National Native Title Tribunal

Registration test decision

Application name	WA Mirning People
Name of applicant	Mr K Dimer [Dec], John Graham, David Hirschausen, Bruce Hogan, Desrae Kelly, Annette-Grace Lawrie, Clem Lawrie, James Peel, Raelene Peel, Fay Sambo, Pearl Scott, Daniel Tucker
NNTT file no.	WC2001/001
Federal Court of Australia file no.	WAD6001/2001
Date application made	27 February 2001
Date application last amended	16 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 C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 17 January 2017

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 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 (Registrar), for the decision to accept the amended native title determination application (the application) for registration pursuant to s 190A of the *Native Title Act 1993* (Cth) (the Act).

Application overview

[2] The original application was made on 27 February 2001 when it was filed in the Federal Court of Australia (the Court). The application was accepted for registration on 14 September 2001.

[3] On 28 April 2016, the amended application was filed with the Court. A further amended application was filed with the Court on 16 August 2016. The amendments to the application include the following:

- the persons who comprise the applicant have been altered;
- the details of the authorisation meeting have been altered in Part A of the Form 1;
- Attachment A has been changed to revise the composition of the native title claim group;
- Schedule B and Attachment B2 have been changed to clarify the written description of the application area;
- Schedule R has been altered to provide information regarding the recent authorisation meeting; and
- Part B has been amended to reflect changes to the applicant's address for service.

[4] On 19 August 2016, the Registrar of the Court gave a copy of this application to the Registrar pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

Requirements of s 190A

[5] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C, known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A).

[6] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply as the nature of the amendments, including a change to the claim group description, are not envisaged by the circumstances in either ss 190A(1A) or 190A(6A).

[7] I must therefore apply the registration test to this application. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, under s 190A(6B), I must not accept the claim for registration.

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

[9] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration.

Information considered when making the decision

[10] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the additional material provided by the applicant on 27 July 2016;
- the information contained in the documents accompanying and provided in relation to the original application;
- the Geospatial Assessment and Overlap Analysis prepared by the Tribunal's Geospatial Services on 12 December 2016 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

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

Procedural 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.

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

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

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

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

Native title claim group: s 61(1)

[16] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

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

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

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

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

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

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

[22] The application amended on 28 April 2016 was accompanied by affidavits by some of the persons comprising the applicant. Another two affidavits were separately filed with the Court. Another affidavit was filed with the amended application on 16 August 2016 and this affidavit was referred to the Registrar with the amended application. On 4 January 2017, after being notified that an incomplete version of the affidavit of one of the persons comprising the applicant accompanied the application, the applicant's representative confirmed that the complete affidavit was filed with the court on 28 July 2016. This was confirmed by the Registrar of the Court.

[23] As outlined above, the further amended application was not accompanied by new s 62 affidavits. In *Doepel*, Mansfield J stated that the s 62 affidavits were to accompany the application — at [16] and [88]. In *Drury v Western Australia* [2000] FCA 132, whilst dealing with an amendment of geographical contraction of a claim area, French J held that not all amendments of applications required the filing of new s 62 affidavits with an amended application — at [10]. However, the Court may 'direct affidavit evidence in support of amendments to be filed in an appropriate case' — at [14]. I therefore understand that the requirement to file new affidavits with an amended application is at the discretion of the Court.

[24] In this instance, the persons comprising the new applicant have filed new affidavits with the Court although not all accompanied the most recent amendment to the application. I note there is no reference in the Court's orders for the need to file fresh affidavits.

[25] In my view, the amendments do no seek to alter the claim in the application and given that the Court has not required the filing of fresh affidavits, I consider it appropriate to have regard to the affidavits that were filed previously. As the court in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 commented at [73], the Act is remedial in character and should be construed beneficially.

[26] I consider that the affidavits from each of the persons jointly comprising the applicant contain all the statements required by s 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant.

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

Details required by s 62(1)(b)

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

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

[29] Attachment B2 contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B contains information of areas within those boundaries that are not covered by the application.

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

[30] Attachment B1 contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[31] Attachment D provides the results of the tenure searches conducted by the applicant to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

[32] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

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

Activities: s 62(2)(f)

[34] Schedule G describes the activities undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[35] Schedule H provides that the applicant is unaware of any other application made in relation to the area covered by the application.

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

[36] Attachment HA contains details of notifications given under s 24MD(6B)(c) of which the applicant is aware.

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

[37] Attachment I contains details of notices issued under s 29 of the Act relating to the whole or part of the area covered by the application.

Conclusion

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

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

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

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

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

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

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

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

[43] The geospatial assessment does not identify any previous application that covered the whole or part of the area covered by the current application.

[44] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.

[45] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

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

Subsection 190C(4) Authorisation/certification

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

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

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

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

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

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

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

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

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

[48] Schedule R indicates that the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) are met.

[49] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(b) are met.

