NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

Decision

Native Title Act 1993 (Cth)
Section 190E

Application name:	Darlot
Name of applicant:	Geoffrey Alfred Ashwin, Ralph Edward Ashwin, June Harrington-Smith
State/territory/region:	Western Australia
NNTT file no.	WC2018/005
Federal Court of Australia file no.	WAD142/2018
Date application made:	10 April 2018
Date of Delegate's registration decision:	6 July 2018
Date reconsideration application made:	16 August 2018
Name of Member:	President Dowsett AM
Date of Decision:	19 September 2018

I have reconsidered the claim made in this application, having regard to each of the conditions contained in ss 190B–190C, in accordance with s 190E of the *Native Title Act 1993* (Cth).

I have decided that the claim does not satisfy s 190C(4). The claim must not be accepted for registration.

I draw the Registrar's attention to the matters addressed at [39] and direct that she take the appropriate steps.

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John Alfred Dowsett AM
President of the National Native Title Tribunal
pursuant to section 190E of the *Native Title Act 1993* (Cth)

CASES CITED

Brown v South Australia [2009] FCA 206

McKenzie v South Australia (2005) 214 ALR 214

Risk v National Native Title Tribunal [2000] FCA 1589

Walker v South Australia [2014] FCA 962

Watson and Others on behalf of the Wiri People v Native Title Registrar and Another (2008) 168 FCR 187

Western Australia v Strickland (2000) 99 FCR 33

REASONS FOR DECISION

THE APPLICATION

1 Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Harrington-Smith comprise the applicant (the "Applicant") for a determination of native title pursuant to s 61(1) of the Native Title Act. The application was filed in the Federal Court of Australia (the "Court") on 10 April 2018. A copy of the application was duly forwarded to the Registrar pursuant to s 63 of the Native Title Act. The Registrar provided a copy of the application to the relevant Minister of the State of Western Australia ("Western Australia") and, I infer, pursuant to s 66(2A), gave notice to relevant representative bodies including Central Desert Native Title Services Limited ("CDNTS"). Pursuant to s 190A of the Native Title Act, the Delegate then considered whether to accept for registration the claim contained in the application. He declined so to do.

RECONSIDERATION

2 The Applicant now seeks reconsideration of the claim pursuant to s 190E of the Native Title Act. In any reconsideration, the Tribunal may refer to the evidence before the Delegate and any other appropriate information. It follows that I must form my own views as to the matters raised in ss 190A, 190B and 190C.

THE DELEGATE'S CONSIDERATION

3 Pursuant to s 190A(6)(b) of the Native Title Act, the Delegate had to determine whether the claim in the application satisfied all of the conditions in:

- section 190B (which is said to deal mainly with the merits of the claim); and
- section 190C (which is said to deal with procedural or other matters).

4 In reaching his decision, the Delegate had regard to material and submissions provided by the Applicant and submissions by each of Western Australia and CDNTS. On 6 July 2018, he published his decision. The Delegate found that the claim satisfied the requirements of s 190B. He gave detailed reasons, summarizing the evidence and identifying inferences which he had drawn in reaching his decision. No party challenges that aspect of the Delegate's decision. I would draw the same inferences and reach the same conclusions as did the Delegate.

5 Section 190C provides as follows:

> (1) This section contains the conditions mentioned in subparagraph 190A(6)(b)(ii).
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> …
>
> (2) The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.
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> …
>
> (3) The Registrar must be satisfied that no person included in the native title claim group for the application (the ***current application***) was a member of the native title claim group for any previous application, if:
>
> (a) the previous application covered the whole or part of the area covered by the current application; and
>
> (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and
>
> (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.
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> …
>
> (4) The Registrar must be satisfied that either of the following is the case:
>
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.
>
> …
>
> (4A) To avoid doubt, the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected merely because, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.
>
> …
>
> (5) If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
>
> (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
>
> (b) briefly sets out the grounds on which the Registrar should consider that it has been met.

