and had a good cry'—at [33].

[159] Continued acknowledgement and observance of traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel in the areas covered by the application. They have continued to observe and acknowledge their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to Wutha country. The witness statements and the illustrative examples provided in the Draper Report demonstrate that these and other laws and customs of the Wutha people have been passed from generation to generation and continue to be acknowledged and observed today among the current generations of the claim group.

[160] There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Conclusion

[161] 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.

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

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

[163] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

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

[164] I note that, in my view, as set out above at s 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

Consideration

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 of the Native Title Act 1993 (Cth) applies), the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the native title application determination are (application area) as against the whole world ("exclusive possession area").

[165] I consider that the exclusive right of possession, occupation, use and enjoyment can be prima facie established. The decisions of the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) and *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171 (*Banjima*) indicate that for this right to be established, it must be accompanied by evidence that the practice of seeking permission to go onto another's country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'[15]. In the more recent case of *Banjima*, the Full Court referred to these statements from *Griffiths* and held that 'controlling access to country, expressed by the need to

[15] *Griffiths FFC* at [127].

obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession'[16].

[166] The Draper Report states:

> Traditional law and culture does not only control where Wutha people can move within their traditional territory, but gives Wutha people the right to access the land (Ashwin 1999a: [6]) and the authority to restrict or prohibit the access of other individuals and groups. This role of custodian is based both in practical and cultural concerns—at [455].

[167] The exercise of the right to exclusive possession continues to be apparent, referred to by each of the claimants in their witness statements:

[168] Ralph Ashwin:

- he does not need the permission of any other Aboriginal people to visit his country because it is accepted that he and his family are responsible for that country—at [6].

[169] [claimant name 2 removed]:

- access to country permissions still prevail whereby restrictions and sanctions exist that govern protocols for accessing country not of your own; she speaks of telling people where they can and can't go in her country if they are a stranger from another group – spirits from the land look after her people and warn strangers away—at [45]-[47].

[170] [claimant name 1 removed]:

- Wutha people are guided by traditional law and custom in relation to who speaks for country and who can make decisions about who may enter it or cross it, following the correct permission protocols when entering onto other country and expecting the same of others when they come onto Wutha country—at [65]-[66], transcript;

[171] In my view, the right to exclusive possession is evidenced sufficiently in the factual material and supported in the claimants' statements. As outlined above, there is information going to the right to control others' access to Wutha land and waters, one that appears to have been acknowledged and observed since sovereignty in relation to defined tracts of country.

[172] The evidence is suggestive that the right to exclusive possession exists under the traditional laws and customs of the native title claim group and as such is prima facie established.

Non exclusive rights

[173] Over areas where a claim to exclusive possession cannot be recognised ("non-exclusive possession area"), the native title claim group claim the following rights and interests exercisable in accordance with the traditional laws and customs of the native title claim group:

(a) The right of access to the application area;
(b) The right to camp on the application area;
(c) The right to erect shelters on the application area;

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16 *Banjima FFC* at [38].

(d) The right to live on, use and enjoy the resources of the application area;
(e) The right to move about the application area;
(f) The right to hold meetings on the application area;
(g) The right to hunt on the application area;
(h) The right to conduct ceremonies on the application area;
(i) The right to participate in cultural activities on the application area;
(j) The right to maintain and protect places of significance under traditional laws and customs in the application area;

[174] These rights are evidenced in the material before me, suggesting they exist under the traditional laws and customs of the native title claim group.

[175] The Draper Report and the claimants' witness statements describe numerous instances of access and use of the claim area by members of the native title claim group, and their predecessors. Wutha people have continuously accessed the areas of and proximate to the claim areas through camping, hunting, gathering; collection of resources for a multitude of purposes; caring for country and protecting and maintaining places of importance; conducting burials and ceremony; and the teaching of Wutha stories and cultural traditions to the younger generations.

