Registration Decision

National Native Title Tribunal

Application name	Darlot
Name of applicant	Geoffrey Alfred Ashwin, Ralph Edward Ashwin, June Harrington-Smith
Federal Court of Australia No.	WAD142/2018
NNTT No.	WC2018/005
Date of Decision	6 July 2018

Claim not accepted for registration

I have considered the claim in the Darlot application for registration as required by ss 190A, 190B and 190C of the *Native Title Act 1993* (Cth).[1] I have decided that, while the claim satisfies all of the conditions in s 190B, it does not satisfy all of the conditions in s 190C. Therefore, I must not accept the claim for registration: s 190A(6B).

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Delegate

Delegate of the Native Title Registrar

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[1] All legislative references in this decision are to the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

Reasons for Decision

CASES CITED

Banjima People v Western Australia [2015] FCAFC 84 (*Banjima*)

Billy Patch and Others on behalf of the Birriliburu People v Western Australia [2008] FCA 944 (*Patch*)

Bolton v Western Australia [2004] FCA 760 (*Bolton*)

Daniel v Western Australia [2002] FCA 1147 (*Daniel v Western Australia*)

Daniel for the Ngarluma People & Monadee for the Injibandi People v Western Australia [1999] FCA 686 (*Ngarluma People/Monadee)*

De Rose v South Australia [2002] FCA 1342 (*De Rose*)

Griffiths v Northern Territory (2007) 165 FCR 391; [2007] FCAFC 178 (*Griffiths*)

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

Gudjala People #2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)

Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 *(Harrington-Smith v Western Australia)*

Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)

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)*

Martin v Native Title Registrar [2001] FCA 16 *('Martin')*

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 *(Yorta Yorta)*

Moran v Minister for Land & Water Conservation [1999] FCA 1637 (*Moran*)

Mundraby v Queensland [2006] FCA 436 (*Mundraby*)

Narrier v Western Australia [2016] FCA 1519 (*Narrier*)

Noble v Mundraby [2005] FCAFC 212 (*Noble v Mundraby*)

Northern Territory v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

PC on behalf of the Njamal People v Western Australia [2007] FCA 1054 (*PC v Western Australia*)

Quall v Native Title Registrar [2003] FCA 145 (*Quall*)

Risk v National Native Title Tribunal [2000] FCA 1589 *(Risk)*

Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] FCAFC 26 (*Sampi*)

Strickland v Native Title Registrar [1999] FCA 1530 *(Strickland)*

Ward v Registrar, National Native Title Tribunal [1999] FCA 1732 (*Ward v Registrar*)

Ward v Western Australia [2006] FCAFC 283 (*Ward FC*)

Western Australia v Strickland [2000] FCA 652 *(Strickland FC)*

Western Australia v Ward [2002] HCA 28 (*Ward HC*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*Western Australia v Native Title Registrar*)

Wiri People v Native Title Registrar [2008] FCA 574 *(Wiri People)*

BACKGROUND

[1] The application was filed on behalf of the Darlot native title claim group. The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (the Registrar) on 12 April 2018 pursuant to s 63 of the Act.

[2] The current application is situated between and adjacent to the several parts of the Wutha application (WAD6064/1998, WC1999/010) that remain following the decision on Lindgren J in *Harrington-Smith v Western Australia*. In this respect, the application comprises, with minor alterations, those areas of the original Wutha claim that overlapped, and were dismissed along with, the Wongatha claim, as well as an additional area representing the former Sir Samuel claim (WAD6050/1998, WC1995/058).

[3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration: s 190A(6). If it does not satisfy all the conditions, the Registrar must not accept the claim for registration: s 190A(6B). I have decided that the claim does not satisfy all of the registration test conditions and my reasons on each condition follow below.

Information considered

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

[5] I have had regard to information in the application. I have also considered under 190A(3)(a) the following documents provided by the applicant directly to the Registrar on 16 April 2018:

(a) N Draper, *Darlot Native Title Claim: Preliminary Darlot Anthropology Connection Report*, 20 March 2018 ('Draper 2018')

(b) N Draper, *WAD6064/1998 Raymond William Ashwin & Others v the State of Western Australia & Others (Wutha): Anthropology Connection Report*, 4 October 2016 ('Draper 2016')

(c) N Draper, *WAD6064/1998 Raymond William Ashwin & Others on behalf of the Wutha People: Second Supplementary Expert Anthropology Report for the Applicant*, 5 May 2017 ('Draper 2017')

(d) Witness statements of:

(i) [Claimant 1 named removed]dated 22 September 2015

(ii) [Claimant 2 name removed] dated 22 September 2015

(iii) [Clamant 3 name removed] dated 23 September 2015

(iv) [Claimant 4 name removed] dated September 2015 and 11 June 2002

(v) [Claimant 5 name removed] dated 19 September 2015 and 12 June 2002

(vi) [Claimant 6 name removed] dated 22 September 2015

(vii) [Claimant 7 name removed] dated 18 November 2016

(viii) [Person A name removed] dated 21 October 2002

(e) Transcripts of evidence given by:

(i) [Person A name removed] on 11 November 2002

(ii) Lenny Ashwin on 27 March and 15 July 2002

(iii) [Claimant 8 name removed] on 24 June 2002

(iv) [Claimant 9 name removed] on 26 March 2002

(v) [Claimant 4 name removed] on 12, 15 and 16 July 2002

(vi) [Claimant 10 name removed] on 15 and 16 July 2002

(vii) [Claimant 5 name removed] on 12, 15 and 16 July 2002 and 12 August 2003

[6] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers: s 190A(3)(b).

[7] The State of Western Australia ('the State') provided submissions in relation to the application of the registration test on 31 May 2018. I have had regard to those submissions under s 190A(3)(c). I have also considered the submissions the applicant provided on 11 June 2018 in response to those of the State.

[8] I may also have regard to such other information as I consider appropriate: see s 190A(3). On 15 May 2018, Central Desert Native Title Services Ltd ('CDNTS') provided unsolicited submissions in relation to the application of the registration test. The following documents accompanied those submissions:

(a) Affidavit of [Person B name removed] sworn 19 April 2018

(b) Affidavit of [Claimant 5 name removed] sworn 24 April 2018

(c) Affidavit of [Person C name removed] affirmed 15 May 2018

[9] I consider it appropriate to have regard to this material on the basis that it is relevant to the authorisation of the claim and whether the application satisfies the condition in s 190C(4).

[10] I have also had regard to the submissions and other documents provided by the applicant in response to the submissions of CDNTS, including:

(a) Affidavit of [Person D name removed] sworn 31 May 2018

(b) Affidavit of [Claimant 5 name removed] sworn/affirmed 19 June 2018

[11] Finally, I have considered the information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 18 April 2018 (the Geospatial Report).

Procedural fairness

[12] A copy of the application was provided to the State on 22 May 2018. The letter enclosing the application advised that, if the State wished to make a submission in relation to the registration of the claim, it should be provided by 31 May 2018.

[13] On 25 May 2018, the State requested copies of the additional material the applicant provided directly to the Registrar. The material was provided to the State later the same day. As noted above, the State made submissions in relation to the application of the registration test on 31 May 2018. Later the same day, Tribunal staff wrote to the applicant enclosing the State's submissions, providing them with an opportunity to comment by 11 June 2018. I received the applicant's further submissions in response to the State's submissions on 11 June 2018.

[14] As noted above, I have considered it appropriate to have regard to unsolicited information provided by CDNTS on 15 May 2018. On 22 May 2018, I wrote to the applicant enclosing a copy of the submissions and advising that, should they wish to comment on the submissions, they should do so by 31 May 2018. I received the applicant's further submissions and documents in response to the submissions of CDNTS on 31 May, 1 June and 19 June 2018.

Merits of the claim (s 190B) – Conditions met

Identification of area subject to native title – s 190B(2) condition met

[15] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas is sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

[16] To meet s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the 'particular land and waters' where native title rights and interests are claimed (*Doepel* at [122]).

[17] The two questions that need to be addressed for this condition are whether the information provides certainty about:

(a) the external boundary of the area where the rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.

Does the information about the external boundary meet this condition?

[18] Attachment B2 of the application contains a written description of the external boundary of the application area. It describes the external boundary by metes and bounds referencing pastoral leases boundaries; townships, roads, reserves and specific parcels; coordinate points identified by latitude and longitude to six decimal points; and specified native title determinations and claimant applications.

[19] Attachment B1 of the application comprises a black and white scanned copy of a colour A3 map prepared by the Geospatial Services entitled 'Darlot' and dated 16 February 2018. The map identifies the application area in bold black outline, the interior of which is finely scored, and includes pastoral lease and reserve boundaries depicted in grey outline with names and reference numbers. The map also includes: towns, identified by name; a scalebar and coordinate grid; and notes relating to the source, currency and datum of data used to prepare the map. There is also a legend identifying various land tenures, however the colours used to identify each tenure type are no longer visible due to black and white printing or copying.

[20] The Geospatial Report states that, on review of the map and the written description, Geospatial Services consider they are consistent and identify the application area with reasonably certainty. I have independently considered the map and the written description and I am satisfied they are consistent and identify the area with reasonable certainty.

Does the information about excluded areas meet this condition?

[21] Paragraphs 2 and 3 of Schedule B contain a written description of areas within the external boundaries of the application area that are not covered by the claim, subject to the

application of the non-extinguishment principle and where the Act requires extinguishment to be disregarded under ss 47, 47A or 47B.

[22] Specifically, Schedule B states that the application area does not include areas covered by:

(a) Category A past acts or intermediate period acts; or

(b) Category B past acts or intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights and interests.

[23] The written description also excludes any area covered by a 'previous exclusive possession act' or where native title has otherwise been extinguished.

[24] Attachment B1 further excludes any areas subject to the following native title determinations and claimant applications:

(a) Native Title Determination Application WAD186/2017 Maduwongga WC2017/001 as filed in the Court on 24 July 2017;

(b) Native Title Determination Application WAD297/2008 Yilka WC2008/005 as accepted for registration on 30 June 2011;

(c) Native Title Determination Application WAD6064/1998 Wutha WC1998/010 as accepted for registration on 13 January 2017;

(d) Native Title Determination WAD6164/1998, WAD248/2007, WAD181/2012 Wiluna WCD2013/004 as determined by the Court on 29 July 2013;

(e) Native Title Determination WAD6123/1998 Badimia People WCD2015/001 as defined by the Court on 25 May 2015; and

(f) Native Title Determination WAD228/2011 and WAD302/2015 Tjiwarl and Tjiwarl #2 WCD2017/001 as defined by the Court on 27 April 2017.

[25] While the application does not specifically identify the parcels excluded from the application by paragraphs 2 and 3 of Schedule B, the general exclusions provide an objective mechanism by which the areas that are not covered by the application can be discerned. On this basis, I find that the written description provides reasonable certainty about the excluded areas (*Ngarluma People/Monadee* at [31]-[38]; *Strickland* at [51]-[52]).

Identification of the native title claim group – s 190B(3) condition met

[26] I am satisfied the claim meets the requirements of s 190B(3). Schedule A is sufficiently clear to enable someone to ascertain whether a particular person is a member of the claim group.

What is required to meet this condition?

[27] To meet s 190B(3), 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.

[28] The question that needs to be considered is not whether the applicant has made the claim on behalf of the correct claim group or whether the claim group is correctly described but 'whether the application enables the reliable identification of persons in the native title claim group' (see *Doepel* at [37] and [51]; *Gudjala 2007* at [33]).

Does the description of the persons in the native title claim group meet this condition?

[29] Schedule A of the application describes the claim group in the following terms:

> The Claim is brought on behalf of the Darlot claim group comprising those aboriginal persons who are the descendants of:
>
> (a) Telpha and her union with Arthur Cranbrook Ashwin;
>
> (b) Lenny Ashwin (Ninardi);
>
> (c) Daisy Cordella (Kugila);
>
> (d) Inyarndi (Yinnardi); and
>
> (e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

[30] I interpret the statement that the claim group comprises 'those aboriginal persons who are the descendants of' the listed persons to mean that a person is a member of the native title claim group if they are descended from one or more of the named apical ancestors.

[31] A literal interpretation of paragraph (e) might suggest the claim group includes those descended from persons recognised as being adopted according to the traditional laws and customs of the group but not necessarily those persons who are so recognised. I infer that the intent of paragraph (e) is to include persons recognised as being adopted and their descendants rather than including only the descendants of those persons.

[32] The Court has accepted that descent from named apical ancestors can constitute a 'substantial factual element' for ascertaining the membership of the claim group (see *Ward v Registrar* at [27]). That some factual inquiry is necessary to determine whether a particular person is a member of the claim group does not mean the group has not been sufficiently described (see *Western Australia v Native Title Registrar* at [67]).

[33] Paragraph (e) refers to persons 'recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.' Membership on this basis appears to be conditioned by two requirements: first, that a person is adopted 'according to the traditional laws and customs of the group'; and second, that a person's adoption on that basis is recognised 'by those ancestors and descendants' who comprise the claim group.

[34] In *Yorta Yorta*, the High Court considered that the existence of a society depends upon a principle of mutual recognition (see for example [49]-[54]). The Full Court of the Federal Court elaborated on this point in *Sampi* at [45]:

> A relevant factor among the constellation of facts 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.

[35] Attachment F contains the following information with regard to the traditional laws and customs relating to adoption and eligibility for membership of the claim group:

(a) oral history suggests that Julia Sandstone, who is identified as a member of the Inyarndi descent line, may have 'grown up' Frank Wheelbarra/Wheelbarrow (paragraph 18);

(b) members of the claim group are 'members of western desert society living in acknowledgement and observance of Tjukurrpa (Thukurr); the Dreaming and western

desert laws and customs which connected and continue to connect them, by those traditional laws and customs, to the claim area' (paragraph 34); and

(c) 'Tjukurrpa and the traditional laws and customs and cultural norms of western desert society practiced by claim group members and their predecessors give rise to the claimed native title rights and interests in relation to the claim area' (paragraph 37).