The application must contain the information specified in s 190C(5)

[50] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that:

> [i]f the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in [s 190C(4)] has been satisfied unless the application:
>
> (a) includes a statement to the effect that the requirement set out in [s 190C(4)(b)] has been met, and
>
> (b) briefly sets out the grounds on which the Registrar should consider that [the requirement in s 190C(4)(b)] has been met.

[51] I note that the following statement is made in Schedule R of the application:

> The applicants are members of the native title claim group and are authorized to make the application and deal with matters arising in relation to it all by other persons in the native title claim group, pursuant to a process of decision making that the persons in the native title claim group agreed to and adopted in relation to authorising decisions of that kind.
>
> Pursuant to the above process of decision making, the native title claim group authorized the Applicants to act on behalf of all the members of the native title claim group by resolutions passed at a meeting of native title holders held near Mundrabilla in Western Australia on 28 February 2016.

[52] In my view, the above constitutes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

The application must address the requirements of s 190C(4)(b)

The requirements of s 190C(4)(b)

[53] Justice Mansfield, in *Doepel*, commented that s 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which 'clearly … involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — at [78].

[54] Justice Collier, in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*), noted that s 190C(4) requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the

other persons in the native title claim group — at [21], [29] and [35]; see also *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60].

[55] In *Strickland*, French J stated that the authorisation condition at s 190C(4)(b) is not 'to be met by formulaic statements in or in support of applications' — at [57].

[56] Section 251B provides, for the purposes of s 190C(4)(b), two alternative means of authorisation:

- authorisation in accordance with a process required under the traditional laws and customs of the native title claim group — s 251B(a); or
- authorisation in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group — s 251B(b).

[57] I note that a claim group is not permitted to choose between the two processes described in s 251B. If there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group — *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 at [1229] – [1230]; see also *Evans v Native Title Registrar* [2004] FCA 1070 at [7].

The applicant's authorisation material

[58] In addition to the information contained in Schedule R, further authorisation material is contained in the affidavits of the persons comprising the applicant and the affidavit of a Goldfields Land and Sea Council (Goldfields) lawyer dated 21 April 2016 which was filed with the Court on 16 August 2016 and provided to the Registrar.

[59] The affidavit of the Goldfields lawyer provides the following information about the authorisation meeting:

- Goldfields notified and convened the two authorisation meetings on 28 February 2016 at Mundrabilla — at [2].
- Employees of Goldfields that attended the meetings included a lawyer, principal legal officer, senior legal officer, anthropologist and logistical staff — at [3]. Also attending the meetings was a general manager of Pila Nguru Aboriginal Corporation RNTBC and an independent archaeologist and anthropologist who accompanied and assisted the attendees from Tjuntjuntjara.
- The purpose of the meeting was, among other things, to amend the description of the native title claim group following information from further anthropological research and the views of the State of Western Australia — at [5] – [9].
- The persons invited to the first authorisation meeting were the persons who fit the original description of the native title claim group and the persons invited to the second meeting were those included in the proposed description of the claim group — at [9].
- A series of consultations by Goldfields with certain Mirning claim group members took place in early to mid-2015 in person at various locations and by phone — at [10].

The persons who were contacted by phone were sent information sheets containing information and legal advice — at [11] – [13].

- Goldfields staff arranged for transportation and accommodation for attendees — at [14] – [20].
- Goldfields sent notices and information about the meetings to members of the Mirning claim group for which they had contact details of or found through enquiry — at [22] – [26] and [39]. Goldfields also asked notices to be circulated by South Australian Native Title Services Ltd among any Mirning people known to that representative body and to the Far West Coast Aboriginal Corporation (Corporation) which is the registered native title body corporate for the area east of the application area — at [26]. On 22 February 2016, the Corporation confirmed that the notices had been received and displayed and that information about the meeting was circulating through the community there. Some members were also contacted by telephone and through social media and informed of the meetings — at [29] – [38] and [44].
- In relation to the ritual right holders, consultation trips were taken to speak and inform them of the meetings and notice of the meeting was mailed or circulated to the relevant people — at [40] – [42].
- Notices of the meetings were also advertised in the West Australian, Esperance Express, Adelaide Advertiser and Kalgoorlie Miner in February 2016 — at [43]. The information contained in the notices included the date, time, location, purpose of the meetings and the persons who were invited to attend — Annexure "NED13".
- At the meeting, the Goldfields field/liaison officer was positioned at the entrance and explained the registration process to each person arriving and gave them a family history form to complete before handing it to the anthropologist who analysed the forms against a set of genealogies — at [48] – [49]. Coloured wrist bands were allocated depending on the response provided and votes were counted taking into account the relevant colour of the band — at [50] – [51].
- At the first meeting:
    - Goldfields staff informed those in attendance of the substance of the proposed changes to the application and legal advice was provided in relation to those changes — at [54]. Opportunity was given for attendees to ask questions, raise issues and express contrary views. Attendees were also given an opportunity to discuss among themselves, including within family groups — at [56].
    - A consensus agreement was reached to the proposed changes with some qualifications — at [60]. These issues were discussed and the proposed draft resolutions were amended and were discussed again — at [60] – [62].
    - Each draft resolution were read out, moved, seconded and voted on by show of hand — at [63]. Each resolution was passed unanimously.
- At the second meeting:

- The additional invitees joined the meeting — at [69]. Goldfields staff explained the decisions that had been made at the first meeting and went through the authorised changes in detail.
- The same principles of decision making as in the first meeting were read out and there was general approval to those principles and no disagreement — at [72].
- The draft resolutions that were displayed on a handout distributed to attendees were read out and explained to the attendees and questions were clarified or confirmed — at [73].
- The attendees discussed nominating applicants among individuals and family groups and then reconvened for nominations — at [74]. Twelve names were called out from the floor and recorded, and no attendee objected to any nomination. The resolutions were called out and voted upon. Each resolution passed unanimously — at [75].

- Information sheets handed out during the meetings referred to the proposed resolutions and also set out the principles applying to Mirning decision making process that was agreed to and adopted and which was based on previous meetings, including that:
  - Families are important to how decisions are made;
  - In each family there are some older people who will speak with more cultural authority than other family members;
  - These people can give members of their family guidance about the decisions;
  - Nobody has a right to veto and everyone makes the decision together; and
  - Formal decisions are made by a motion moved and seconded by members of the group, and then voted on by show of hands — at [77] and Annexure "NED17".
- At the close of the meeting, a number of participants were spoken to and they confirmed that they understood and approved of what had happened at the meetings and how the next steps would proceed in Court — at [76].
- There were 54 registered participants in the first meeting and approximately 100 registered participants to the second meeting — at [79]. The anthropologist was of the opinion that the representation at the first and second meeting and the decision making process in each meeting exhibited cultural integrity and is likely to reflect the views of a majority of claimants — at [81].
- The ritual right holders from Tjuntjuntjara were also sufficiently representative and authoritative to make decisions of the kind discussed at the second meeting on behalf of the ritual right holders — at [83]. These attendees were well balanced in the sense that it contained most senior men, the most knowledgeable and capable men of the next generation, and a good sample of younger and up-and-coming men, and they were all initiated and knowledgeable about the *Tjukurpa* (Dreaming) in the area — at [82].

[60] The affidavits of the persons comprising the applicant provide details confirming some of the above information.

Consideration

[61] I note that the first limb of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

[62] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[63] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified — *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

[64] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. Schedule R indicates an agreed and adopted process was used during the authorisation meetings. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[65] Although in the context of s 66B, the requirements of s 251B(b) were discussed by Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) where her Honour observed that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' — at [25]. Her Honour held that:

> … the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process — at [25].

[66] Justice Stone cited with approval the decision of *Ward v Northern Territory* [2002] FCA 171 (*Ward*), where O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance, were required to be addressed before his Honour would consider making an order pursuant to s 66B:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? — *Ward* at [24], cited in *Lawson* at [26].

[67] O'Loughlin J noted that it was not necessary that these questions be answered in any formal way but held that 'the substance of those questions must be addressed' — at [25].

[68] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meetings and who it was convened by. It indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meeting, which included by public notice, notices circulated through communities, letters, telephone calls and communicated between claim group members, and the notice indicates that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meetings were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion, breaking out into groups and asking questions. The meetings are said to have had sufficient representation of the group. The resolutions were passed unanimously, including the authorisation of the persons comprising the current applicant to make the application and to deal with matters arising in relation to it.

[69] In my view, the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that, I am satisfied that the condition of s 190C(4)(b) is met.

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

Merit conditions: s 190B

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

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

[71] Attachment B2 describes the application area by a metes and bounds description referencing parcels of land, State borders, native title determination applications, geographic coordinates and roads.

[72] Attachment B1 is a copy of a map titled 'Amended Native Title Determination Application WAD6001/2001 – WA Mirning People (WC2001/001)'. The map includes:

- the application area depicted by a bold outline;
- town and locations, and
- the Eyre highway, railway, state border, and legend.

Consideration

[73] The geospatial assessment states that the area covered by the application has not been amended nor reduced and does not include any areas which have not previously been claimed. It concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[74] Schedule B contains some general exclusions to categories of land and waters, which provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] – [38].

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

[76] 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.

[77] Schedule A contains the description of the native title claim group as being those persons:

- who are descendants of a list of apical ancestors, where descent is either by birth or adoption, and they are recognised by other native title holders as having realised their rights under the traditional laws and customs of the native title holders through knowledge, association and familiarity with the application area; and
- a list of identified members of the Spinifex People who:
  - hold mythical or ritual totemic knowledge and experience of *Tjukurpa* associated with any part of the application area so as to give rise to rights and responsibilities in those areas; and
  - are recognised by other native title holders of ritual totemic knowledge as having native title rights and interests within the application area by virtue of that knowledge and experience.

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

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

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

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

[81] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described' — at [67].