6 At [143]-[148] the Delegate dealt with the matters identified in s 190C(2). He recognised that s 190C(2), "does not require any assessment of the merits of the information contained in the application". On that basis, the Delegate was satisfied, for the purposes of s 190C(2), that the application contained the details, other information, affidavits and/or other documents required by ss 61 and 62. However he noted that questions concerning membership of the claim group and authorisation of the claim were also to be considered pursuant to s 190C(4). I also conclude that the requirements of s 190C(2) are satisfied.

7 With respect to s 190C(3), the Delegate was satisfied that no person included in the native title claim group was a member of the native title claim group for any previous overlapping application. On the material before the Delegate, I would reach the same conclusion. However, on 28 May 2018 the Kultju People filed an overlapping application for a determination as to native title (WAD225/2018; WC2018/007). Following the Delegate's decision of 6 July 2018, on 20 July 2018 the Kultju application was accepted for registration. Further, on 2 July 2018, another overlapping application was filed by the Waturta People (WAD297/2018; WC2018/012). It was accepted for registration on 2 August 2018. The Applicant accepts that at least one member of the Darlot claim group is a member of the Kultju claim group. I shall defer my consideration of the questions raised by s 190C(3) until I have considered those raised by s 190C(4).

8 The Applicant expressly seeks reconsideration of the Delegate's decision concerning the matters identified in s 190C(4)(b). In the present case s 190C(4)(a) and s 190C(4A) are not relevant. Hence I must consider whether, for the purposes of s 190C(4)(b):

> [T]he 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.

9 As to s 190C(5), the Applicant does not rely on s 190C(4)(a). Hence I can only be satisfied that s 190C(4)(b) is satisfied if the requirements of ss 190C(5)(a) and 190C(5)(b) are satisfied. If those provisions are satisfied, then I must consider whether I am satisfied as to the matters identified in s 190C(4)(b). Although the Delegate found that there was a statement that the persons comprising the Applicant were members of the claim group, he did not expressly find that the application otherwise complied with s 190C(5). However it is clear that in a formal sense, the requirements of the section have been met. In considering the question of s 190C(4)(b), I must have regard to the provisions of ss 190A(3), (4) and (5) as follows:

…

(3) In considering a claim under this section, the Registrar must have regard to:

(a) information contained in the application and in any other documents provided by the applicant; and

(b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory; and

(c) to the extent that it is reasonably practicable to do so in the circumstances—any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar's opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim;

and may have regard to such other information as he or she considers appropriate.

…

(4) Without limiting subsection (3), information mentioned in that subsection may include information about current or previous non-native title rights and interests in, or in relation to, the land or waters in the area covered by the application.

…

(5) The fact that no information of the kind referred to in paragraph (3)(b) has been supplied at a particular time does not prevent the Registrar accepting a claim for registration under this section.

10 Those provisions permit and require me to rely on information other than that contained in the application. The Applicant seems to submit that in considering the matters raised in s 190C(4)(b), the Delegate was obliged to accept that the claim group, as identified in the application, comprised the native title claim group for the purpose of deciding the questions posed by that section. Such an approach would effectively deprive s 190C(4) of any real effect. Compliance with s 190C(2) and supply of the statements required by s 190C(5) would mean that the Delegate had, and I have nothing about which to be satisfied. Further, there would be no reason to consider the "extrinsic" material contemplated by s 190A(3).

11 The Applicant places emphasis upon s 184 of the Native Title Act which provides:

> A reference in this Part to a claim is a reference to an assertion contained in an application filed in the Federal Court, or given to a recognised State/Territory body, that a person or persons hold native title in relation to a specified area of land or waters.