[36] I also refer to Schedule G of the application, which states that the activities of the claim group include 'engag[ing] in intergenerational transmission by oral history traditional knowledge and stories of Tjukurrpa (the Dreamtime) about the land and waters of the area to succeeding generations of the native title claim group.'

[37] I infer from these statements that the following rules or principles inform whether a person is recognised as being adopted 'in accordance with traditional laws and customs':

(a) being 'grown up' by a person recognised as a member or predecessor of the claim group;

(b) having knowledge of, and acknowledging and observing, Tjukurrpa or Thukurr;

(c) acknowledging and observing Western Desert laws, customs and cultural norms; and

(d) connection to the application area through such acknowledgement and observance.

[38] In my view, these criteria constitute appropriate rules or principles by which a person's membership in the claim group may reliably be ascertained through a process of factual inquiry, having regard to the content of the traditional laws and customs acknowledged and observed by the claim group. In reaching this view, I have also had regard to the fact that the Act is remedial in nature and should be construed beneficially 'so as to give the most complete remedy which is consistent with the actual language employed' (see *Kanak* at [73]).

Identification of claimed native title – s 190B(4) condition met

[39] I am satisfied the description in Schedule E is sufficient to clearly understand and identify the itemised rights as 'native title rights and interests.'

What is required to meet this condition?

[40] To meet s 190B(4), the Registrar must be satisfied that the description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified.

[41] The question here is whether the claimed rights and interests are understandable and meaningful, having regard to how the term 'native title rights and interests' is defined in s 223 of the Act (*Doepel* at [99] and [123]).

Does the description of the native title rights and interests meet this condition?

[42] The claimed rights and interests are described in Schedule E. The description is divided into areas where a claim to exclusive possession can be recognised and area where such a claim cannot be recognised.

[43] For areas where exclusive possession can be recognised, the claim group is said to claim the right to possess, occupy, use and enjoy the lands and water [of the application area] … as against the whole world.' This formulation can readily be identified as a claim to exclusive possession (*Ward HC* at [51] and [89]; *Strickland* at [60]).

[44] In respect of areas where exclusive possession cannot be recognised, the claim group is said to claim the following rights and interests, exercisable in accordance with their traditional laws and customs:

(a) the right of access to the application area;

(b) the right to camp on the application area;

(c) the right to erect shelters on the application area;

(d) the right to live on, use and enjoy the resources of the application area;

(e) the right to move about the application area;

(f) the right to hold meetings on the application area;

(g) the right to hunt on the application area;

(h) the right to conduct ceremonies on the application area;

(i) the right to participate in cultural activities on the application area;

(j) the right to maintain and protect places of significance under traditional laws and customs in the application area; and

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

[45] Schedule E states that claimed rights and interests are subject to the valid laws of the State of Western Australia and the Commonwealth and the rights conferred upon persons pursuant to those laws.

[46] In my view, the claimed rights and interests described in Schedule E are clear and comprehendible and I am satisfied they can properly be understood as 'native title rights and interests' as defined in s 233 of the Act.

Factual basis for claimed native title – s 190B(5) condition met

[47] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the assertions at subsections 190B(5)(a), (b) and (c).

What is needed to meet this condition?

[48] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:

(a) the native title claim group have, and the predecessors of those persons had, an association with the area;

(b) there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and

(c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[49] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim' (*Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92]).

What is required to provide a sufficient factual basis for s 190B(5)(a)?

[50] To satisfy the requirements of s 190B(5)(a), the factual basis must support the assertion that the native title claim group has, and its predecessors had, an association with the application area. Although it is not necessary that all members of the claim group have an association with the area at all times, the factual basis must support the assertion that the claim group as a whole presently has an association with the area (see *Gudjala 2007* at [51]–[52]).

[51] The factual basis must address the association between the predecessors of the whole group and the claim areas over the period since sovereignty (see *Gudjala 2007* at [52]). It must also support the claim group's association with the 'area as a whole' (see *Gudjala 2009* at [67]). In *Martin v Native Title Registrar* at [26], French J said the Registrar is not obliged to accept 'very broad statements … which have no geographical particularity.'

Factual basis supports predecessors' association with the application area

[52] Attachment F to the application states that the apical ancestors named in Schedule A are people who have lived on or in relation to, and in traditional association with, the claim area since the time that sovereignty was asserted. It says the predecessors of the claim group are known by their names, ages, places of birth and living, oral history and historical records, and anthropological and ethnographic studies to have been living about the time of first contact with non-Aboriginal people in the claim and surrounding areas in the 1890s. Attachment F states that, by necessary inference, the ancestors of those people were alive and associated with the claim area about the time of that sovereignty was asserted in 1829.

[53] The additional material provided by the applicant outlines the following information about the named apical ancestors of the claim group:

(a) *Telpha*: Draper 2018 asserts that Telpha was born about 1887 at Wingara Soak, east of Darlot in the southern part of the Wutha 'tail' area (paragraph 35). Tindale recorded Telpha as the daughter of Darugadi and Murni, whose mother was Matjika, and identified her as a member of the Pini tribe (Draper 2016, paragraphs 147-149). Draper says Telpha's description of her traditional country, as related to Tindale, included 'substantial parts of the claim area westwards to Lawlers, Darda, Darlot and Leonora' (Draper 2018, paragraphs 34-35). Telpha's brother, [Person E name removed], is recorded as having been born in 1889 at Thurraguddy Creek, in the northern part of the Wutha 'tail' area. Draper infers from the reported dates and places of Telpha's and [Person E name removed]'s births that they and their mother were living within or on the border of traditional Pini country prior to 1900 (Draper 2018, paragraph 39). Draper 2018 refers to records that place Telpha 'at or in the vicinity of' Darda station from approximately 1900 to 1909 (paragraph 40-41) and show her children residing and working at Yelma and surrounding stations between 1924 and 1929, including Wongawol, Banjo, Lorna Glen, Darda and Wonganoo (paragraphs 43-44). Draper 2018 also refers to material describing trips taken by Telpha to Darlot and Leonora (paragraph 44).

(b) *Lenny Ashwin (Ninardi)*: Draper 2018 asserts that Lenny Ashwin was born at Mt Grey in the early 1930s and was the grandson of Telpha (paragraph 76). He states that Lenny grew up with his parents at Mt Grey and Barwidgee 'travelling, camping, hunting and living off the land from Wiluna to Leonora,' where they would stay with [Person F name removed], Telpha's son, and his wife[Person G named removed]. Lenny is said to have gone through the law in the western desert tradition at Wiluna, Jigalong and Leonora, where he lived from the 1970s until his death in 2006 (Draper 2018, paragraph 78). Draper 2018 notes that Lenny's description of his traditional country includes Barwidgee, Mt Grey, across to Albion Downs Station, Yeelirrie, down to Sandstone right up to Agnew and back to Wiluna, which 'overlaps and intersects with Telpha's traditional country identified by her to Norman Tindale' (paragraph 78)

(c) *Daisy Cordella (Kugila)*: Draper 2018 asserts that Daisy Cordella was born about 1909 in Darlot and was the daughter of Billy and Mary-Ann. He states that Billy and Mary-Ann had another daughter, Julia and that Billy and his partners Mary-Ann and Mary-Ann's sister 'are ancestors of the [Family A name removed] and [Family B name removed] families' (paragraph 52). He refers to oral history describing Daisy Cordella as 'moving from Lake Carnegie to Wongawol and down to Mulga Queen and Darlot' and residing at Ida Valley, Old Murrin Murrin Townsite, Sturt Meadows, Tarmoola and Weebo (paragraphs 54-55). Draper 2018 notes that [Claimant 4 and Claimant 5 names removed] view their traditional country as including Lake Carnegie, Mulga Queen, Kookynie, Mt Leonora, Perrinvale, Sandstone and Depot Springs (paragraph 57).

(d) *Inyarndi*: Draper 2018 asserts that Inyarndi was a Tjupan woman born near Lake Carnegie. No date is given for Inyarndi's birth or death, however Draper infers that one of her five children, Jimmy Wheelbarra, 'could have been living and travelling in his identified traditional country around or before 1900,' assuming his son Horace was born in the 1920s (Draper 2016, paragraph 182). He says that [Person H name removed], another of Jimmy's children, told her daughter [Claimant 6 name removed] that she had travelled around Cue, Meekatharra, Wiluna, Lawlers and Agnew when she was growing up, 'following the law around (Draper 2018, paragraph 61). She also told her that Inyarndi 'came from Lake Carnegie' and that her 'traditional country ran south from Lake Carnegie along the rock-hole travelling route to Darlot, and she moved south permanently' after shootings at Wongawol station. [Claimant 6 name removed] was also told that Noongjul (or Noon:jul) was born at Sandstone and his traditional country also included Darlot (paragraph 71).

[54] The State submits that, at its highest, the factual basis material indicates an association between the predecessors of the claim group and that part of the application area north of Darlot, whereas there is little or no material to support an association of the claim group's predecessors with any other part of the application area. In particular, the State makes the following submissions:

(a) Draper 2018 at paragraph 33 states that Telpha was born near Wingara Soak, 30 kilometres northeast of Darlot. The tribal boundary of Telpha country is described at paragraph 33 and depicted as 'Pini' country on Map 2-1.

(b) Draper 2018 states at paragraphs 52 and 53 that Billy and Mary-Ann are recorded as being born at Darlot; however, [Claimant 10 name removed], [Claimant 4 name removed]'s older sister, is said to have stated that her mother, Daisy Cordella, told her

'that she came down from the Carnegie Area,' which she called the 'Spinifex Country' (Draper 2018, paragraph 54).

(c) Draper 2018 states at paragraph 58 that Inyarndi was born near Lake Carnegie. Carnegie and Lake Carnegie are to the northeast of the application area in the vicinity of Wongawol station.

(d) Draper 2018 states at paragraph 75 that Lenny Ashwin, the grandson of Telpha, was born at Mt Grey, within the application area. Paragraph 78 quotes Lenny Ashwin's description of his country, which includes part of the northern portion of the application area with a southern boundary at Agnew and Sandstone.

[55] In response, the applicant submits the factual basis material directly associates the claim group and their predecessors over a long period with a large number of named places across a large swath of the application area centred on Darlot by being born on, living, camping, hunting, gathering, using resources, protecting significant and sacred places, travelling and following ceremony within the application area. The applicant argues that, assuming the facts asserted in Schedule F and the additional material to be true, the factual basis for the association of the claim group and their predecessors with the application area is, on the guiding principles of *Gudjala FC* and *Doepel*, substantial and sufficient to satisfy s 190B(5)(a).

[56] I am satisfied the factual basis material supports Telpha's association with the northern part of the claim area. For example, paragraph 33 of Draper 2018 describes Telpha's tribal boundaries as related to and recorded by Tindale:

> c*ountry … South of Lake Carnegie. Their boundaries were from Lorna Glen in the NW as far as Lake Carnegie taking in Wongawall (sic) Creek (Wangawal) but not Charles Well Creek which belongs the country of the Tjitijanba(?) tribe. The wide Lake divides them also from the Nan:a tribe who are to the North East of the Lake. The line of Lakes to L. Wells indicates the eastern boundary & the southern limits are along Bonython Creek then South West-ward to Mt. Maiden & Darlot thence west to Yandal Lagoon (Jandal) & North through Mt Grey Station (Mindi Hill to Lorna Glen.*

[57] Map 2-1 of Draper 2018, which overlays the Darlot and Wutha claim areas onto Tindale's 1974 tribal boundaries, suggests that Pini country covers areas in the northern and northeastern parts of the application area as well as the 'tail' area of the Wutha claim. Draper 2018, at paragraph 39, asserts that 'it is reasonable to assume that the country Telpha described was broadly similar to the traditional country of her parents and grandparents, which takes the connection back well before first contact with Europeans and at least close to the date sovereignty was assumed.'

[58] Lenny Ashwin's description of his traditional country, with its southern boundary at Sandstone and Agnew, also supports his association with areas in the northern part of the claim. Lenny, who was born at Mt Grey, apparently considered Lake Darlot to be outside his traditional country 'in Leonora district' and it appears that what he understood as his traditional country only marginally intersects with that of Telpha. Similarly, Daisy Cordella is described as 'coming down from the Carnegie area' (Draper 2018, paragraph 54). Inyarndi is also said to have been born near Lake Carnegie and her traditional country is said to have 'ran south from Lake Carnegie along the rock-hole travelling route to Darlot,' where she moved to after the Wongawol shootings (Draper 2018, paragraphs 58 and 82).

[59] The principal material on the association of the claim group's predecessors with the southern part of the application area relates to Julia Sandstone and her daughter, [Person G name removed]. [Person G name removed] is said to have married [Person F name removed], the

son of Telpha and Arthur Cranbrook Ashwin, a non-Aboriginal pastoralist (Draper 2018, paragraph 48). [Person G name removed] and her brother [removed] are recorded as being born in Sandstone in 1912 and 1906 respectively, from which Draper 2016 infers that Julia was in and around the Sandstone area in the early 1900s (paragraph 155).

[60] Draper 2016 refers to the recollections of [Person G name removed]'s children about the places their mother told them she travelled to as a child, including Tower Hill near Leonora; Sturt Meadows and Mt Ida in the central part of the claim; Menzies, Niagara and Kookynie in or around the south-eastern portion of the claim; and Cashmere Downs, Perrinvale Outcome and Yoanmi Downs in and around the western-most part of the claim. Having regard to this information, Draper 2016 asserts that 'it is probable that [Person G name removed]'s childhood travels with her mother are similar to routes her mother Julia would have travelled before [Person G name removed] was born' (paragraphs 159-165).