[82] While not addressing the requirements of s 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among other things, a request to change the native title claim group description to

include a criterion of descent from another apical ancestor not identified in the application, stated that:

> … for the purposes of the [Act], it is the claim group which must determine its own composition … The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs — at [256].

[83] Dowsett J referred to the decision of the *High Court in Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; (2202) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J stated that identification as a member involved an internal perspective of the group. The decision of French J was appealed and the Full Court stated that:

> A relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by Yorta Yorta means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v State of Western Australia* [2010] FCAFC 26 at [45].

[84] Dowsett J noted that '[t]hese cases clearly demonstrate that membership must be based on group acceptance' — at [260].

Consideration

[85] Although there are a number of elements to the claim group description, I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[86] I will discuss each criteria below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[87] I note that in reaching my view about this condition, I have been informed by the applicant's factual basis material contained in the application.

Mirning membership

[88] I understand the first criterion to include those persons who are the biological or adopted descendants of the identified apical ancestors, and are recognised by other native title holders.

[89] In relation to biological descent, describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

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

[91] In respect of membership by adoption, I note that in *WA v NTR*, Carr J accepted the approach of identifying members of the native title claim group by biological descendants, *including by adoption*, of named people. His Honour accepted the description without any qualification indicating whether the method of adoption of persons was according to traditional laws and customs — at [67]. I note Attachment A provides the rules by which a person can be adopted under Mirning traditional laws and customs.

[92] In relation to recognition by other native title holders, the objective rules by which members fit this criterion have been outlined in Attachment A, namely through knowledge, association and familiarity with country can those persons be recognised by other native title holders.

[93] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

List of Spinifex members

[94] The members of the native title claim group who fit the last criterion have been identified and the rules by which they fit this criterion have been detailed, namely that they hold mythical or ritual totemic knowledge and experience of *Tjukurpa* over areas which give rise to rights and responsibilities in those areas, and that they are recognised by other native title holders of ritual totemic knowledge as having rights and interests by virtue of that knowledge and experience.

[95] I consider that with some factual inquiry it would be possible to ascertain members who would satisfy this criterion in the future. I note that the members who currently fit this criterion have been identified. In light of this, I am satisfied that this part of the description is described sufficiently clearly in order to ascertain whether any particular person is part of the group.

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

[97] 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.

[98] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92],

[95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

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

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

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

Consideration

[101] Schedule E provides the description of the claimed native title rights and interests. I understand that there is a broad claim to exclusive possession and the rights listed from (a) to (k) are non-exclusive rights.

[102] In respect of the right at paragraph (k), namely 'the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area', I am unable to understand how this right is in relation to land and waters and consider it more to be akin with intellectual property. The information within the application and accompanying documents, in my view, do not elucidate its meaning for the purposes of s 190B(4).

[103] In my view, the right and interest at paragraph (k) is not understandable or has meaning. This does not mean that this right does not exist. I am however unable to understand how this right and interest is claimed in relation to the land and waters of the application area and the material within the application does not provide any clarification. For the purposes of s 190B(4), I am not satisfied that this right and interest is readily identifiable.

[104] In respect of the remaining rights and interests, I am satisfied that they are understandable and have meaning.

[105] I note that although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision — *Strickland* at [60].

[106] I have considered the description of the native title rights and interests claimed and find that, with the exception of (k), the rights and interests claimed are sufficient to fall within the scope of s 223 and are readily identifiable as native title rights and interests.

[107] 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.

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

The requirements of s 190B(5) generally

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

[110] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

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

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

[113] The factual basis material is contained in Schedule F. I also consider that the affidavits accompanying the original application dated 9 February 2000 and 6 June 2001 of claim group members and the supplementary information dated 27 July 2016 provided by the applicant contain more detailed information that is also relevant to the factual basis.

[114] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

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

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

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

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

[116] The factual basis material contains the following relevant information about the association of the claim group and that of their predecessors with the application area:

- The application area lies east of the Ngadju determination area and west of the Far West Coast determination area and the northern part of the claim area extends into the Nullarbor Plain, north of which lies the Spinifex People native title determination area — supplementary information at [4].
- Effective sovereignty in the area occurred around the early to mid 1870s — at [9].
- Of relevance to the association of some of the apical ancestors identified in Schedule A includes the following information:
    - Jack Mountain was born in the late 1870s or early 1880s and was associated with the western region;
    - Rosie Yalgoo was born in the 1880s and was associated with the area around the northwestern region;
    - Clara Giles was born around 1893 and was associated with the southeastern region;
    - Sally Broome was born around 1870 and was associated with the northern, southeastern and southern regions;
    - Maggie was born around 1885 and was associated with the southeastern, midsouthern and northern regions;
    - Tjabilja was born around 1845 and was associated with the southeastern region;
    - Gumillya 'Carmelia' Button was born around 1875 and was associated with the southern regions;
    - Gordon Charles Naley was born around 1884 and was associated with the mid-southern region; and

- Dick Scott was born between 1905 and 1910 and was associated with the southeastern region — at [11].