[176] As referred to above in relation to my consideration of the factual basis, the claimants' witness statements are replete with references to their life-long access to Wutha country. For example, in her 2015 statement [claimant name 3 removed] describes in detail her and her family's past and current access to and use of the resources of Wutha country:

- she was born at Wildara Outstation on Weebo Station and now lives in Leonora;
- she and her family have continuously accessed and travelled through these areas, camped and erected shelters, lived and moved about for work and cultural activities – as a child and now with her children and grandchildren;
- she attests to her and other families and individuals hunting and collecting bushfood and living off the land—hunting for kangaroo, bungarra emu and picking wild berries, quandong, silky pear and digging for honey ants, collecting seeds and bush medicine, learning and practising how to use the minimal water resources of the area;
- her and her people's access to the claim area has been regulated by access protocols and prohibitions which she continues to acknowledge and now teach to the younger generations;
- in her childhood she witnessed corroborees and other ceremonies taking place on her country and today participates in meetings relating to site surveys and protection, the passing on of cultural knowledge and activities, making decisions about country.

[177] Throughout their lives Wutha people (and their predecessors) have accessed their country, hunting and fishing and gathering bush tucker, taking children on trips, having holidays, attending funerals, travelling through with their parents and grandparents, visiting and caring for significant sites, and being taught and telling the stories of Wutha country and traditional laws and customs. All of the material before me refers in detail to the continuing practice of ceremonial activities that include, but are not limited to: Welcome to Country ceremonies, smoking ceremonies, men's initiation, women's business, women's initiation, and repatriation

ceremonies for the reburial of skeletal remains. Current generations continue to teach the younger generations about ceremony and its importance in the maintenance of Wutha laws and customs and spiritual life.

[178] As evidenced by the conduct of these activities, the above claimed rights have been and continue to be exercised and possessed under the group's traditional law and custom.

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

[179] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group.

[180] All of the claimants speak to this existence of this right. For example, [claimant name 1 removed] states in her 2002 statement:

> When Aboriginal people who don't speak for our country want to come on to it to camp or hunt, under our law they should come and ask us first. Then we will show them where they can go. This is the right thing under our law, and at the same time it is courteous. Most people do this—at [65].

[181] The continuing existence of the right is referred to in the Draper Report:

> The basis of this tradition in spiritual concerns and etiquette demonstrate a continuing link between the traditional law and culture of the Wutha people and their claimed rights and interests. Furthermore, the examples of non-Wutha individuals requesting permission from the claimants indicates an acceptance by non-Wutha people of the traditional and cultural basis of Wutha connection to the country and their right to control access—at [466].

[182] As evidenced in the accounts of claimants of their interrelationships with other Aboriginal groups, the above claimed rights have been and continue to be exercised and possessed under Wutha traditional law and custom.

Conclusion

[183] 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.

[184] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

[185] In *Doepel*, Mansfield J also considered the nature of the Registrar's task at s 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

[186] Each of the persons comprising the applicant provides numerous examples throughout their statements in relation to residing on and regularly travelling around, hunting, camping and fishing in the areas of the application. They attest to having been taught by their grandparents, aunts and uncles and parents, traditional knowledge and cultural practices relating to Wutha traditional country. They each state that they and other members of the native title claim group continue to have a traditional connection with its land and waters. They continue to practice and exercise the rights and interests that arise under traditional law and custom of Wutha people and pass their knowledge onto succeeding generations. This material has been extensively referred to in my consideration of the requirements at ss. 190B(5) and (6).

[187] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area and the application therefore satisfies the condition of s 190B(7).

[188] 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 in relation to an area; 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 provision 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 in relation to an area; 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 provision as mentioned in s 23I in relation to the act;

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

(4) However, subsection (2) or (3) does not apply to an application if:

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

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

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

Section 61A(1)

[190] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 20 September 2016 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the current amended application.

Section 61A(2)

[191] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B provides the relevant general exclusion statements that the current amended application excludes any area where a previous exclusive possession act was done in relation to the area covered by the application.

Section 61A(3)

[192] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Schedule B provides the relevant statements at [2] that meet the requirements of this section.

Conclusion

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

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

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

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

Section 190B(9)(a)

[1] Schedule Q identifies that no claim is made to ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[195] Schedule P provides that no claim is made to exclusive possession of any offshore place.

Section 190B(9)(c)

[196] There is no information in the amended application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

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

[End of reasons]