[61] Draper 2016 and Draper 2018 also include a series of maps depicting the presence and activities of claimant families from pre-sovereignty times to the recent past over the notional 'traditional country' of the claim group:

(a) Map 5-1 (updated as Map 2-2): People on Country pre-1900

(b) Map 5-2 (updated as Map 2-3): People on Country 1900-1950

(c) Map 5-3 (updated as Map 2-4): People on Country 1951-2000

(d) Map 5-4 (updated as Map 2-5): People on Country post-2000

(e) Map 5-5: Wutha People on Country, undated

(f) Map 2-6: People on Country – frequency of references to particular locations

(g) Map 5-6: Wutha People on Country, Travels of Telpha Ashwin, [Person G name removed], and [Person H name removed]

(h) Map 5-7 (updated as Map 2-7): Wutha/Darlot people on country – families and individual 'runs'

[62] Draper 2018 states that the activities depicted in Maps 5-1 to 5-4 (Maps 2-2 to 2-5) include, but are not limited to, births, burials and 'other activities that involve an identifiable person at a known date and location' including habitation, work and heritage survey. With the exception of heritage surveys, which he notes are a recent phenomenon, these activities 'range from before 1900 to the recent past' (paragraph 121). Draper 2018 observes that Weebo, Darlot and Darda Station 'all feature frequently, despite the fact they were outside of the Wutha claim area and not the subject of specific research focus' (paragraph 123). This is also supported by the information in Table 2-1, which shows the birth, death or burial of key individuals at Darlot, Darda Station and Leonora.

[63] A different approach was taken to produce Map 5-7 (Map 2-7). This map is based on recorded accounts where members of the claim group or their predecessors have referred to their own or their family's 'run' in terms of a 'list of places that illustrate the extent of their use of traditional country ("manta"), or the extent of their travels in what they regard as their traditional country' (Draper 2018, paragraph 124). These include areas identified as the traditional country of Telpha, [Person H name removed] and [Person G name removed]. Draper 2018 observes that 'the combined extent of these runs practically covers the Darlot claim area, in addition to the Wutha claim area depicted on the map' (paragraph 124).

[64] The State submits that this material provides little support for the assertion that the predecessors of the claim group had an association with the application area. In particular, the State submits that:

(a) the travels of [Person H name removed], a descendant of Inyarndi, have almost no association with the claim area and any connection arise from the degree of smoothing or curvature built into the mapping function of the software used to produce the map;

(b) the travels of Telpha Ashwin are only marginally within the claim area;

(c) Lenny Ashwin's travels are only within a small portion of the claim area and only marginally overlap with the area of Telpha's travels; and

(d) the travels of the Hogarth family, being the descendants of Daisy Cordella, relate to only part of the area.

[65] In a similar respect, the State submits that Map 5-7 of Draper 2016 purports to show the location of people's traditional country on the basis of where they were known or suspected to have travelled during their lifetime, yet the Registrar may accept that the mere fact a person travelled to a place at some point during their life does not necessarily mean the area is within their traditional country. In this regard, the applicant submits that the State's references to Maps 5-6 and 5-7 are isolated from the totality of Draper's anthropological and ethnographic research connecting predecessors Telpha, Lenny Ashwin, Daisy Cordella, Inyarndi (and their predecessors) by Western Desert traditional law and custom, including Western Desert Tjurkurpa (or Thukkur), to the claim area.

[66] While I have considered State's view that Map 5-7 suggests [Person H name removed]'s travels are only marginally associated with the application area, I note that Julia and [Person G name removed] are also identified as being part of the Inyarndi descent line, on the basis that Noonjul was either Julia's father or uncle (Draper 2018, paragraph 72; see also Draper 2017, paragraph 13, Figure 2-1; [Claimant 6 name removed] Statement, paragraph 22). They are also said to be related to other predecessors of the claim group through [Person G name removed]'s marriage to Telpha's son, [Person F name removed]. I have also had regard to the fact that [Person H name removed]'s travels take in the larger area considered by the claimants to be their traditional country. With respect to the travels of Telpha, Lenny Ashwin and the [Family A name removed] family, I am satisfied that Maps 5-6, 5-7 and 2-7 support the assertion that they had an association with parts of the application area.

[67] The association of the claim group's predecessors with the application area is also illustrated by the recollections and oral history of the claimants, as evidenced in the witness statements made by members of the claim group and transcripts of evidence given in the Wongatha proceedings. For example:

(a) Lenny Ashwin gave evidence that he was born at Mt Grey in 1932 and that his grandmother was Telpha and grew up on Barwidgee Station, where his parents worked. His parents also worked on Weebo, Carnegie, Leinster Downs, Yandal and Paroo Stations and 'travelled back and forth to Leonora,' where they stayed with his uncle[Person F name removed]. He recalled seeing part of a ceremony in Leonora before he went through the law and said that men 'used to come through Leonora and Mulga Queen on Law business' (Lenny Ashwin Transcript, paragraphs 52, 55-56 and 71-72)

(b) [Claimant 1 name removed] states that his father was born in 1908 and his mother was born in 1911. His mother was from Sandstone and her mother was Julia. He says his

father, whose mother was Telpha, was from 'around Darlot.' He speaks about his father and 'the old people' teaching him how to hunt and going hunting with his parents at Tamboola, Nambi, Mertondale, Weebo, Wilgarra and other stations. He also recalls ceremonies being held 'at the back of Leonora' and other boys being taken for initiation, as well as people gathering wood to make spears and boomerangs around Weebo Station ([Claimant 1 name removed] Statement, paragraphs 1, 3-4, 9-15, 18 and 20-21)

(c) In his 2002 statement, [Person A name removed] said his mother, [Person G name removed], told him that her country was 'from Sandstone to Mt Magnet, Riverine, Perinvale and Menzies' and that, as a girl, she 'used to go to ceremonies/tribal meetings around Menzies' ([Person A name removed] Statement 2002, paragraphs 44-45). In testimony given during the Wongatha proceedings, [Person A name removed] said he claims 'the area from Sandstone down to Leonora and Menzies from my mother because she used to tell us that they went there for their tribal meetings when they were travelling ([Person A name removed] Transcript, paragraph 224)

(d) [Claimant 4 name removed] says she was 'brought up around Tarmoola, Ida Valley, Weebo and Sturt Meadows Stations,' where she lived with her parents for most of her life. Her mother, Daisy Cordella, told her she 'left Wongawol country' and 'came down to Darlot' with her sisters and cousins 'and then they stopped around there and on the stations.' She says that her country is 'all the places my mother's people lived in and walked around and where I've been living all my life – Darlot, Weebo, Tarmoola, Wilson's Patch, Marshall's Pool, Sturt Meadows and Ida Valley' ([Claimant 4 name removed] Statement 2015, paragraphs 3, 13, 25 and 26; [Claimant 4 name removed] Statement 2002, paragraphs 4-7 and 59)

(e) [Claimant 5 name removed] states that her 'early memories' are of being on stations such as Tarmoola, Weebo and Sturt Meadows, 'with my mother and also with her parents.' She says the Tarmoola areas, Sturt Meadows, and Weebo, Wilson's Patch, Mt Ida and Ida Valley 'are special to my family because my old people worked and I grew up there' and her parents 'worked all around those stations when I was growing up. Her grandmother, Daisy Cordella, told her they were Koara people ([Claimant 5 name removed] Statement 2015, paragraph 8, 40-41; [Claimant 5 name removed] Statement 2002, paragraphs 8, 10 and 43)

(f) [Claimant 6 name removed], the daughter of [Person H name removed], says her mother was a Tjupan woman. Her mother was born at Lawlers, a few kilometres from the western boundary of the application area, within the Wutha claim ([Claimant 6 name removed] Statement, paragraph 2)

[68] Attachment F asserts that the 'continuity of the archaeological and ethnographic record' within the application area, including places linked by Tjukurrpa (or Thukurr), further supports the continuing occupation of the application area by the predecessors of the claim group.' Draper 2018 refers to several significant mythological sites within or proximate to the application area, for example:

(a) *Lake Barlee*: a significant mythological site associated with the *Wati Kutjarra* and *Wanampi* Thukurr, the southern part of which lies in the western-most portion of the application area (Draper 2018, paragraphs 138-140; Map 2-9). Draper 2018 refers to field notes indicating that [Person G name removed] and her relatives 'used to cross the northern part of the lake from the old camp at Cashmere Downs soak (near the

homestead) on the western side with pack animals as a short-cut to get to the Panhandle soak camp site on the east' (paragraph 139)

(b) *Lake Ballard and Lake Marmion*: significant mythological sites situated near Menzies in the south of the application area, associated with the Mallee Fowl Nanadamarra and the Seven Sisters dreaming (Draper 2018, paragraphs 141-145; Map 2-20). Draper 2018 asserts that these are 'among the most important Thurkur (Dreamings) for this region in accounting for the shape of the landscape, traditional travelling and ceremonial routes associated with specific food and water supplies, the origins and behaviours of important fauna species, and the origins of traditional laws and customs (paragraph 145)

(c) *Goomboowan Thurkurr*: a series of rockholes and wells running roughly north to south along the north-eastern margin of the application and the adjacent eastern 'tail' section of the Wutha application. Draper 2018 asserts that the Goomboowan story 'provides an important source of knowledge about the chain of water sources which provide the traditional travelling route and associated use of surrounding country between Wongawol and Lake Carnegie in the north, down the west side of the "tail" of the Wutha Claim to Lake Darlot and southeast to Wingara and Runggul Soaks, Milurie and Mulga Queen, or southwest towards Darlot … and Weebo' (paragraphs 159-168)

(d) *Kalaya (emu) sites*: a cluster of sites consisting of six hills north-east of the Ngnumuda mines site, south-east of Leinster within the application area, linked with other mythological sites along a Thurkur or Dreaming track from Leonora to Wutha and beyond (Draper 2018, paragraphs 155-158; Map 2-11)

[69] Draper 2018 also refers to the archaeological record, including a rock shelter near Mt Ida, 80 kilometres south-west of Leonora, featuring painted hand stencils and archaeological deposits which is also known as a traditional campsite with a nearby law ground. While Draper 2016 acknowledges, at paragraph 737, that it is difficult to make definitive connections between the archaeological record and specific contemporary individuals, he notes there is 'no obvious lack of continuity between the oldest dated sites in the area and sites known to relate to the claimants or their ancestors' (paragraph 739). In a similar respect, Draper 2016 asserts, at paragraph 740, that members of the claim group:

> are not only familiar with particular sites in the general area of the claim but are also able to identify sites not individually remembered (e.g. various quarries, or camps along waterways), relate these to activities that would have occurred in those area and resources that would have been exploited in the process, and explain connections to cultural and mythological places – particularly Tjukurrpa stories

[70] The factual basis material indicates that the apical ancestors and their immediate descendants had a long-term physical and spiritual association with the application area through birth, residence and travel and by knowledge of dreaming tracks and significant sites. The anthropological material and claimant evidence suggests the claim group's predecessors regarded parts of the application area as their traditional country, either through boundary description or by describing their travels. The asserted facts support an inference that the predecessor's association with the application area had been maintained prior to European contact and persisted despite the disruption of colonisation. This is also supported by reference to the presence of Thukkur/Thurkur sites and the archaeological record.

[71] On this basis, I am satisfied the factual basis supports the assertion that the predecessors of the claim group had an association with the application area.

Factual basis supports the claim group's present association with the application area

[72] Attachment F asserts that claim group members continue to be associated with areas across the claim area, through their acknowledgement of Tjukurrpa and western desert traditional law and custom and by their continuing actions within State and Commonwealth laws to protect sites of significance within the claim area.

[73] The witness statements and transcripts of hearings held in the Wongatha proceedings support the claim group's present association with the application area by birth and residence but also through activities such as travelling through the application area, hunting, camping and caring for country, and through knowledge of historically, culturally or spiritually significant places.

[74] For example, [Claimant 1 name removed], in his 2015 statement, deposes that:

(a) he was born in 1940 at Mt Morgans, between Leonora and Laverton approximately 30 kilometres to the east of the application area (paragraph 1)

(b) as a young man, he lived and worked at Weebo Station, where he used to take 'the old people' to find seed, grinding stones and trees marked for boomerangs and spears (paragraph 20)

(c) his mother 'told [him] stories for the area of the Wutha claim' including the story for a site on Weebo Station and the '7 sister rock hole' at Menzies (paragraph 16)

(d) he spent the earlier part of his life in Leonora and moved back later in 1993, where he taught his children 'how to live off the land in the Aboriginal way' (paragraphs 21-29)

[75] In her witness statements, [Claimant 4 name removed] describes how her understanding of the area that forms part of her traditional country is derived from that of her mother and her aunts and uncles but also her own association with the application area:

(a) she recalls visiting or residing at Wilson's Patch, 70 kilometres north of Leonora, in the 1980s and says other Aboriginal people, including her relatives, were also residing there ([Claimant 4 name removed] Statement 2015, paragraph 13).

(b) there is an area that is her *manta* (home) because she spent time there as a young girl and worked there later on. She describes this area as 'Leonora, Darlot Weebo, Banjawarn, Runggul, Wingara, Kudjelan, Mulga (next to Milyari where the ration depot was), Yuldari, Mt Vernon, Wudarra, Kunabulla (Mt Von Meuller), Milyari.' She shares this country 'with the rest of the Darlot mob' ([Claimant 4 name removed] Statement 2015, paragraph 27[Claimant 4 name removed] Statement 2002, paragraph 60)

(c) she still goes out bush to places such as Marshall Pool, Doyle's Well and Weebo which she has 'known … for a long time.' She was introduced to them by her mother and her aunties and uncles and was taught how to get food and how to hunt. She now takes her children and grandchildren to these places and teaches them the same things ([Claimant 4 name removed] Statement 2015, paragraph 28)

[76] Similarly, [Claimant 5 name removed] relates her understanding of her traditional country to her experiences living in the application area but also the connection she shares with her predecessors and other members of the claim group:

(a) she recalls living as a young woman at Darlot and later Wilson's patch. She moved back to Leonora in the 1980s, at which point she periodically lived at or visited Wilson's Patch, at a time when her 'old people' were moving there from Darlot 'because they had heard

about the new main road that was to go from Leonora to Leinster ([Claimant 5 name removed] Statement 2002, paragraphs 12 and 18).