- One claimant says his father was married in the southeastern region to his mother who was the daughter of a full descent Mirning woman — affidavit of claimant dated 9 February 2000 at [5]. His father spoke some of the Mirning language so was able to pass through Mirning country in pursuit of work. He would travel with his father who worked at various places including within the mid-southern and southwestern regions — at [6] and [11]. The claimant says he spoke Mirning and learnt from the old people who used to come to the southeastern region or the southwestern region — at [7]. He learnt Mirning culture mainly from his mother, her cousin and her other relatives who came from the southwestern, western and southeastern regions. He says he would camp around the southwestern region when he was little — at [10]. He has lived on Mirning country including within an area proximately east of the application area most of his life — at [20].
- Another claimant says that her mother, the daughter of Jack Mountain, was born in the southeastern region in 1899 — affidavit dated 6 June 2001 at [3]. She says that she travelled to stations west of the application area with her parents — at [10]. They would travel to the mid-southern and southeastern regions — at [11]. Her mother said they would walk across the application area around the northern and central regions — at [11]. Mirning people would walk across the beach in the southern regions — at [21]. Her mother would travel through Morning country, drinking from various rock holes — at [23]. The claimant has worked in the southwestern region of the application area — at [28]. She considers Mirning to be her land, she feels at home out there.
- Anthropological and evidentiary material record the current claimants as having a physical and cultural association with sites within the southeastern, southwestern, southern, mid-western and central regions — supplementary information at [31]. For instance, one claimant has been hunting and camping in the mid-southern region and brings her children to places along the southern boundary to camp and teach them about Mirning country — at [34]. Another claim group member has taken bush food, hunted, looked after important sites in the claim area such as a site within the southwestern region, and has brought others to places such as those in the southwestern region to teach them about plants, land and animals in the area — at [35]. Other claimants continue to bring others to the application area and teach them about sites, such as the rock holes near the southwestern region, in accordance with traditional laws and customs — at [33].
- The Mirning People follow a landholding system where rights and interests are inherited by descent and therefore exercised by the descendants of the apical ancestors — at [14] and [18]. Mirning families continue to have strong association with certain places on country — at [27]. Rights and interests to country are also exercised by the ritual right holders — at [19].
- Spinifex men have a traditional physical connection to places around the northern regions, which they continue to visit, protect, manage, teach and learn about sites, and where they perform rituals — at [37].

- The members of the native title claim group are taught narratives about the Dreaming beings and their association with landscape and they have knowledge of sites on country connected with the Dreaming beings, such as within the southwestern, eastern and southeastern regions — at [38]. Two important strings of sites travel through the western and eastern boundaries of the claim area — at [39].
- Members of the native title claim group pass on cultural knowledge to their children in accordance with traditional Mirning laws and customs through narratives and common practice — at [32] – [38].

Consideration

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

[118] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of effective sovereignty, which I understand from the factual basis to have occurred around the 1870s. For instance, Tjabilja was born around 1845. Given the time some of the other apical ancestors were born, it is likely that their parents or grandparents were born prior to settlement of the area. There are also references to the descendants of the apical ancestors being born or present on the application area and surrounding areas.

[119] The factual basis is also sufficient to support the assertion that the native title claim group have a spiritual association with the application area and is sufficient to show the history of that association. The members of the claim group have knowledge of the *Tjukurpa*, and the associated myths and sites on country. The asserted facts indicate that their country and specific places within it is occupied by spiritual beings. The claimants are taught traditional laws and customs from their immediate predecessors so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the native title claim group have with the application area.

[120] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. In my view, the factual basis is sufficient to support the assertion that there is a traditional system of landholding, which current members continue to acknowledge by remaining associated with it or identifying with it – see also my reasons at s 190B(5)(b) below. The material indicates that ancestor Jack Mountain was associated with the western region; Clara Giles, Tjabilja, Sally Broome, Maggie, Gumillya 'Carmelia' Button, Gordon Charles Naley and Dick Scott with the southern regions; and Rosie Yalgoo, Sally Broome and Maggie with the northern regions. Their descendants have remained associated with country and have continued to travel for various purposes such as for work, living and visiting sites, across the southern, central, western and northern regions. There are also references to a mythical sites located around the northern, southern and eastern regions.

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

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

Reasons for s 190B(5)(b)

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

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

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

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];

- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

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

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

Society

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

- A single regional society exists over the application area which includes the Mirning People as well as members of the Spinifex People with ritual rights in the area — supplementary information at [9].
- The members of the Mirning language group at sovereignty lived in and held rights and interests in the claim area — at [11]. They observed a common body of laws and customs — at [13]. Mirning identity and rights to country were transmitted by biological or adoptive descent and depended on knowledge, association and familiarity with Mirning country — at [14].
- Members of the society, including those Spinifex persons with ritual rights in the area, also acknowledged and observed a broader body of laws and customs in common with the Western Desert peoples — at [13]. Within this broader normative system, some properly qualified Western Desert persons, namely those members of the Spinifex People, held rights and interests within the Mining claim area as a consequence of their mythical or ritual totemic knowledge and experience. Their

rights and interests have been recognized by the Mirning People prior to assertion of British sovereignty.