12 The distinction between the application and the claim contained in the application is relevant only to Part 7. The distinction seems to be observed at various places in that Part. However s 190C is primarily concerned with the application rather than the claim contained in that application. The

Applicant seems to submit that the effect of the distinction drawn in s 184 (for the purposes of Part 7) leads to the conclusion that the term "native title claim group" describes a group of persons who, by an application made under s 13(1) and s 61(1) **assert** they are native title holders of the rights and interests claimed to exist in the claimed area. Such an approach fails to recognise the fact that the operation of s 184 is limited to Part 7, whilst the term "native title claim group" is used at various other places in the Native Title Act. Further, the term is defined in s 253 as follows:

> (a) in relation to a claim in an application for a determination of native title made to the Federal Court—the native title claim group mentioned in relation to the application in the table in subsection 61(1); or
>
> (b) in relation to a claim in an application for an approved determination of native title made to a recognised State/Territory body—the person or persons making the claim, or on whose behalf the claim is made.

13 In s 61(1) a person who may apply for a determination of native title is:

> A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group … .

14 Section 251B provides:

> For the purposes of this Act, all the persons in a native title claim group or compensation claim group ***authorise*** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
>
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
>
> (b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

15 Clearly, s 61(1) permits an application only by a person or persons authorised by all of the persons who, according to the traditional laws and customs, hold common or group rights and interests comprising the claimed native title. The section proceeds upon the basis that by reference to identified laws and customs, all members of the native title claim group can be identified, so that the

question of authorisation can be tested. That does not mean that all are necessarily known by name.

16 Further, the description of the native title claim group in accordance with traditional laws and customs will be necessary in order to identify how any authorisation must be given such as, for example, by a meeting called in an appropriate way or by reference to identified decision-makers. Although there may be many complications and difficulties in identifying the native title claim group, the description of the claim group in the application must not be inconsistent with the traditional laws and customs upon which the claim is based. It may be that the term "native title claim group" can be used in two different ways, as simply describing the persons identified in the application, or as describing persons who, according to traditional laws and customs, have native title rights and interests over the subject area. The group identified in the application may seek to prove that they comprise the group having native title rights and interests, but in s 61(1), the term is used in the latter sense.

17 In cases under the Native Title Act, it has been long accepted that the traditional laws and customs of indigenous groups can be identified by evidence from appropriate group members and from anthropological, historical and archaeological evidence. In most cases, such evidence is used to formulate the appropriate claim group description. At some stage, an applicant will have to address the need to demonstrate the correctness of the claim group description by reference to the available evidence. If it cannot do so, the claim will fail. In some cases, it may become clear that the claim group description does not comply with the traditional laws and customs upon which the claim depends. In those circumstances, the Court might strike out the application, but that is not the business of the Tribunal or the Registrar. However acceptance of a claim for registration pursuant to Part 7 is a matter for the Tribunal and the Registrar. In that process, the Tribunal must go beyond the application, at least where there is information of the kind described in s 190A(3).

18 In the present case, the material in Schedule F to the application indicates that Jumbo Harris was Telpha's brother. It is clear that Telpha's descendants from her union with a non-indigenous person, Arthur Cranbourne Ashwin, are accepted as traditional owners. The material demonstrates that Jumbo Harris, like Telpha, travelled widely across the claim area in the traditional country of their parents, living at Darlot and other places in the claim area camping, hunting and for ceremony, frequently visiting Telpha's son and his indigenous wife and other indigenous people living in and around Leonora. It is accepted that Gay Harris is his daughter.

19 As the Delegate observed, one would readily infer that, in the absence of any contrary explanation, Jumbo Harris' descendants are traditional owners on the same basis as are Telpha's descendants.

Clearly, the present claim group accepts as much. Jumbo Harris' descendants were to be included in the claim group but were removed because Ms Harris asked that her father not be included in the application as an apical ancestor. Ms Harris' preferences do not trump the relevant traditional laws and customs.

20 The Delegate points to other persons who might also seem to be, inferentially, traditional owners. I shall deal with those matters at a later stage.

21 The Delegate proceeded upon the basis that the proper question was whether the native title claim group, as defined in s 253 of the Native Title Act had authorised the application, to the extent that such question could be answered on the available evidence.