(b) there are particular areas that are special to her, namely the Tarmoola areas, Sturt Meadows, and Weebo, Wilson's Patch and Mt Ida and Ida Valley.' These areas are also special to her family because her old people worked there and she grew up there. She shares this country 'with the rest of the Koara people' ([Claimant 5 name removed] Statement 2015, paragraph 40; [Claimant 5 name removed] Statement 2002, paragraph 44)

[77] The testimony of [Claimant 8 name removed] in the Wongatha proceedings also illustrates the way in which members of the claim group who no longer reside on their traditional country continue to maintain an association with the application area:

(a) He was born in 1945 in Leonora. After leaving school, he lived and worked at Weebo and later went to Darlot and other places, periodically returning to Leonora before settling in Kalgoorlie (paragraphs 1 and 107-110)

(b) Although he no longer resides in the application area, he still goes out to Leonora to hunt, including at Ida Valley, around the back of Sturt Meadows and Clover Downs, and still goes out to check on sacred sites in the application area and participates in site clearance surveys (paragraphs 146-150)

[78] The protection of historically, culturally and spiritually significant places is another important aspect of the claimant's association with the application area. Draper 2016 asserts that heritage surveys 'play an important part in protecting cultural heritage and sacred sites, and also demonstrate the claimants' knowledge of country and of those sites and their connections within a cultural landscape.' He also notes that the distribution of survey 'events' on Map 5-5 'demonstrates widespread Wutha presence on heritage surveys both within the current claim area and to some degree in the wider area they consider to constitute their traditional country' (Draper 2016, paragraph 376). Map 2-2 of Draper 2018 suggests much of the activity recorded on the application area since 2000 has been associated with such survey 'events.' [Claimant 2 name removed], for example, states that she has been involved in heritage surveys 'since at least 2005' ([Claimant 2 name removed] Statement, paragraph 69).

[79] There is some conflicting material regarding the claimants' association with areas south of Mt Ida. In his testimony in the Wongatha proceedings, [Claimant 8 name removed] described his father as Tjupan and said 'his country is a little bit different' from that of his mother [Person G name removed], whom he identified as a Badimaya woman. He describes his own country as 'from Darlot, to Sandstone, down to Mt Ida, Riverina, up to Albion Downs and Yakabindie and back to Leonora.' He says he does not know the names of the country to the east or south of Leonora, however he was told about a place on the Menzies-Sandstone Road, possibly on Perrinvale Station, called the Seven Sisters Rockhole' (paragraphs 134-139, 155, 162). Similarly, [Claimant 4 name removed] states in her own testimony that Menzies 'is not part of my country' though she does not need to seek permission to visit the area 'because my family are there, my sisters are around there' (paragraph 2527).

[80] On the other hand, [Claimant 7 name removed] states that he was raised at Menzies, among other places, and knows the Sandstone/Menzies area because 'some of our [Family C name removed] family came from there and were raised there.' He says that, while he did not go there with his grandfather or uncles and aunts when he was growing up, they told him about

their family connections there ([Claimant 7 name removed] Statement, paragraphs 5 and 30). I also note that [Claimant 1 name removed] states that his mother told him stories about the application area, including the seven sisters rock hole in Menzies ([Claimant 1 name removed] Statement, paragraph 16). I also note the references in Draper 2018 to Thurkur sites in the southern and south-western parts of the application area.

[81] Although there are some conflicting statements in the factual basis material regarding the claim group's relationship with certain areas in the south of the claim, in my view the factual basis provides a sufficient basis on which to infer the claim group's present association with the entire area of the claim. While there are differing views expressed within the claimant evidence as to the source of the claim group's asserted rights and interests in the southern parts of the application area, the factual basis material as a whole suggests a continued physical and spiritual association with the entirety of the claim area, maintained by spiritual and familial connections with the area and expressed through activities such as heritage surveys that are aimed at protecting and maintaining historically, culturally and spiritually significant sites.

What is required to provide a sufficient factual basis for s 190B(5)(b)?

[82] To satisfy the requirements of s 190B(5)(b), the factual basis must support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests claimed.

[83] In *Gudjala 2007*, Dowsett J considered that, to meet the requirements of s 190B(5)(b), the factual basis must:

(a) demonstrate that the laws and customs observed by the claim group have their source in a pre-sovereignty society and have been observed by a continuing society – at [63];

(b) identify a society of people living, at the time of sovereignty, according to a system of identifiable laws and customs having normative content – at [65] and [66]; and

(c) identify a link between the apical ancestors used to describe the claim group and the society existing at sovereignty – at [66]

Factual basis supports existence of relevant pre-sovereignty society

[84] Attachment F to the application identifies the relevant pre-sovereignty society in the following terms:

> the persons named in Schedule A, [and] their predecessors and descendants were … members of western desert society living in acknowledgement and observance of Tjukurrpa (Thukurr); the Dreaming and western desert laws which connected and continue to connect them, by those traditional laws and customs, to the claim area at the time of first contact and, by necessary inference, earlier to the time of assertion of sovereignty by the British Crown.

[85] The State submits that, whereas the applicant's position appears to be that the whole of the claim area is part of Western Desert country and so the relevant laws and customs are the same as those which are acknowledged and observed in the rest of Western Desert country, there is little direct information in the application or the additional material to support or bolster this assertion. The State submits that the findings of Lindgren J in dismissing the Wutha claim to the extent it overlapped the Wongatha claim remain relevant to the extent that the current claim covers the same previously covered by the Wongatha/Wutha overlap.

[86] In response to the State's submissions, the applicant says the findings in Wongatha do not operate as an estoppel, nor is any new application made in respect of areas or persons the subject of the Wongatha proceedings an abuse of process with respect to what is Western Desert country, who are members of Western Desert society and the extent to which Western Desert law and custom applies to areas of land and waters and groups of Aboriginal people. In this respect, the applicant submits that the State seeks both to apply a higher standard than the *Gudjala* and *Doepel* principles and to introduce irrelevant considerations. Although the findings of Lindgren J in many respects frame the presentation of the factual basis material, it is not my role to consider whether those findings have any bearing on the existence or non-existence of the facts presented in support of the claim in the application.

[87] Draper 2018 asserts that the name 'Darlot People' originates from a permanent camp of Aboriginal people in the Darlot area (paragraph 82). The report refers to claimant evidence and oral history suggesting Darlot people 'were equivalent to Tjupan people' and that claim group members continue to identify themselves as 'Tjupan,' whereas Aboriginal people 'living at Darlot but originating elsewhere' were not considered Darlot People. According to Draper 2018, claimant evidence suggests Darlot People 'maintained traditional Tjupan socio-cultural relationships between individuals, which would have relied on existing and understood kinship systems and familiar relationships extant prior to settling in Darlot' (paragraphs 81-92).

[88] Draper 2016 observes that 'several names … appear to encompass the Wutha claimant group' including Tjupan, Pini, Koara (or Kuwarra) and more recently 'the Darlot mob' (paragraph 81). He notes that, although Tindale mapped Telpha's traditional country as Pini country, he also recorded Telpha as a member of the 'Djuban,' an alternative spelling of Tjupan (paragraphs 85-86). Referring to the relationship between the claim group and the Koara group in particular, Draper 2016 acknowledges that the 'continuation of familial ties has made the distinction between the groups particularly complicated' (paragraph 108). However, he says the claimant evidence suggests there is 'both a coherent larger tradition of law and culture for the whole Tjupan group, as well as local variations between those "known as Wutha now" and other subgroups' (paragraph 88). Although claimants refer to their predecessors and themselves alternatively as Tjupan or Koara, Draper 2018 says these terms 'are practically synonymous according to their experienced speakers' (paragraph 209).

[89] Draper 2018 asserts that 'the Wutha/Darlot traditional law and customs and their basis for claiming rights and interests in their claim area appear to be consistent with the broad precepts of Western Desert culture, while expressing some distinctive local characteristics,' which is 'exactly what I would expect a cultural group on the margin between Western Desert and non-Western Desert cultural groups to look like,' based on prior research (paragraph 191). Surveying the relevant anthropological literature, he concludes that it is 'consistent with my ethnographic observations that the Wutha and Darlot native title groups represent a border or transitional group and area on the western margin of the [Western Desert Cultural Bloc, or WDCB] with the Yamatji and Badimaia people, whose primary cultural configuration and orientation is with the WDCB' (paragraph 213; see also Draper 2016 at paragraphs 744-759).

[90] These conclusions find support in the early ethnographic and anthropological literature and the oral history related in the witness statements, which suggest the existence of a long-term association of the apical ancestors with the land and waters within application area in accordance with traditional law and custom. This link between the predecessors of the claim group and the Western Desert tradition is further supported by reference to identified Dreaming tracks said to connect Western Desert Thurkurr through Wutha and Darlot country

and ‘are regarded by Western Desert people as belonging to their cultural geography and as being within the jurisdiction of their traditional laws and customs’ (Draper 2018, paragraphs 192-198). In this way, the movement of people south from Wongawol to Darlot and other areas within the application area, as documented in the oral evidence of the claimants, is explained not in terms of a migration but as the ‘old people … following their widely dispersed habitable lands along their dreaming tracks which identified and linked water sources, according to climatic conditions’ (Draper 2018, paragraph 397).

[91] While anthropological material suggests the precise identity of the group who occupied the application area at first contact or the assertion of sovereignty is not entirely clear, I am satisfied the factual basis material supports the assertion that, within the application area, there existed at the time of sovereignty a society connected through relationships of descent and kinship and who were bound together by their acknowledgment and observance of a normative system of law and custom.

Factual basis supports assertion that laws and customs derive from those of relevant society

[92] Attachment F to the application makes the following assertions in relation to the continued acknowledgement and observance of the traditional laws and customs of the relevant society:

(a) The claim group ‘continue to substantially acknowledge and observe Tjukurrpa and western desert lands and customs notwithstanding the intrusion of non-aboriginal people into the traditional western desert country of their predecessors … and consequent impact upon traditional lifestyles, laws, customs and practices at and since the time of first contact’ and ‘include Wati law men, and women who acknowledge and observe traditional western desert significant places and practices.’

(b) 'Acknowledgement of Tjukurrpa by the generational transmission of traditional knowledge and practice to claim group members and their predecessors is verified by historical records, oral history and the information from descendants reported in Draper 2016 and Draper 2017, witness statements of claim group members in Wutha, statements of evidence and summaries of transcript evidence in Wongatha by claim group members and predecessors.’

(c) ‘Tjukurrpa and the traditional laws and customs and cultural norms of western society practiced by claim group members and their predecessors give rise to the claimed native title rights and interests in relation to the claim area. The existence and content of those traditional laws and customs verified by historical record, oral history and living acknowledgement and practice of laws and customs in relation to the land and waters comprising the claim area is attested by the information provided by informant members of the claim group collated and recorded in Draper 2016 and Draper 2017 and the written statements and evidence of informants.’

[93] Draper 2016 considers two aspects of claim group’s continued acknowledgement and observance of traditional law and custom by the claim group. First, he considers evidence relating to a systematic knowledge of Thurkurr as defining the traditional country of the claim group. In particular, he refers to claimant testimony suggesting knowledge of Thurkurr is an important aspect of their identification of their traditional country (paragraphs 372-375). This is borne out by the witness statements and transcript evidence, in which knowledge of country is frequently related through knowledge of Thurkurr and associated sites, stories and songlines (for example, [Claimant 1 name removed] Statement, paragraph 16; [Claimant 5

name removed] Statement 2015, paragraph 48; [Claimant 6 name removed] Statement 2015, paragraph 21; [Claimant 8 name removed] Transcript, paragraphs 153-157).

[94] Draper 2016 also notes, and the claimant evidence supports, the existence of cultural norms surrounding the protection of sacred places and stories, particularly the avoidance of particular places based on gender or status (paragraph 377). In a similar manner, heritage surveys 'play an important part in protecting cultural heritage and sacred sites' and also demonstrate the claimant's knowledge of country, significant sites 'and their connections within a cultural landscape' (paragraph 377).

[95] The second aspect of the claim group's continued acknowledgement and observance of traditional law and custom is evidence relating to the systemic knowledge and observance of a recognisable body of laws and customs. In this regard, Draper 2018 present claimant evidence in relation to particular laws and customs said to support the existence and continued practice of traditional law and custom, as evidenced in activities and cultural practices undertaken by members of the claim group:

(a) *ceremonial life and caring for sacred sites*: Draper observes that {Person A], though not a Wati, was 'taught by his Elders the identity and locations of numerous sacred sites so that he can look after them and pass on this knowledge, and he has been reassured by a group of senior Wati's [*sic*] at Wiluna, a neighbouring ritual centre with demonstrated close cultural ties to the Wutha/ Darlot group' (paragraphs 225 to 240)

(b) *law business and male initiation*: Draper notes that some men from the claim group continue to 'go through the law' whereas others do not, though both groups have been active in learning about sites and associated Dreamings and caring for those places. According to Draper, the situation is analogous to other 'western desert fringe' groups he has researched such as Kokatha in northern South Australia and the Ngadju people in the southern Goldfields/Western Nullabor region (paragraphs 241-253)

(c) *hunting and food preparation*: Draper refers to evidence given by [Claimant 8 name removed] in the Wongatha proceedings on the importance of proper food preparation, particularly of kangaroo, and 'his efforts to pass these practices on to his grandchildren and guide them to do things properly.' Draper notes that, despite recent modifications to these practices, they 'still recognise cultural norms' (paragraphs 254-265)

(d) *skin groups and marriage rules*: Draper refers to claimant testimony indicating knowledge of skin groups and an understanding of the skin system, as taught by parents and other family members. Although members of the claim group have married outside these rules by marrying non-Aboriginal people or people from other groups, they still acknowledge them (paragraph 265)

(e) *Funeral rites*: Referring the findings of Lindgren J in *Wongatha*, Draper asserts that additional evidence provided by the claimants 'suggests to me strongly that there is still a definite societal norm involved here among Wutha/ Darlot people, and that it is recognised and shared by Western Desert cultural groups' such as at Wiluna and Warburton (paragraphs 266-271)

(f) *Traditional medicine and healing*: Draper refers to claimant testimony regarding the traditional use of plants and animal products and recent field trips where animals and plants were collected by members of the claim group and used to prepare bush medicine (paragraphs 272-273)

(g) *Access and permission to enter country*: Draper notes there is 'a complex interrelationship between the combined area of the Wutha/ Darlot claims in terms of access, permission from local traditional owners to enter and use country, and safeguarding visitors and their hosts from potential harm at powerful spiritual (Thurkurr/Tjukurpa) place[s]' (paragraphs 274-313)

[96] Referring to similar material, Draper 2016 concludes that 'there is an existing, consistent body of law and custom by which the claimant group associate themselves with and claim rights and interests in the land and waters of the claim area' (Draper 2016, paragraph 768).