Traditional laws and customs

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

[128] The Mirning members of the native title claim group continue to descend from the apical ancestors identified in Schedule A — at [14]. The non-Mirning members continue to pass mythical or ritual knowledge down from senior men to younger men like their predecessors did — at [15]. The specific places and sites to which the non-Mirning members hold rights are generally within the northern regions of the claim area and these sites link Mirning country with the desert areas to the north, and their spiritual and cultural underpinnings form part of the normative basis for the broader regional society — at [15].

[129] Members of the native title claim group continue to acknowledge and observe a system of landholding which sets out how rights and interests on country are held and transmitted — at [18]. Mirning members obtain rights to country through descent from one or more Mirning ancestors together with the mutually recognised possession of knowledge, association and familiarity with country. Mirning identity and rights country continue to be on the basis of cogantic descent, being passed down from one's parents, and is not based merely on birth on country. Mirning families continue to have strong connection to certain places on country — at [27].

[130] Ritual right holders, who include some Mirning People and some Spinifex People, gain their rights and interests to country through the acquisition of mythical or ritual totemic knowledge and experience of *Tjukurpa* associated with particular parts of the claim area — at [19]. The *Tjukurpa* and the knowledge, ritual practice, and experience associated with it, are older than the assertion of sovereignty. Senior ritual right holders, in accordance with traditional laws and customs, hold knowledge, experience and responsibility for certain *Tjukurpa* in Mirning country, including the narratives, places, and ritual elements associated with the *Tjukurpa* — at [20]. The senior ritual right holders also hold and are responsible for the law that governs the acquisition of this knowledge, experience and responsibility.

[131] The members of the native title claim group continue to have knowledge of the laws and customs relating to the *Tjukurpa* and the associated places, and ritual right holders have special rights and functions under these laws and are able to speak for particular places with more authority than others — at [21]. One claimant says that he was told a number of Dreaming stories by his mother, her cousins and her other relatives and provides details of a particular story — affidavit of 9 February 2000 at [7] – [8].

[132] The Mirning People continue to follow a system of social organisation and kinship which sets out rules defining relationships, obligations and behaviour to each other, as well as rules governing marriage — supplementary information at [22]. Laws and customs also define who has authority within Mirning families — at [23]. Senior people, called 'elders' who have sufficient age, experience and knowledge, command respect and authority under traditional law and custom. This system of respect and authority is consistent with and

based on customary principles that predate sovereignty. One claimant provides details of traditional Mirning kinship and descent — affidavit of 9 February 2000 at [18].

[133] Current claimants continue to hunt, fish, camp, and gather natural resources on country. They were taught about traditional foods and how to collect them by their parents and other old people — at [12]; see also affidavit of 6 June 2001 at [12] – [13] and [19] – [22].

[134] Under traditional laws and customs, traditional knowledge is passed down from elders to the younger generations — supplementary information at [24]. For instance, one claim group member says he learnt from his mother, her cousin and from Mirning old men — affidavit of 9 February 2000 at [22]. The granddaughter of apical ancestor Jack Mountain says that her mother taught her dreaming stories and stories about Mirning people, how they used to live and hunt on country and how they prepared traditional food — affidavit dated 6 June 2001 at [12] – [18].

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

Consideration

[136] My understanding of the factual basis material is that the pre-sovereignty society, being the Western Desert society, encompasses a wide area of land which is held at a localised level by various groups, including the Mirning People and the Spinifex People. I understand that these landholding groups can be linked through shared mythical or ritual totemic knowledge or experience. However, the groups have distinct territorial domains, the boundaries of which are recognised by the other groups.

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

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

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

[139] In my view, the factual basis demonstrates that the apical ancestors were either associated or were amongst the generation born to those who were associated with the Mirning country at the time of European settlement. In this sense, I understand that the information supports the assertion that at least some of the apical ancestors were born into the native title claim group of the pre-sovereignty society that existed at and prior to

European settlement — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of the ancestors identified in Schedule A.

[140] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The native title claim group observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the named ancestors and the ritual right holders. The factual basis demonstrates that the descendants continue to have knowledge of their country, sites of significance such as those relating to the *Tjukurpa*, and have strong connection with certain places. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the native title claim group gain rights to country on the basis of cognatic or adoptive descent and recognised knowledge, association and familiarity of country, or through acquisition of mythical or ritual totemic knowledge and experience of *Tjukurpa* associated with particular parts of country, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before settlement. I consider that there is a sufficient factual basis that the landholding system held by the current claimants are derived from and rooted in customary laws and practices.

[141] The factual basis contains information which speaks to the way the members of the claim group continue to follow a kinship system that governs relationships, behaviours and obligations to other Mirning people, and also governs marriage rules. They observe a system of respect for elders who have sufficient age, experience and knowledge. The claim group members have knowledge of traditional foods and are taught how to collect them by their parents and other old people. This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of settlement, and that they have been passed down the generations to the claimants today.