22 Registration fulfils a particular purpose. Once a claim is accepted for registration, a claim group has a right to negotiate concerning future acts pursuant to Part 2 Div 3. Other rights may arise under State legislation. If a claim is to be accepted for registration, the Registrar must be satisfied as to the matters identified in ss 190B and 190C. Any such decision by the Registrar will not bind the Court in determining the ultimate question as to the existence and content of native title. Whilst the native title claim group may select one or more persons to comprise the applicant, it cannot definitively determine the holders of native title pursuant to traditional laws and customs. This is the approach taken by Collier J in *Watson and Others on behalf of the Wiri People v Native Title Registrar and Another* (2008) 168 FCR 187 and in the cases there cited.

SECTION 190C(4)(B) – THE DELEGATE'S SATISFACTION

23 Section 190C(4)(b) requires that the Registrar or Delegate be satisfied as to two matters, namely:

- that the applicant (or each person comprising the applicant) is a member of the native title claim group; and
- that it (or they) are authorised by all of the other members of the claim group to make the application and deal with matters arising in relation to it.

24 The Delegate was satisfied as to the first, but not the second requirement. I also consider that the first requirement was met.

AUTHORISATION

25 Section 251B of the Native Title Act offers two alternative methods of authorisation. Section 251B(a) provides that where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group, **must** be complied with in relation to authorising the making of an application for a native title determination and associated matters,

then that process **must** be adopted. Section 251B(b) provides that where there is no such mandatory process prescribed by traditional laws and customs, the process of authorisation must be agreed to, and adopted by the persons in the native title claim group, and applied in authorising the making of the application and associated matters. In the present case the Applicant claims to have been authorised in accordance with s 251B(a). The Delegate was not satisfied that the meeting had authorised the application pursuant to a traditional decision-making process, as contemplated by s 251B(a), but was satisfied that the meeting had adopted and applied another, non-traditional process in granting such authorisation. However he was not satisfied that all persons in the native title claim group, other than the persons comprising the Applicant, had authorised the application.

NEW MATERIAL

26 The Applicant placed a large amount of material before the Delegate. It included two affidavits from [name removed] and three reports from Dr Draper, an anthropologist. In support of the Applicant's request for reconsideration, it has filed a further affidavit by [name removed] and a further report by Dr Draper. CDNTS and Western Australia placed material before the Delegate and/or made submissions. CDNTS had made submissions in connection with my reconsideration.

[Name removed]

27 [Name removed]'s first affidavit was dated 24 April 2018. It was prepared by CDNTS. In para 1 [name removed] asserts that:

> I make this affidavit knowing that it will accompany Central Desert Native Title Services Limited's submissions to the application of the registration test to the Darlot Claim.

28 [Name removed] then outlines her relationship to the claim area and that of her mother. She describes the traditional decision-making process pursuant to traditional laws and customs. The affidavit suggests that she and her mother attended the claim group meeting and opposed authorisation of the application. [Name removed] asserts that the majority of the people at the meeting were opposed to such authorisation. In para 21 of her affidavit she says:

> 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 that it is a strong claim so that we can get our native title there the right way.

29 The "GLSC" is the Goldfields Land and Sea Council, which organisation is a native title representative body.

30 On 19 June 2018, apparently at the instigation of the Applicant, or on its behalf, [name removed] swore the second affidavit, referring to her earlier affidavit. In para 3 of the second affidavit she says, referring to the first affidavit:

> I withdraw my statement in paragraph 21 that we, meaning my mother Luxie Hogarth and I, did not authorise the Darlot Claim by the application made by Geoffrey Ashwin, June Harrington-Smith and Ralph Ashwin.

31 At para 4 she says:

> I do authorise the Darlot Claim by the claim group. My mother and I, the applicant persons Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Harrington-Smith and other descendants of Telpha and Lenny Ashwin, Lorraine Barnard and other descendants of lnyarndi (Yinnardi), the Wheelbarrow and Barnard families, we are all family together and we and our ancestors are all Darlot Mob people.