[97] The witness statements and testimony from the Wongatha proceedings illustrate the claim group's acknowledgement and observance of the traditional laws and customs that are said to give rise to the claimed native title rights and interests. For example, [Claimant Name 1 removed] states that his parents both spoke in language and that his father and 'the old people' taught him how to prepare goanna and cook emu and kangaroo 'in the right way' (paragraphs 9 and 12).

[98] The continued acknowledgement and observance of rules around marriage and affiliation are also apparent from the witness statements and transcript evidence. [Claimant 4 name removed] states that her skin group is *karimarra* and her mother's was *tharuru*. She grew up knowing this and says it is still important so that people 'know how you fit in' and 'who talks to who.' She taught her children about these matters and they know their skin group ([Claimant 4 name removed] Statement 2015, paragraphs 34-37). [Claimant 5 name removed] also knows her skin group and talks about its importance for marriage and funeral arrangements. She says skin groups dictate who can talk to whom about matters such as hunting, cooking and 'teaching young girls about growing into women' ([Claimant 5 name removed] Statement 2015, paragraphs 22-33).

[99] The evidence also speaks to the claimants' understanding of their rights to country, knowledge of Thurkurr and participation in ceremonial life. [Claimant 4 name removed] claims her country through her mother, who told her it is her *parna* (ground) or *manta* (home), and says she 'share[s] this country with all of my tribe.' Her mother, aunties and uncles also told her where she was allowed to go and about the spirits which inhabit the country. She says she 'tells [her] children the same things' ([Claimant 4 name removed] Statement 2015, paragraphs 26-27, 38-49). In his 2002 statement, [Person A name removed] also said, when growing up, the old people had told him the places he could not go (paragraph 55). [Claimant 5 name removed] discusses her knowledge of the stories for the area, including the Goomboowan story, and says traditional law 'still passes through Leonora.' She notes that ceremony still occurs around Leonora, albeit with differing degrees of formality, and mentions the avoidance of routes and sites associated with men's and women's business ([Claimant 5 name removed] Statement 2015, paragraphs 48-49).

[100] The statements made by claimants also describe the passing on of knowledge about bush tucker and traditional medicine and rules around food preparation. [Claimant 4 name removed] says she was 'taught all about different kinds of food (*mayi*), where to get it and how to prepare it.' She describes collecting seeds and grinding them to make damper and recalls that her mother used to grind them. She also talks about using grindstones to prepare medicinal plants such as sandalwood seeds. She describes different bush foods, where they can be found and how to prepare them, referring to their names in language ([Claimant 4 name removed] Statement 2015, paragraphs 45-54). [Claimant 5 name removed] also knows

where to find bush foods and what they are called in language ([Claimant 5 name removed] Statement 2015, paragraphs 34-36). Similarly, [Claimant 6 name removed] says she was taught about where to get and how to prepare bush medicine from her mother and aunts ([Claimant 6 name removed] Statement, paragraphs 13-14).

[101] In my view, there is a sufficient factual basis to support the assertion that the claim group and their predecessors have continuously acknowledged and observed the traditional laws and customs of Western Desert society with little modification. The factual basis material discloses a continuing practice whereby knowledge of laws and customs have been passed down to successive generations through various modes of oral transmission, such as the telling of stories, imparting knowledge about Thukkur/Thurkurr and practical instruction. Given there are, in many cases, only a few generations between the apical ancestors and the current claimants, it is open for me to infer the apical ancestors practiced the same or similar modes of teaching and that the laws and customs have remained relatively unchanged from those acknowledged and observed by their predecessors at the time of European contact.

[102] It follows that I am satisfied the factual basis supports the assertion that the laws and customs currently observed and acknowledged by the claim group are derived from a society existing at the time of European contact and are therefore 'traditional' in the *Yorta Yorta* sense.

What is required to provide a sufficient factual basis for s 190B(5)(c)?

[103] To satisfy the requirements of s 190B(5)(c), the factual basis must support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

[104] In *Gudjala 2007*, Dowsett J noted at [82] that the assertion in s 190B(5)(c) may require information to the effect that:

(a) there was a society which existed at sovereignty that observed traditional laws and customs from which the laws and customs of the claim group were derived; and

(b) there has been continuity in the observance of traditional laws and customs going back to the assertion of sovereignty or at least European settlement.

Factual basis supports continued observance of traditional laws and customs

[105] Attachment F asserts that the claim group 'continues to substantially acknowledge Tjukurrpa and observe the western desert traditional laws and customs of their predecessors modified only to the extent of the impact of non-aboriginal settlement.' It asserts that 'certain members' of the claim group continue to acknowledge and observe the traditional laws and customs of Western Desert society, including by hunting and preparing food in accordance with traditional norms and practices and by acknowledging and observing rules relating to significant and sacred places, the conduct of men's business, skin groups and marriage rules.

[106] Referring to the way in which the claimants identify their traditional country, Draper 2016 says there is 'combined knowledge and memory of Elders as to the extent of their collective, agreed hegemony over sacred sites, water sources and their associated "Thukurr" or Dreamings, over traditional camping places and resource patches for hunting and gathering of foods, medicines and other resources.' In the absence of written records, he says the identification of country is 'held and passed inter-generationally in such a manner' (paragraph 206). Draper 2016 refers, at paragraphs 241 to 255, to claimant evidence supporting the transmission of traditional knowledge in this way and the witness statements and transcript

evidence contain further examples where such knowledge has been passed through the telling of stories and the teaching of cultural practices to younger generations.

[107] The claimant material discussed in Draper 2018 does contain instances of adaptation or occasional non-observance of particular law and custom, for example in relation to responsibilities for the care of sacred sites and rules around food preparation. However, he asserts that 'modifications and even individual departure from or ignorance of such practices does not negate other evidence for their existence and persistence' (paragraph 254). Referring to material concerning the relationship of the claimants with ceremonial life in the Western Desert tradition, Draper 2018 acknowledges that the evidence 'certainly suggests cultural adaptation to changing circumstances,' but he says 'it also speaks strong of continuity, and that most important of confirmations of cultural integrity and authenticity – peer recognition and approval from neighbours who are demonstrably practicing Western Desert law and culture in depth with little modification' (paragraph 231).

[108] The statements made in the witness statements suggest these intra-mural connections have supported the continued acknowledgement and observance of traditional law and custom by the claim group and their predecessors. For example, [Claimant 5 name removed]speaks about maintaining her association with the application area through her knowledge of sites and songlines and her affiliation with her 'old people,' despite having lived away from her traditional country at various points in her life. This is also illustrated by a story related by [Claimant 4 name removed] about a trip taken in 1983 across the southern part of the 'tail' section of the Wutha claim 'to learn about the country and places,' where the old people 'wanted to show the younger ones and to say goodbye before they were too old to travel, and had a good cry' ([Claimant 4 name removed] Statement 2012, paragraph 30). Continued association with the application area through work, travel and residence has also made possible the maintenance of traditional practices and responsibilities for country.

[109] The State submits that the application contains little information about the claim group's basis for holding native title specifically in the claim area as opposed to the asserted connection of the Wutha claim group to the traditional country the subject of the Wongatha proceedings. In this respect, they say it is not clear whether and how the claim group acknowledge and observe traditional laws and customs in most of the claim area. For example, the State submits that, according to Map 5-6, only [Person G name removed], who they say is not a descendant of the apical ancestors, had travelled over much of the application area and, apart from references to heritage surveys and material originally derived from evidence in the Wongatha proceedings, there is little or no information about the continued exercise of any rights in the application area or the acknowledgement or observance of any laws or customs specifically in relation to the application area.

[110] As I noted above in the context of s 190B(5)(a), [Person G name removed] is identified in the factual basis material as a descendant of Inyarndi. It is not the task of the Registrar to weight the evidence in support of that assertion or form a determined view as to the existence or otherwise of the asserted fact. Although several of the claimants identify [Person G name removed] as a Badimaia woman, Draper 2016 asserts that 'the pattern of evidence from her life and cultural associations point rather to ancestral links to the Tjupan, Wutha, Koara and/or Darlot people, and with important cultural sites right across the western and southern sections of the Wutha claim area' (paragraph 119). While the claimants who identify [Person G name removed] as Badimia do not themselves identify as Badimia, they maintain that they can claim rights through her or travel through the area without seeking permission (see for

example [Person A name removed] Transcript, paragraphs 224 and 233-234). This is also expressed through participation in heritage surveys.

[111] For these reasons, I am satisfied the factual basis material is sufficient to support the assertion that the claim group continues to hold native title in the application area in accordance with their traditional laws and customs.

Prima facie case – s 190B(6): condition met

[112] I am satisfied that some of the native title rights and interests claimed in the application can be established on a prima facie basis.

What is needed to meet this condition?

[113] For an application to meet the condition in s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.'

[114] A native title right or interest that can be established 'prima facie' is one that is arguable on its face, whether it involves disputed questions of fact or law. Accordingly, this condition requires 'some measure of the material available in support of the claim' (*Doepel* at [126] and [135]).

Which of the claimed native title rights and interests <u>can</u> be established on a prima facie basis?

The right to possess, occupy, use and enjoy the lands and waters as against the whole world

[115] In *Griffiths* at [127], the Full Court of the Federal Court held that it was 'not a necessary condition of the exclusivity of native title rights and interests' that a claim should be framed as 'some sort of analogue to a proprietary right.' Rather, it will suffice if such a right is expressed in terms 'spiritual sanctions are visited upon unauthorised entry' and if the claimants are 'the gatekeepers for the purpose of preventing such harm and avoiding injury to the country.'

[116] In the more recent *Banjima* decision, the Full Federal Court referred at [38] to the statements in *Griffiths* and observed that 'controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction … is readily recognisable as a right to exclusive possession.'

[117] Draper 2016 states that traditional law and culture 'not only control[s] where Wutha people can move within their traditional territory, but gives Wutha people the right to access the land … and the authority to restrict or prohibit the access of other individuals and groups. This role of custodian is based both in practical and cultural concerns' (paragraph 455).

[118] The existence of the right under traditional law and custom also finds support in the claimant evidence. For example, [Claimant 5 name removed] makes the following statement at paragraph 46 of her 2015 statement:

> If friends of mine visit, they ask me where they can go and hunt and I'll tell them where to go. It is courteous to ask people from the area if you are a stranger from another group. They should ask people, if they don't know the country or know about anything special that they know to be there. Also they should ask so as not to get lost. If they went to the wrong place, the *gawdi* would tell them that they are not supposed to be there. The *gawdi* are spirits which comes from the land. The *gawdi* on our *parna* will look after us, and warn strangers away.

[119] [Person A name removed] expresses a similar view at paragraph 54 of his 2002 statement:

> You shouldn't go into other people's country without checking with them first. One of the main reasons for that is so you will know where in their country it is safe for you to go. Also, it is the right thing to do under our ways.

[120] Having regard to these statements and the other material before me, I am satisfied that an exclusive right to possess, occupy, use and enjoy the lands and waters of the application area can be prima facie established.

The right of access to the application area; the right to camp on the application area; the right to erect shelters on the application area; the right to move about the application area

[121] The claimant evidence documents numerous instances of claim group members group using or accessing the land and waters within the application area and the broader area they regard as their traditional country. Many of the claimants continue to live within the application area, mainly at Leonora, and continue to access country to hunt and camp. The anthropological material also indicates that the apical ancestors and other predecessors of the claim group resided at or periodically accessed the application area. With respect to the right to erect shelters, [Claimant 4 name removed] recalls, in her 2015 statement, living in *burri* or *wiltja* with other Aboriginal families during station days and later at Wilson's patch (paragraphs 4 and 13). In my view, this material prima facie establishes existence of the claimed rights.

The right to live on, use and enjoy the resources of the application area;

[122] The anthropological material and claimant evidence provide information about the use and enjoyment of natural resources within the application area. The witness statements in particular refer to the use of plant and animal resources by successive generations of the claim group, including: the gathering and grinding of seeds for making damper; the hunting of kangaroo, goanna and emu; and the harvesting of bush foods such as wild onions and silky pear and medicinal plants such as sandalwood nut. There are also references to predecessors of the claim group collecting grindstones or harvesting wood to create spears and boomerangs ([Claimant 1 name removed] Statement, paragraphs 20-21). In my view, these rights have been prima facie established pursuant to the traditional laws and customs of the claim group.

The right to hold meetings on the application area; the right to conduct ceremonies on the application area; the right to participate in cultural activities on the application area

[123] The factual basis material includes some evidence as to the ceremonial life of the predecessors of the claim group. For example, [Claimant 1 name removed] recalls witnessing ceremonies and boys being taken for initiation in in Leonora in the 1950s ([Claimant 1 name removed] Statement, paragraph 18). Although Draper 2018 and several of the witness statements suggest that major ceremonies ceased to occur at Leonora from the late 1960s, there are indications that men engaged in law business continue to pass through and that women's business still operates in and around the town, though with differing levels of formality (see [Claimant 5 name removed] Statement, paragraphs 49-51). The material also indicates that claimants continue to hold traditional funerals 'out in the bush.' In my view, these rights are prima facie established pursuant to the claim group's traditional laws and customs.

The right to maintain and protect places of significance under traditional laws and customs in the application area

[124] The anthropological material and claimant evidence refer to activities undertaken by claim group members and their predecessors to maintain and protect places of significance. Referring to the testimony of [Person A name removed] in the Wongatha proceedings, Draper 2016 and Draper 2018 disputes Lindgren J's finding that it is not clear what [Person A name removed] meant when he referred to checking on sites on the basis that he was not a Wati, noting that [Person A name removed] 'clearly states that he was checking to see if they are undamaged, and not disturbed by mining' (Draper 2018, paragraphs 225-229; Draper 2016, paragraphs 383-387).