[142] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of myths and the laws and customs relating to the *Tjukurpa* and the associated places, and ritual right holders have special rights and functions and are able to speak for particular places with more authority than others.

[143] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, through narratives and traditional teaching, by elders and other predecessors to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants having knowledge of the *Tjukurpa* and associated sites, hunting, fishing, and have knowledge of kinship and marriage rules, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I therefore infer that given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few

generations from the apical ancestors to the current claimants, the other apical ancestors also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of settlement.

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

Reasons for s 190B(5)(c)

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

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

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

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

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

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

Consideration

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

The factual basis provides references to members of the native title claim group being taught or passing on traditional laws and customs. For instance, one claimant speaks of having knowledge of dreaming stories for important Mirning places and says that it will be passed on at a proper time to the appropriate people — affidavit dated 9 February 2000 at [18]. He says he has been taught that it is important to care for and respect country — at [21]. He has taught other Mirning people including his children about country and Mirning laws and customs — at [23].

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

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;

- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of the native title claim group in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[152] 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.

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

The requirements of s 190B(6)

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

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

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

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

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

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and

> customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

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

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

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

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

Rights prima facie established

The native title rights and interests claimed are the rights to the possession, occupation, use and enjoyment as against the whole world of the area and any right or interest included within the same

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

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

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

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

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to

> relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

[165] The above paragraphs point to the nature of this right in land and waters. In examining whether the claimants' material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[166] The factual basis is such that it is asserted that at the time of settlement, there existed an association between the members of the native title claim group and its land and waters — see my reasons at s 190B(5)(a).

[167] The factual basis provides that the native title claim group maintain the right to exclude all others from the application area. The claim group continue to follow a system of landholding where rights to country are obtained through cognatic or adoptive descent and mutual recognition of possession of knowledge, association and familiarity with country and ritual right holders gain rights through the acquisition of mythical or ritual totemic knowledge and experience of *Tjukurpa* associated with particular parts of the claim area — supplementary information at [19] and [27]. Some Mirning families have a strong connection to particular areas on country.

[168] Current claimants continue to acknowledge and observe the traditional laws and customs regarding rights to country and the right to speak for country. One claimant says that she feels at home on Mirning country and says they have a spiritual connection to land and that she and other Mirning people can make decisions about the land — affidavit of 6 June 2001 at [28] and [39]. Rights about decision making are more strongly exercised by those with more cultural authority, including in some cases ritual authority — supplementary information at [26].

[169] The members of the claim group consider their country to be imbued with spirituality and have knowledge places associated with the *Tjukurpa* and ritual right holders have special rights and functions under the traditional laws and are able to speak for particular places with more authority than others — at [21]. The claimants speak of protecting others from the spiritual dangers in certain parts of the application area — at [35]. Outsiders need to seek permission before entering Mirning country, taking resources and doing anything disruptive to the country or its cultural or spiritual dimensions — at [28]; see also affidavit of 9 February 2000 at [23] and affidavit of 6 June 2001 at [40].

[170] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. Certain families have a strong association with particular area within their country and ritual right holders are able to speak with authority for places associated with the *Tjukurpa* and for

which they have knowledge. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[171] I consider that this right is prima facie established.

Any native title rights and interests which may be shared with any others who establish that they are native title holders of the area and any right or interest included within the same, and in particular, comprise:

(c) the right of access to the area;

[172] The factual basis indicates that some of the apical ancestors and other predecessors resided on country and accessed country for various purposes.

[173] There are references to claimants regularly using country to visit sites, camping, travelling over the application area for cultural purposes and for hunting, fishing and gathering natural resources within it — supplementary information at [33].

[174] It is my view that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

(e) the right to practice the traditional religious customs;

[175] The factual basis contains references to the ritual right holders performing rituals at places within the application area they are connected with like their predecessors at the time of sovereignty — at [13]. The asserted facts indicate that the claimants perform rituals in relation to the preparation of bush food where certain parts were distributed to different people according to religious and spiritual rituals — affidavit of 6 June 2001 at [13].

[176] I am of the view that this right is prima facie established pursuant to the traditional laws and customs of the native title claim group.

(f) the right to use and enjoy resources of the area;

[177] The factual basis contains references to members of the claim group and their predecessors hunting, fishing and utilising the natural resources of the land. The claimants were taught about traditional food and how to collect and prepare them from their predecessors — supplementary information at [12]; see also affidavit of 6 June 2001 at [12] – [22].

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

(h) the right to trade in resources of the area;

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

[179] The factual basis provides that the predecessors would trade resources from country with outsiders — at 9 February 2000 at [23]. Current claimants also speak of distributing bush food to different people according to religious and spiritual rituals — affidavit of 6 June 2001 at [13].