32 She also swore that at the meeting, neither she nor her mother had opposed the authorisation.

33 In para 7 she swears that:

> When I signed the affidavit I did not understand what the affidavit meant. I now want to make things right and make it clear that my mother and I want the Darlot claim by the claim group to go ahead and we do authorise it because Darlot and the claim area is the traditional country of my grandmother, Daisy Cordella (Kuglia) and the ancestors of other claim group members.

34 I understand that the claim group, as identified in the application, accepts that [name removed] and her mother are traditional owners.

35 At paras [173]-[175] of his decision, the Delegate discussed the conflicting evidence given by [name removed] in the two affidavits, concluding at [175] as follows:

> Although [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, [name removed] now states that when a vote was taken 'my mother and I did not oppose it' …

36 In support of its application for reconsideration, the Applicant has filed another affidavit by [name removed], sworn on 11 August 2018. This affidavit causes me some considerable concern. It effectively asserts serious misconduct by those having the carriage of this matter on behalf of CDNTS. [name removed] confirms the position which she adopted in her second affidavit. Paragraphs 1-10 of the third affidavit are as follows:

1. I refer to my affidavit sworn in this matter on 24 April 2018 and my further affidavit sworn 19 June 2018.

2. I confirm my statement and my affidavit sworn 19 June 2018 that I, and my mother Luxie Hogarth, do authorise the Darlot Claim and did authorise the making of the application for that claim at the authorisation meeting held in Leonora on 9 March 2018.

3. I make this affidavit on behalf of myself and my mother. In our traditional way, I am always with my mother when we attend meetings of the kind at Leonora to discuss matters concerning my mother's traditional country. I have given evidence in the Federal Court in native title hearings in this way, seated with my mother when we have been witnesses, for example, in the Tjiwarl hearing before Justice Mortimer and in the Wutha hearing before Justice Bromberg.

4. I made my affidavit sworn 24 April 2018 in circumstances where I believe, to use my own words, I was bribed to do so when I was in a very vulnerable emotional state, my affidavit was not fully explained to me and I did not understand the implications of what I was being asked to sign. I realise the seriousness of what I say.

5. I was in Perth with members of our family mourning the death of my niece [name removed] who had died in Sir Charles Gardner Hospital on 19 April 2018.

6. I had no money for fuel to return to my home in Leonora. Family members suggested I contact Central Desert Native Title Services ("CDNTS") for financial assistance because my mother and I had given evidence for CDNTS in the Tjiwarl claim and are recognised as Tjiwarl native title holders.

7. I contacted CDNTS office in Perth by telephone and was put through to a lawyer, [name removed] (I believe is his name). [Name removed] said words to the effect that he could not give me money from Tjiwarl but if I came in and signed something for the native title claim against the Darlot claim CDNTS would be able to give me fuel money to get back to Leonora.

8. I met [name removed] in his office on 24 April 2018. He asked me questions about the Darlot native title claim and Darlot application authorisation meeting held in Leonora on 9 March 2018. He went away and came back with an affidavit for me to sign. He called in a [name removed] to witness my signature.

9. [Name removed] asked me to read the affidavit. I did so. I said I did not say all those things in it and also asked him to add to paragraph 4 that Billy was born at Darlot. I was still emotionally upset from the death of my niece [name removed] and was anxious to get money for fuel and I just signed the affidavit. [Name removed] then gave Brad Morrell, who was with me at CDNTS' office, a voucher for fuel in the name of Brad Morrell who was going to drive me and my daughter home to Leonora. He used it for fuel and drove us to Leonora.

10. I really didn't understand what I was being asked by CDNTS to sign by the affidavit of 24 April 2018 and didn't want to sign, but I just wanted to get home. I realised when I got home in Leonora that I should not have signed the affidavit. I felt that words were put into my mouth to say my mother and I did not authorise the Darlot native title claim. I felt I had been taken advantage of when I was emotional and vulnerable. I therefore made the further affidavit sworn at Leonora on 19 June 2018 and gave it to June Harrington-Smith to file with the National Native Title Tribunal ("NNTT") so that NNTT would know the true position of myself and my mother with regard to our inclusion as a member of the Darlot claim group and authorisation of the claim on our behalf by Geoffrey Ashwin, June Harrington-Smith and Ralph Ashwin.