[125] The claimant evidence contains further examples of claim group members and predecessors undertaking activities to maintain and protect sacred sites and other places. [Claimant 7 name removed] recalls his father taking him out to keep rockholes clean and several other claimants speak of going out on country to clean soaks, springs and other waterways (see [Claimant 7 name removed] Statement, paragraph 9). Though a more recent phenomenon, many of the claim group members continue to discharge their responsibilities under traditional law and custom by participating in heritage surveys. In my view, this right is prima facie established pursuant to the traditional laws and customs of the claim group.

The right to control access to, and use of, the application area by other Aboriginal people

[126] Unlike the claimed right to exclusive possession, this right is also claimed in respect of areas where exclusive rights cannot be recognised. In my view, the way the right is expressed suggests a degree of control indicating a level of exclusivity.

[127] In *Ward HC* at [52], the High Court cautioned against the framing of non-exclusive rights in exclusive terms, particularly where rights to control access to land or make binding decisions are not said to operate 'as against the whole world.' In subsequent decisions, the Federal Court has been prepared to recognise non-exclusive rights to make decisions about use or access by Aboriginal people who are bound or governed by the traditional laws and customs of the native title holders (see *De Rose* at [553]; *Mundraby*; *Ward FC* at [27]).

[128] In the present case, the claimed right is framed in terms of controlling the access to or use of the application area by other Aboriginal people 'in accordance with traditional laws and customs.' I interpret the use of this qualifier as suggesting that the right is intended to exercise a degree of control over Aboriginal people who are bound by the traditional laws and customs of the claim group and intend to access or use the application area 'in accordance with' those laws and customs. In this regard, I consider the right is qualified or limited in the manner contemplated by the Federal Court in decisions such as *De Rose*, *Mundraby* and *Ward FC*.

[129] The existence of such a right is evidenced in the factual basis material. For example, [Claimant 5 name removed] deposes the following in paragraph 65 of her 2002 statement:

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

[130] When asked during his Wongatha testimony whether he believed anything would happen if other Aboriginal people were to camp and hunt on his country without asking, [Claimant 8 name removed] replied that '[s]ome of our old ancestors used to say the other people who

come to the country, they have to be careful what they do because the spirit or the *gawdis* might get them or make them sick' ([Claimant 8 name removed] Transcript, paragraph 158).

[131] Draper 2016 also refers to the existence of such a right at paragraph 470:

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

[132] On this basis of this material, I am satisfied the right is prima facie established.

Traditional Physical connection – s 190B(7): condition met

[133] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

What is needed to meet this condition?

[134] To meet the condition in s 190B(7), the Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[135] The Registrar must be satisfied of a particular fact or facts that support the person's traditional physical connection to the application area (*Doepel* at [18]; *Gudjala 2007* at [89]).

Is there evidence that a member of the claim group has or had a traditional physical connection?

[136] As noted in my consideration of whether the application meets the conditions in ss 190B(5) and 190B(6), the factual basis material (in particular, the witness statements and transcript evidence) document numerous instances in which members of the claim group have resided in or travelled onto the application area to hunt, camp or care for sites of significance in accordance with traditional law and custom. The material also documents the way in which traditional knowledge has been passed down with each generation and provides examples of the continued exercise of rights and interests arising under the traditional laws and customs of the claim group. On this basis, I am satisfied that at least one member of that group has or had a traditional physical connection with parts of the application area.

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

[137] To meet s 190B(8), the application and accompanying documents 'must not disclose, and the Registrar must not otherwise be aware that, because of s 61A … the application should not be made.' As the application appears to comply with s 61A, I am satisfied the applications meet the condition in s 190B(8).

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination	Geospatial report; Schedule B,	Met

application if approved determination of native title	paragraph 2(c); Attachment B2	
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraphs 2 and 3	Met
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule E, paragraph 2	Met

Application area is not covered by an approved determination of native title: s 61A(1)

[138] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. Several approved determinations of native title fall within the external boundaries of the application area, however the written description in Schedule B and Attachment B2 expressly exclude any such areas from the claim. The Geospatial Report confirms that no part of the application area as described in Schedule B and Attachment B of the application is covered by an approved native title determination.

Application area does not exclude areas covered by previous exclusive possession acts: s 61A(2)

[139] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Section 61A(4) applies where certain provisions of the Act require the extinguishing effect of the previous exclusive possession act title to be disregarded and the application states that one of those provisions apply to the act. Paragraphs 2 and 3 of Schedule B expressly exclude such areas from the claim, subject to the non-extinguishment principle and provisions of the Act requiring extinguishment to be disregarded.

No claim to exclusive possession over previous non-exclusive possession acts areas: s 61A(3)

[140] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Schedule E of the application expressly states that the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world is only claimed over areas where a claim to exclusive possession can be recognised.

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

[141] To meet s 190B(9), the application and accompanying documents must not disclose and the Registrar must not otherwise be aware, that:

(a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation the whole or part of the offshore place;

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

[142] I have had regard to the application and accompanying documents and I am satisfied that the application meets the requirements of s 190B(9).

Requirement	**Information addressing requirement**	**Result**
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule B; Attachment B1; Attachment B2; Schedule P	Met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 2(b)	Met

Procedural and other matters (s 190C)—Conditions not met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

[143] I have examined the application and I am satisfied it contains the prescribed information and is accompanied by the prescribed documents.

What is required to meet this condition?

[144] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken, subject to my comments in relation to ss 61(1) and 61(4) of the Act (see *Doepel* at [16], [35]-[39]; *Harrington-Smith v Western Australia* at [1186]-[1189]).

Subsection 61

[145] The application contains the details specified in s 61.

Section	**Details**	**Form 1**	**Result**
s 61(1)	Native title claim group	Schedule A	Met
s 61(3)	Name and address for service	First page; Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Adequacy of the claim group description: ss 61(1) and 61(4)

[146] As noted above, the condition in s 190C(2) does not require any assessment of the merits of the information contained in the application. In relation to ss 61(1) and 61(4), the condition does not require me to be satisfied that the application properly describes the native title claim group or was made on behalf of the correct native title claim group. The condition only requires that the application contain the requisite information.

[147] Whether the claimed native title holders are adequately identified and the application authorised by all other persons in the native title claim group is a matter that is properly considered under s 190C(4) of the Act (see *Wiri People* at [21]-[36]). I address these matters in my reasons in relation to that condition. For the purposes of s 190C(2), I am satisfied the application does not appear, on its face, to have been made by or on behalf of anything less than all members of the claim group.

Subsection 62

[148] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form		Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B; Attachment B2	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment B1	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis:	Schedule F; Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA; Attachment I	Met
s 62(2)(h)	Notices under s 29	Schedule I; Attachment I	Met

No previous overlapping claim group – s 190C(3): condition met

[149] I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[150] To meet s 190C(3), the Registrar must be satisfied that no person included in the native title claim group for the application was a member of a 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;
(b) when the current application was made, there was an entry on the Register of Native Title Claims in relation to the previous application; and
(c) the entry was made, or not removed, as a result of the consideration of a previous application under s 190A.

[151] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if a previous application meets the conditions found in paragraphs (a), (b) and (c) (see *Strickland FC* at [9]). The purpose of s 190C(3) is to ensure there are no common native title claim group members between the application currently being considered for registration (the current application) and any overlapping 'previous application' that was registered when the current application was made in the Court.

Does the current application overlap with a previous application?

[152] The Geospatial Report confirms that no applications were entered on the Register of Native Title Claims in respect of any part of the application area when the current application was made. The Geospatial notes there is an overlap between the current application and the Marlinyu Ghoorlie application (WC2017/017, WAD647/2017). However, the Marlinyu Ghoorlie application has not been registered. There is therefore no need to consider whether there are any claimants in common between the two applications. In any case, the State notes (and the applicant confirms) that Schedule O of the application implies that the Darlot and Marlinyu Ghoorlie claim groups are mutually exclusive.

Identity of claimed native title holders – s 190C(4): condition not met

[153] I am not satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met.

What is required to meet this condition?

[154] To meet s 190C(4), the Registrar must be satisfied that:

(a) each representative Aboriginal/Torres Strait Islander body that can certify the application in performing its functions has certified 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.

[155] The application does not contain any information at either at Part A or at Schedule R. On this basis I consider that the representative Aboriginal/Torres Strait Islander body has not certified the application. It is necessary therefore to consider whether the application meets the requirements of s 190C(4)(b). This means that each of the persons comprising the applicant must be a member of the native title claim group and be authorised by all the other persons in the group to make the application and deal with matters arising in relation to it.

[156] The application must also include a statement to the effect that the requirements of s 190C(4)(b) have been met and briefly set out the grounds on which the Registrar should consider they have been met: see s 190C(5). These requirements may inform how the Registrar is to be satisfied that the application meets the condition in s 190C(4)(b) but 'clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' (*Doepel* at [78])

[157] Section 251B defines what it means to be authorised for the purposes of s 190C(4). That section provides that a person or persons can be authorised in one of two ways:

(a) in accordance with a process of decision-making that, under the traditional laws and customs of the persons in the claim group, must be complied with in relation to authorising 'things of that kind' (that is, the making of a native title determination application) – **traditional decision-making process**; or

(b) where there is no such process, by a process of decision-making agreed to and adopted by the persons in the claim group in relation to authorising the making of the application or doing things of that kind – **agreed and adopted decision-making process**.

[158] For the purposes of s 251B, the 'native title claim group' is defined as 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed' (see ss 61(1) and 253 of the Act).

Is the applicant a member of the native title claim group?

[159] Each the affidavits that have been made by the persons comprising the applicant and which accompany the application include a statement that the deponent is a member of the native title claim group. This is also supported by the genealogical information referred to in Attachment F and Draper 2016. I am therefore satisfied that the persons who comprise the applicant are members of the native title claim group.

What decision-making process was followed to authorise the applicant?

[160] The basis on which the applicant is said to be authorised to make the application and deal with matters arising in relation to it are set out in the affidavits of the persons comprising the applicant and in particular the affidavit of Geoffrey Alfred Ashwin. Mr Ashwin states that the native title claim group 'has a traditional decision-making process … by which the eldest living male descendant of Telpha Ashwin can speak and has responsibility for the land and waters of her traditional country.' Mr Ashwin says this 'includes the Darlot claim area the subject of this application and traditional authority for making decisions concerning traditional rights and interests' of the kind claimed in the application (Geoffrey Ashwin Affidavit, paragraph 9).

[161] Mr Ashwin states that, as the eldest living male descendant of Telpha, he has 'traditional responsibility for the Darlot claim area and decision making authority, in relation to it, in consultation with claim group elders and families.' According to Mr Ashwin, '[d]ecisions affecting native title rights and interests are made in consultation with families of claim group members.' For the purpose of the application, 'decisions are made by me in consultation with my fellow applications, elders and members of the native title claim group who meet together at an authorisation meeting for that purpose' (Geoffrey Ashwin Affidavit, paragraphs 11-12).

[162] For the purpose of holding 'a consultation and authorisation meeting' to authorise the making of the application, public notices were placed in the *West Australian*, the *Kalgoorlie Miner* and the *Koori Mail* newspapers. Copies of the notices are annexed to the affidavit of June Rose Harrington-Smith. That meeting was supposed to take place on 23 February 2018 but was delayed 'out of respect for a bereavement in a claim group family and ill health' and held instead in Leonora on 9 March 2018 (Geoffrey Ashwin Affidavit, paragraph 14).

[163] Advertisements notifying the public that the meeting had been postponed were placed in the *West Australian* and the *Kalgoorlie Miner* on 24 February 2018, copies of which are annexed to the affidavit of Ms Harrington-Smith. Ms Harrington-Smith states that she also advised claim group members of the delayed meeting 'by word of mouth and telephone as far as possible' (June Harrington-Smith Affidavit, paragraph 11).

[164] The original notices were set out as follows:

> **NOTICE OF AN AUTHORISATION MEETING TO LODGE A NATIVE TITLE CLAIM**
>
> An Authorisation Meeting will be held in LEONORA on 23 FEBRUARY 2018 to authorise an application on behalf of the Darlot Claim Group to the Federal Court of Australia for a determination of native title in relation to the claim area shown on the map below.
>
> **Venue of the meeting: Recreation Hall Tower street Leonora**
>
> **Time of registration: 10 30 am**
>
> **Time of commencement of meeting: 11 00 am**
>
> ***The Darlot Claim Group comprise the Aboriginal persons descended from:***
>
> Telpha and her union with Arthur Cranbook Ashwin

[Person E name removed]

Daisy Cordella Kugila (Aboriginal name)

[Person H name removed]

And those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

THE PURPOSE OF THE MEETING IS FOR THE ATTENDEES TO DECIDE:

1. Whether to authorise the native title claim over the claim area.
2. The identity and description of the claim group.
3. The name of the native title claim
4. The persons authorised to make the application on behalf of the claim group and to deal with matters arising in relation to the claim.
5. Any other matters incidental to carrying out the decisions of the meeting and making the native title claim authorised by the meeting.

Descendants of the above-named ancestors are invited to attend and the meeting is open to any person who holds, or believes they hold, under traditional law and custom, native title rights and interests in the proposed claim area.

…

[165] The original notices also included a map of the proposed Darlot claim area and the contact details of [Person D name removed] 'for further inquiry about the meeting or to inspect the map of the proposed claim area.'

[166] The notices informing the public that the 23 February meeting had been postponed are considerably briefer and simply state that the 'Darlot Native Title Claim Authorisation Meeting' had been postponed 'due to the passing of a family member and ill health' and provide details of the meeting venue and time. I note that the notice placed in the *Kalgoorlie Miner* specifies the date of the meeting as 1 March 2018 rather than 9 March 2018.