[180] These rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

(j) the right to maintain and protect places of importance under traditional laws, customs and practices in the area;

[181] The factual basis indicates that the current claimants continue to look after important sites in the claim area — supplementary information at [35]. Ritual right holders continue to protect and manage the string of sites connected with the *Tjukurpa* — at [37].

[182] This right is prima facie established under traditional laws and customs.

Rights not prima facie established

(a) rights and interests to possess, occupy, use and enjoy the area;

(b) the right to make decisions about the use and enjoyment of the area;

(d) the right to control the access of others to the area;

(g) the right to control the use and enjoyment of others of resources of the area;

[183] The way these rights are expressed, in my view, exerts a degree of control indicating a level of exclusivity. I therefore consider that the case law in relation to this right is closely linked to that involving 'the right to determine use and enjoyment' of land. The High Court expressed concern in *Ward HC* of non-exclusive rights expressed in exclusive terms — at [52].

[184] In *De Rose v South Australia* [2002] FCA 1342, however, O'Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders — at [553]. His Honour, however, did not make a subsequent determination of native title. In the consent determination in *Mundraby v Queensland* [2006] FCA 436, the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]' — at [3(c)(ii)]. I also note that in another consent determination, the Full Federal Court held that:

> there is a clear distinction between a right to control access … and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lease entitling the pastoral lessee to determine who has access to the land; the latter right is not — *NT v Ward* [2003] FCAFC 283 at [27].

[185] In light of the case law cited above, I consider that there is willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who are bound by the laws and customs of the native title holders. The rights being claimed here are, however, not qualified to be against persons who are bound by the laws and customs of the native title holders.

[186] I am therefore unable to be satisfied that these rights are prima facie established.

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

[187] I refer to my reasons under s 190B(4) above, and consider that as this right and interest is not readily identifiable as a native title right and interest in relation to land and waters, it follows that it cannot be prima facie established.

Conclusion

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

Subsection 190B(7)
Traditional physical connection

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

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

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

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

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

[192] I note that the factual basis contains relevant information that describe a traditional physical association of members of the native title claim group with the application area, including travelling, camping, hunting, fishing and visiting sites within it — see for instance supplementary information at [32] – [39].

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

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

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s 61A(1)

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

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

Reasons for s 61A(2)

[198] Schedule B indicates that areas which are subject to valid exclusive possession acts are excluded from the application, except to the extent that ss 47, 47A or 47B of the Act may apply.

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

Reasons for s 61A(3)

[200] Schedule E provides that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts, except to the extent that ss 47, 47A or 47B of the Act may apply.

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

Conclusion

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

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

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

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

Reasons for s 190B(9)(a)

[204] Schedule E provides that the applicant does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[206] Schedule E appears to indicate the native title claim group does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[208] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished. The application also claims the protections afforded by ss 47, 47A and 47B — see Schedule B.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	WA Mirning People
NNTT file no.	WC2001/001
Federal Court of Australia file no.	WAD6001/2001

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

27 February 2001

Date application entered on Register:

14 September 2001

Applicant:

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

Applicant's address for service:

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

Area covered by application:

As appears below:

> (a) The external boundaries of the claim are the external lines of the area as set out in the map attached (Attachment B1) and described in Attachment B2. Where there is any written discrepancy between the map at Attachment B1 and the written description at Attachment B2, the latter prevails.
>
> (b) Internal boundaries:

(1) The applicants exclude from the claim any areas covered by valid acts done on or before 23 December 1996 comprising such of the following as are included as extinguishing acts within the Native Title Act 1993, as amended, or Titles (Validation) and Native Title (Effect of Past Acts) Act 1995, as amended, at the time of the Registrar's consideration:

- Category A past acts, as defined in s 228 and s 229 of the Native Title Act 1993.
- Category A intermediate period acts as defined in s 232A & s 232B of the Native Title Act 1993.
- acts attributable to the State (Titles Validation) and Native Title (Effect of Past Acts) Act 1995 as amended).

(2) The applicants exclude from the claim any areas in relation to which a previous exclusive possession act, as defined in section 23B of the Native Title Act 1993, was done in relation to an area, and either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia, and a law of that State has made provision as mentioned in section 23E of the Native Title Act 1993 in relation to the act.

(3) The applicants exclude from the claim areas in relation to which native title rights and interests have otherwise been extinguished, including areas subject to:

(i) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or

(ii) actual use made by the holder of a tenure other than native title which is permanently wholly inconsistent with the continued existence of native title

and, to avoid any uncertainty, the applicants exclude from the claim areas the tenures set out in Attachment B3.

(4) Pargraphs (1) to (3) above are subject to such of the provisions of sections 47, 47A and 47B of the Native Title Act 1993 as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

Persons claiming to hold native title:

Please remove what appears on the extract from the Schedule of Native Title Applications and insert 'See Attachment A' and include Attachment A as an attachment to the extract.

Registered native title rights and interests:

As appears on the extract from the Schedule of Native Title Applications except remove paragraphs (a), (b), (d), (g) and (k)

[End of document]