[167] Ms Harrington-Smith attended the 9 March meeting and states that all the persons attending the meeting who signed the attendance register and voted to authorise the application were all members of the claim group descended from the named apical ancestors. The attendance register is annexed to her affidavit. According to Ms Harrington-Smith, two of the names that appear on the attendance register are not members of the claim group and did not vote on the resolutions. The first is [Person D name removed], who attended the meeting as a non-voting chairperson, and the second is [Person I name removed], an anthropologist engaged by the Goldfields Land and Sea Council. Ms Harrington-Smith states that [Person I name removed] was 'requested by the meeting to leave' and 'left the meeting before the authorisation resolutions were put and passed by the meeting' (June Harrington-Smith, paragraph 12).

[168] According to Ms Harrington-Smith, the meeting passed the following resolutions authorising the making of the application 'according to the traditional decision making process of the claim group,' which are set out at paragraphs 14 and 15 of her affidavit:

Resolution 1

14. THE MEETING ACKNOWLEDGES THAT:

    14.1 Telpha is the daughter of Duragadi (Thurraguddy) and Murni whose mother was Matjika;

14.2 Lenny Ashwin (Ninardi) is the grandson of Telpha;

14.3 Daisy Cordella (Kugila) is the daughter of Billy and Mary-Anne;

14.4 Inyarndi (Yinnardi) is the mother of Minnie Wheelbarrow, Jimmy Wheelbarrow (whose wife was Maude), Tommy Wheelbarrow, Paddy Wheelbarrow and Patrick Wheelbarrow,

and they, their ancestors and descendants have, by Tjurkurrpa and continued acknowledgement of their traditional laws and customs been connected and remain connected to the land and waters of the claim area.

MOVED: Ralph Edward Ashwin; SECONDED: June Rose Harrington-Smith. CARRIED by vote on a show of hands.

Resolution 2

15. THE MEETING RESOLVES:

15.1 That an application be made under the *Native Title Act 1993 (Cth)* for a determination that the persons comprising the claim group hold native title rights and interests in relation to the claim area.

15.2 The aboriginal persons comprising the native title claim group on whose behalf the application shall be made are the descendants of:

(a) Telpha and her union with Arthur Cranbrook Ashwin;

(b) Lenny Ashwin (Ninardi);

(c) Daisy Cordella – (Kugila);

(d) Inyarndi (Yinnardi); and

(e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

15.3 That the name of the application shall be "Darlot" native title claim and the name of the claim group shall be "Darlot" claim group.

15.4 That Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Rose Harrington-Smith be authorised to make the native title determination application on behalf of the persons comprising the Darlot claim group.

15.5 [Person D name removed] be appointed spokesperson for the Darlot claim group and representative in relation to the application in the NNTT and the Federal Court of Australia to do all things required to carry out the decisions of the meeting and to file and carry on the native title determination application.

MOVED: Geoffrey Alfred Ashwin; SECONDED: [Person J name removed]. CARRIED by vote on a show of hands.

Was the process a traditional decision-making process?

[169] For an application to be authorised under s 251B(a), there must exist a process under the traditional law and custom of the claim group that must be complied with to authorise 'things of that kind.' This is reflected in the observations of Wilcox J in *Moran* at [34], albeit made in the context of s 66B of the Act:

> So I accept it may be possible to satisfy the requirement of s 66B(1)(b), of authorisation by the claim group, otherwise than by proving the making of individual decisions by all or most of the members of the group; it would be enough if there was a decision by a representative or other collective body, that exercises authority on behalf of the group under customary law. This is

> consistent with the provision in s 251B of the Act for representative authorisation of the making of a native title determination application, about which I will say more later. However, a person who wishes to rely on a decision by a representative or other collective body needs to prove that such a body exists under customary law recognised by the members of the group, the nature and extent of the body's authority to make decisions binding the members of the group and that the body has authorised the making of the application.

[170] In my view, these observations apply with equal force to circumstances where it is said that traditional decision-making authority is reposed in a single individual. Crucially, it must be evident that, under the traditional laws and customs of the claim group, that the person or body 'has the power to bind the claimant group as a whole' (see *Moran* at [38]).

[171] CDNTS submits that the process outlined in the affidavit of Geoffrey Ashwin affidavit and the resolutions passed at the meeting as described in the affidavit of Ms Harrington-Smith is not the traditional decision-making process of the WDCB. They say that decisions are only properly made by consensus and not by a single individual or through a ballot process. In support of these submissions, CDNTS refers to the affidavit of [Person C name removed] and [Claimant 5 name removed]'s 24 April affidavit.

[172] [Person C name removed], an anthropologist engaged by CDNTS, deposes that in his experience, including from having observed the process of decision-making at community meetings in Wiluna and Leonora, decisions among members of the WDCB are made by consensus. He describes this process as one that involves 'talking about a proposed decision within and between family groups.' Although people identified as elders 'will be listened to as having more authority on certain problems,' it is the group who makes the final decision. [Person C name removed] states that, from his own observations of the decision-making process of the WDCB and his own research, 'it is not consistent with Western Desert laws and customs to have a decision-making process that leaves final decision making to the oldest surviving male member of a family' ([Person C name removed] Affidavit, paragraphs 23-24).

[173] [Claimant 5 name removed] is a descendant of, and claims native title in the application area through, her grandmother Daisy Cordella and attended the 9 March meeting with her mother, [Claimant 4 name removed]. [Claimant 5 name removed] deposes that '[a]s a people, we don't make decisions alone, it's got to be everybody who makes the decision. A group decision is the right way under our law and custom. No one person is the boss; it's a shared decision-making.' [Claimant 5 name removed] states she is aware, from reading the application, that the applicant purports to be authorised by a resolution carried by a show of hands. However, she says 'we did not authorise them to make an application for native title on our behalf and I don't think that decision was made in accordance with our traditional decision-making process because we don't make decisions that way, by a show of hands' ([Claimant 5 name removed] April Affidavit, paragraphs 9 and 18).

[174] The applicant has since provided a further affidavit affirmed or sworn by [Claimant 5 name removed] on 19 June 2018. In the affidavit, she deposes that she did not understand what her April affidavit meant when she signed it and withdraws her statement in paragraph 21 of that document. Paragraph 21 of the April affidavit is set out in the following terms:

> We are sad that this Darlot claim has been filed because we did not authorise it. We are worried that it has the wrong people on it and also that it does not include all the people who should be able to claim native title in that area. We want the GLSC to be able to do research in that area to make sure it is a strong claim so that we can get our native title there the right way.

[175] Although [Claimant 5 name removed] now states that she does authorise the application, I note that her June affidavit does not appear to withdraw any of her statements regarding the decision-making process itself or whether it is a process that exists under traditional law and custom. On the other hand, [Claimant 5 name removed] now states that when a vote was taken 'my mother and I did not oppose it' ([Claimant 5 name removed] June Affidavit, paragraph 5).

[176] The applicant, in response to the submissions of CDNTS, maintains that the traditional nature of the decision-making process is supported by attestations in the affidavits of [names removed]. The applicant says the statements made in [Person C name removed]'s affidavit are generalised observations and assertions lacking a necessary factual foundation and that his expertise experience is limited. In particular, the applicant argues that [Person C name removed] has not inquired into whether, as a matter of fact, the native title claim group has a traditional decision-making process and has only stated what he has observed to be the process followed by the other persons at other meetings.

[177] I do not find the applicant's arguments particularly compelling in this regard. [Person C name removed]'s evidence is that he has conducted research and fieldwork with members of the WDCB, including in relation to land and waters within the application area, and has directly observed how decisions are made among members of the WDCB at community meetings in Wiluna and Leonora. His commentary on the traditional decision-making process of the WDCB is also consistent with the evidence of [Claimant 5 name removed], who is a member of the claim group.

[178] On the other hand, the applicant's assertion that the process outlined in the affidavit of Geoffrey Ashwin is a traditional decision-making process relies principally on the assertions made in Mr Ashwin's affidavit and the affidavits of Ralph Ashwin and June Harrington-Smith. In this respect, I note the comments of French J in *Strickland* at [57], who said that authorisation is 'a matter of considerable importance and fundamental to the legitimacy of native title determinations' and that s 190C(4) 'is not a condition to be met by formulaic statements in or in support of applications.'

[179] The applicant does refer to the following passage from Elkin's *The Australian Aborigines*, which they say is consistent with the role of Geoffrey Ashwin in decision-making and the process of consultation he describes:

> Each local group has its headman, usually the oldest man, provided that he be not too old to take full interest in its affairs. The headmen of the various groups of a tribe constitute a council – informal in nature – who talk over matters of common interest and make decisions, when several local groups are together. Their authority depends on knowledge, position in the secret life and personal respect.

[180] In my view, the above passage does not necessarily support the position advanced by the applicant. It is not clear, at least out of context, whether the passage is referring to the decision-making process of the WDCB or that of some other group or society, let alone the predecessors of the native title claim group. In any event, I do not consider the passage necessarily supports the assertion that the eldest living male descendant of a particular ancestor has authority to bring the claim group as a whole.

[181] I have also had regard to the fact that none of the information in Attachment F or the additional material provided by the applicant supports the existence of the traditional decision-making process of the kind described in the affidavit of Geoffrey Ashwin. The claim

made in the application is clearly brought on the basis that members of the claim group observe and acknowledge the traditional laws and customs of Western Desert society (see for example Attachment F, paragraphs 33-77). Although Draper asserts that the group has 'some unique characteristics arising from their cultural, social and economic relationships with their western and southern, non-western desert neighbours' (see Draper 2018, paragraph 119), he does not explicitly address the issue of traditional decision-making authority.

[182] There is some information in the additional material that touches on the issue of decision-making within the native title claim group. However, much of that information is conflicting or contradictory. For example:

(a) Draper quotes [Claimant 8 name removed] as saying that he 'was taught by my parents that I had a responsibility to look after the country on which I carried out customs and traditions' (Draper 2016, paragraph 537). However, it is suggested elsewhere that others have similar responsibilities (see for example Draper 2016, paragraphs 560 and 563).

(b) [Claimant 8 name removed] states that 'every Aboriginal person has a say in their county' ([Claimant 8 name removed] Transcript, paragraph 144).

(c) [Claimant 2 name removed] states that 'Lenny gave the authority to [Person A name removed]]' ([Claimant 2 name removed] Statement, paragraph 58). I note however that this statement was made in the context of discussing who is responsible for undertaking heritage surveys.

(d) Geoffrey Ashwin, in his 2012 statement, describes his status and that of Lenny and [Person A name removed] as follows: 'People look up to me. That's a tradition. [Removed] Lenny handed it down to [removed] [Person A name removed]. He set up native title claim in Wiluna and gave it to [removed]. He was still with us doing site clearing. We needed an initiated person, he was there with us. He was there to guide us. That's as much as I know' (paragraph 30).

(e) [Claimant 7 name removed] says his father [Person A name removed] 'was the oldest out of all of his brothers and sisters and everyone has to respect his decisions – that's how he grew up, and that's how I grew up' ([Claimant 7 name removed] Statement, paragraph 7). I note however that decision-making authority presumably resided with Lenny Ashwin at that time.

[183] More fundamentally, there is no explanation in the application or the additional material as to why the eldest living male descendant of Telpha should have the authority to bind the claim group as a whole, as opposed to the eldest living male (or indeed any other descendant) of the other apical ancestors, or the claim group as a whole through a process of collective decision-making. The absence of any explanation for why this is so is particularly difficult given the anthropological material suggests that Telpha's traditional country is confined to the northern part of the application area.

[184] On balance, I am not satisfied the process described by Geoffrey Ashwin and through which the applicant is purported to be authorised was a traditional decision-making process for the purposes of s 251B(a).

Was the applicant authorised through an agreed and adopted decision-making process?

[185] If there is a decision-making process that is mandated by the traditional laws and customs of the claim group in relation to authorising things in the nature of an application for a

determination of native title, then that is the process that must be followed in authorising the applicant to make the application. As Lindgren J observed in *Harrington-Smith v Western Australia* at [1230], the native title claim group 'is not given a choice between traditional and non-traditional processes of decision-making.' It is only if there is no traditional decision-making process in relation to authorising things of that kind that s 251B(b) applies.

[186] I have considered the evidence of [Person C and Claimant 5 names removed] in relation to decision-making among members of native title groups within the WDCB. However, I have also had regard to the fact that the anthropological material characterises the claim group as a 'border' or 'transitional' group whose laws and customs express 'some distinctive local characteristics' (see Draper 2018, paragraphs 191 and 213; Draper 2016, paragraphs 744-749). As I noted earlier in these reasons, the material before me does not directly address the issue of traditional decision-making authority in relation to the claim group specifically.

[187] On balance, I am not satisfied the material before me establishes there is process for decision-making mandated by the traditional laws and customs of this claim group in relation to authorising things of this kind. As I concluded above, I am not satisfied the process followed, as described in the affidavit of Geoffrey Ashwin and detailed in the other materials, was such a process. The question then is whether the applicant was nevertheless authorised to make the application through an agreed and adopted process (cf *Daniel v Western Australia* at [51]).

[188] There are two issues that need to be considered in this context:

(a) whether the process followed was a process that was agreed and adopted by the persons in the native title claim group;

(b) whether the persons who attended the meeting actually authorised the applicant to make the application.

[189] As the Full Court observed in *Noble v Mundraby* at [18], s 251B 'does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question.' Agreement to adopt a particular process may therefore be proved by the conduct of the parties, noting however that such agreement need not be unanimous (*Lawson* at [25]; see also *PC v Western Australia* at [22]). Similarly, an agreed and adopted decision-making process may involve something less than authorisation by every individual in the group, though the people making the decision may still need to be fairly representative of the claim group as a whole (see *Moran* at [41]; *PC v Western Australia* at [23]; *Bolton* at [44]).

[190] In relation to the process followed at the 9 March meeting, the affidavit of June Harrington-Smith simply states that 'the persons attending the meeting who signed the attendance register and voted to authorise the application were all members of the claim group descended from the named apical ancestors' and the resolutions were passed 'according to the traditional decision making process of the claim group.' No resolution appears to have been passed in relation to the decision-making process.

[191] CDNTS submits that, contrary to the application and the accompanying affidavits, not all of the people who attended the authorisation meeting and signed the attendance sheet authorised the applicant. They rely in particular on [Claimant 5 name removed]'s April affidavit and the evidence of [Person B name removed]. [Claimant 5 name removed]'s April affidavit suggests she felt that authorising the applicant by a show of hands was not an appropriate decision-making process and that her memory of the meeting is that 'the majority of people who attended did not want the claim to be made in the way it was notified or in the way it has

been.' [Claimant 5 name removed] now says that she and her mother did authorise the application and did not oppose the vote.

[192] [Person B name removed], who also attended the 9 March meeting and claims native title to parts of the application area including the Barwidgee pastoral lease and the northern part of the Wonganoo pastoral lease, says he 'got the sense that nobody else who attended the meeting wanted the Darlot Claim to go ahead and the majority of people present at the meeting were against it.[Person B name removed] notes that, early on in the meeting, the persons who attended were asked to vote on whether [Person I name removed] should leave and recalls that 'a majority of people at the meeting put our hands up to keep him there but June and [Person D name removed] kicked him out anyway.' ([Person B name removed] Affidavit, paragraphs 16 and 19). [Person B name removed] also recalls [Person K name removed] saying the Darlot Claim 'had the wrong people on it' and 'walked out of the meeting and asked them to take her name off the claim because she did not want to authorise the Darlot Claim without the right people on it' ([Person B name removed] Affidavit, paragraph 21). [Person K name removed] is a descendant of [Person E name removed] and is noted as an 'Elder' of the claim group on the proposed agenda, a copy of which is annexed to [Person B name removed]'s affidavit.

[193] The affidavit of [Person D name removed], which was provided by the applicant in response to submissions made by CDNTS, annexes minutes of the 9 March meeting, which he signed as chairperson on 22 March 2018. The minutes show that, after each motion was moved and seconded, [Person D name removed] 'asked for a vote on a show of hands' and the motion 'was carried by a show of hands without dissent.' The minutes note that [Person B name removed] and others associated with Barwidgee Station attended the meeting but did not vote on the resolutions. The minutes also note that [Person K name removed] asked that [Person E name removed] be taken off any application, after which she left and took no further part in the meeting.

[194] In his affidavit, [Person D name removed] states that the resolution authorising the making of the application was carried by a show of hands and that, contrary to the statements in [Claimant 5 name removed]'s April affidavit, a clear majority of those present raised their hands in favour of the resolution. [Person D name removed] states that [Claimant 5 name removed] and her mother, [Claimant 4 name removed], were present when the resolution was put to the meeting and no hands were raised in opposition to the resolution. The applicant's submissions in response to CDNTS say that, although [Claimant 5 name removed] stated in her April 2018 affidavit that she does not authorise the application, the relevant time for authorisation was the 9 March meeting.

[195] The material before me does raise doubts as to whether those present at the meeting in fact agreed to the process adopted and whether the applicant was in fact authorised to make the application. For example, according to [Person B name removed], a similar 'show of hands' process was used to decide whether to remove [Person I name removed] from the meeting but the decision of the majority was overturned. The applicant did not provide any material to challenge that characterisation and the minutes are largely silent on the issue. Furthermore, [Person K name removed], who was acknowledged as an 'Elder' of the claim group, left the meeting before the resolutions were voted on, after saying she did not want her father [Person E name removed] to be named as an apical ancestor.

[196] Nevertheless, I am not prepared to infer, on the basis of the examples cited above, that the decision-making process did not have the overall support of those who attended the meeting. Even if one were to accept that the decision of the majority as to whether [Person I name removed] should leave the meeting had been overruled, the decision itself was not relevant to authorising the application. On one view, it might ordinarily be expected to have been a matter of protocol within the discretion of the chairperson. Apart from [Person K name removed], who is said to have left after her request for [removed] to be removed from the claim was acceded to, no one else appears to have left the meeting or objected to the vote proceeding in the manner in which it did. Though [Person B name removed] states that he and others did not authorise the application, they were not members of the claim group as constituted by the application.

[197] On balance, I am satisfied the process was an agreed and adopted process of the kind required by s 251B(b).

Is the applicant authorised by all the other persons in the native title claim group?

[198] Leaving aside the issue of whether the applicant was authorised to make the application by an agreed and adopted decision-making process, the material before me also raises questions as to whether the applicant was authorised by all the other persons in the native title claim group because of the way the claim group has been described or constituted.

[199] Section 61(1) of the Act sets out the fundamental requirements for authorisation. It provides that a native title determination application may only be made by a person or persons authorised by all the persons who, according to their traditional laws and customs, hold the common or groups rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

[200] The corollary of s 61(1) is that the 'native title claim group' is a group 'constituted by all the actual holders … of the common or group rights and interests comprising the particular native title claimed' (*Harrington-Smith v Western Australia* at [72]). This means that authorisation must come from all of the persons who hold such rights and interests (*Risk* at [62]). This directs attention to whether the claim group has been properly constituted (see *Quall* at [35]; *Wiri People* at [20]-[36]).

[201] The State makes the following submissions in relation to the composition of the claim group:

(a) The genealogical information referenced in Attachment F to the application and Draper 2016 shows Murni as the child of Matjika, and Murni and Darugadi as having three offspring, namely Albert Dandy, [Person E name removed] and Telpha. [Person E name removed] and Telpha are both shown as having partners but only a subset of Telpha's offspring are now members of the claim group.

(b) By describing membership of the claim group by reference to the descendants of Telpha and her union with Arthur Cranbrook Ashwin, a non-Aboriginal pastoralist, the claim group excludes the offspring of Telpha and Wurnal (other than the descendants of Lenny Ashwin) and the offspring of Harry Fisher.

(c) Where it is apparent on the face of information in the application that rights are obtained by descent, it is reasonable to assume that the offspring of Telpha and [Person E name removed] would have the same rights and interests in the claim area as they did themselves.

(d) The genealogical information in Draper 2016 indicates that Billy and Mary-Ann were the parents of Daisy Cordella, and that Billy had two daughters with Mary-Ann and three daughters with Mary-Ann's sister, who would be half-sisters to Daisy Cordella.

(e) It is reasonable to assume that that any of the offspring of Billy and Mary-Anne or Mary-Anne's sister would have similar rights and interests by descent as the descendants of Daisy Cordella.

(f) Figure 2-1 in Draper 2017 suggests that Inyarndi is the daughter of Wunga Nulgu and Trailer and that there are many other descendants of the siblings of Inyarndi.

(g) It is reasonable to assume that any of offspring of Inyarndi's siblings would have similar rights and interests by descent as descendants of Inyarndi.

[202] The State submits that, before the claim is registered, it is necessary to establish by credible evidence whether there is a credible reason why these people should not be included in the claim group. Otherwise, the application cannot have been properly authorised by all the persons who hold the common or group rights and interests comprising the particular native title claimed.

[203] CDNTS makes similar submissions regarding the composition of the claim group. Specifically, they note that, although the application is brought on the basis that the laws acknowledged by and the customs observed by the member of the claim group are those recognised as WDCB laws and customs, the claim group description impliedly excludes those who claim rights and interests in the claim area through multiple pathways. These persons include [Person B name removed], who was born within the application area, and others identified by [Person B and Person C names removed] as being associated with the Barwidgee and Wonganoo pastoral stations. In support of this submission, CDNTS refers to the decisions of the Federal Court in *Patch* and *Narrier*, which recognised the 'multiple pathways' model of connection to country.

[204] In response to the submissions of CDNTS, the applicant argues that all that is required by s 190C(2) is that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62 of the Act, and does not require the Registrar to undertake a merit or qualitative assessment. Similarly, the applicant submits that all s 190B(3) requires is that the persons in the native title claim group are named in the application and those persons are sufficiently described. The applicant says the assertions made by [Person B and Person C names removed] do not contradict the identification of the native title claim group on whose behalf the Darlot application is made and that 'persons other than the named claim group members are at liberty to claim native title' over the areas to which they refer.

[205] In response to the State's submissions, the applicant states that the claim group is defined in terms of descent from named apical ancestors and it is the descendants of those persons who, according to the Western Desert traditional laws and customs they acknowledge and observe, claim to hold the common or group rights and interests comprising the native title claimed. The applicant states that the claim group is no different in this respect to any other application that identifies membership of the group by descent and it is not the function of the Registrar 'to embark upon a notional exercise as to whether or not there are or might be persons who might claim or hold native title or that there are, or might be, other criteria (e.g. pathways) by which a person may claim native title rights and interests in the area.'

[206] I have considered the fact that the Federal Court has, in its decisions in *Patch* and *Narrier*, recognised the multiple pathways through which members of Western Desert society can claim native title. However, I also note the application is made on the premise that the traditional laws and customs of the claim group and the basis for claiming rights and interests in the claim area is 'consistent with the broad precepts of Western Desert culture, while expressing some distinctive local characteristics' (see Draper 2018, paragraph 191). In this respect, I note the following assertion at paragraph 325 of Draper 2018:

> In my opinion, the Wutha/ Darlot group emphasises the set of Western Deseret [*sic*] connection pathways of group membership and traditional rights in country that correspond with long-term connections through descent through family bloodlines associated with the claim area as far back as memories go … They clearly do not admit group membership for anyone claiming it through the multiple pathway of birth, residence or male initiation status, unless there is the underlying qualification of descent from a local apical ancestor.

[207] Some of anthropological material does suggest the [Family D name removed] family have rights and interests in the application area. For example, Draper 2018 refers to evidence given by [Person A name removed] in 2002 that 'are lots of other people who share this country, including the [Family D, Family E and Family F names removed] – all the Darlot people' (paragraph 87). I infer that the reference to the '[removed]' family in this context is in fact a reference to [Family D name removed]. Noting they were formerly part of the Sir Samuel claim, which shared a common boundary with but did not overlap the Wutha claim, Draper 2018 states that 'it is believed that the [Family D name removed]'s may have rights and interests in land directly north of the Wutha claim including the Darlot area, but not within the Wutha native title claim' (paragraph 88). However, the conclusion he ultimately reaches is that '[i]mmigrant Western Desert Families from further east and north who have co-resided with Wutha/ Darlot families at places like Darlot for two or three generations are not regarded as members of the Wutha/ Darlot traditional owner group that has decision-making powers over these claim areas according to traditional law and custom' (Draper 2018, paragraph 325).

[208] On the other hand, the application and the additional material provided by the applicant does not provide any credible explanation as to why the description of the claim group does not include certain people the descendants of whom could reasonably be expected to have similar rights and interests by descent. The genealogical information referred to in Attachment F and in Draper 2016 indicates that Telpha and [Person E name removed] were both the children of Murni and Darugadi. [Person E name removed] is shown to have had descendants, including [Person K name removed], who are not otherwise part of the claim group. With the exception of Lenny Ashwin, the descendants of Telpha's unions with Wunal and Harry Fisher are also omitted from the claim group.

[209] Similarly, the claim group description appears to exclude the cognates of Daisy Cordella and Inyarndi. The genealogical information indicates that Billy and Mary-Ann were the parents of Daisy Cordella. Billy and Mary-Ann, and Billy and Mary-Ann's sister, are shown to have had other children, the offspring of whom do not appear to be included in the claim group description. Figure 2-1 of Draper 2017, which depicts a genealogy constructed by certain members of the claim group, indicates that Inyarndi was one of several children of Wungu Nulga and Trailer, at least one of whom is shown as having descendants who do not appear to be included in the claim group description.

[210] The minutes of the authorisation meeting indicate that Daisy Cordella was preferred as an apical ancestors to avoid any confusion as to Billy's identity pending further research 'to

identify the descendant families of Billy's other wives and then include them in the claim group after research.' I do not find this explanation particularly satisfactory, given that Billy is currently identified as an apical ancestor in the Wutha claim. On the other hand, no explanation is provided as to why Inyarndi is identified as an apical ancestor as opposed to her parents, Wungu Nulga and Trailer, or why the claim group description does not include any of her siblings. Nor is there any explanation as to why the descendants of Telpha's other unions were impliedly excluded from the claim group description by limiting it to the descendants of her union with Arthur Cranbrook Ashwin, a non-Aboriginal pastoralist.

[211] The original notice for the authorisation meeting identified [Person E name removed] as one of the apical ancestors for the claim group. The applicant states that [Person E name removed] was removed as an apical ancestor at the request of [Person K name removed], who thereby 'excluded herself' from membership of the claim group. If that is the case, then it underscores the very issue the application faces. Whether or not [Person K name removed] asked for [removed] to be removed from the claim group description, the fact that [Person E name removed] was not included in the claim description because [Person K name removed] did not authorise it indicates the application was in fact not properly authorised.

[212] As O'Loughlin commented in *Risk* at [60], where a group named or described in the application is not the native title claim group as defined in s 61(1) but only part of that group, it becomes 'impossible to accept the application for registration.' The anthropological material asserts that rights and interests in the application area are derived 'by descent through family bloodlines associated with the claim area.' It is reasonable assume, therefore, that the descendants of Telpha's other unions, those of Billy and Mary-Ann and Mary-Ann's sister, and those of Wungu Nulga and Trailer, would have similar rights and interests as others within the claim group. No credible explanation has been provided as to why these people are not included in the claim group description. Conversely, the only explanation given for omitting the descendants of [Person E name removed] is that they did not authorise the making of the application.

[213] For these reasons, I am not satisfied the persons who comprise the applicant are authorised by all members of the claim group to make the application and deal with matters arising in relation to it. It follows that the application does not meet the requirements in s 190C(4).

End of reasons

Attachment A

Summary of registration test result

Application name	Darlot
NNTT No.	WC2018/005
Federal Court of Australia No.	WAD142/2018
Date of decision	6 July 2018

Section 190B conditions

Test condition	***Subcondition/requirement***	***Result***
s 190B(2)		Met
s 190B(3)		Overall result: Met
	s 190B(3)(a)	NA
	s 190B(3)(b)	Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Met
s 190B(6)		Met
s 190B(7)(a) or (b)		Met
s 190B(8)		Aggregate result: Met
s 190B(9)		Aggregate result: Met

Section 190C conditions

Test condition	***Subcondition/requirement***	***Result***
s 190C(2)		Aggregate result: Met
s 190C(3)		Met
s 190C(4)		Overall result: Not met