37 [Name removed] then makes detailed comments on various paragraphs in her first affidavit, asserting that, in many respects, it does not reflect information provided by her to those acting for CDNTS.

38 In its submissions in support of the reconsideration, the Applicant seems to assert that the content of [name removed]'s second and third affidavits should be accepted and preferred to the first. It submits that the Delegate erred in failing to prefer the content of the second affidavit to that of the first. In the absence of cross-examination, it is hard to see how the Delegate or I could act upon the content of any of the three affidavits. Whether or not [name removed] is to blame, she has been discredited as a witness in these proceedings. In my view, it would be unwise to act upon any aspect of her affidavits.

39 Serious allegations have been made against officers of CDNTS. It is most unfortunate that such allegations, if they were to be raised at all, were not raised before the Delegate. Given that [name removed]'s evidence is clearly unreliable, it is not necessary, for present purposes, that I consider the truth or otherwise of her allegations against the CDNTS officers. If the allegations are untrue, then [name removed] may have sworn at least one false affidavit. These are serious matters. I intend to draw them to the attention of the Commonwealth Attorney-General. As the relevant officers of CDNTS are solicitors, I also intend to refer the matter to the relevant professional association in Western Australia.

The Anthropological Evidence

40 The Delegate had before him anthropological evidence from Dr Draper and another anthropologist, Trinity James Handley who was retained by CDNTS. It seems that Dr Draper's reports had not addressed traditional decision-making, an issue which was, and is of some significance. On that issue, the Delegate acted primarily upon Mr Handley's evidence. I should summarise that evidence.

41 Mr Handley has carried out research concerning the area for which CDNTS has responsibility, including the Barwidgee and Wonganoo pastoral stations, areas which fall within the boundaries of the present application. With a colleague, he has also performed research in connection with two other Western Desert claims. He is familiar with the first three named apical ancestors, Telpha, Lenny Ashwin and Daisy Cordella. However he is not familiar with the name lnyarndi (or Yinnardi). Mr Handley is also familiar with the name Jumbo Harris (Thampa) and with Gay Harris, one of his informants in researching the Barwidgee/Wonganoo area. That area is covered by two pastoral properties having those names. The area lies in the north of the Darlot claim area.

42 Based on his own research, Mr Handley considers that a number of family groups and individuals, who are connected to the Barwidgee/Wonganoo research area, are not included in the Darlot claim group description as set out in the application. He considers that there are also other persons who could claim native title rights and interests in that area, which persons are not presently included in the claim group description. He identifies a number of such persons, some of whom also have interests north and east of the Barwidgee/Wonganoo area.

43 Concerning traditional decision-making processes, Mr Handley says that in his experience, based on observations of community meetings in Wiluna and Leonora, decisions amongst members of the Western Desert Cultural Bloc are made by consensus, involving discussion about a proposed decision within and between family groups, and continuing over time. That process may involve several inter-related conversations. People identified as elders may have more authority than others on some matters. Nonetheless, any decision will be a group decision. He says that, "under the laws and customs of the Western Desert a final decision on matters is not made by just one person." Leonora is fairly centrally located within the claim area. Wiluna is just outside the north-western tip of the claim area.

44 Three reports by Dr Draper were before the Delegate. They are described in the reasons as "Draper 2016", "Draper 2017" and "Draper 2018". Whilst Draper 2018 apparently deals directly with the present claim group, Draper 2016 and Draper 2017 appear to have been prepared in connection with a claim by the Wutha people. In Draper 2018, at paras 188-191, under the heading "Traditional Laws and Customs", Dr Draper says:

> 188. During the course of my research on the Wutha claim, including some attention to the adjacent area that now forms the Darlot claim, it became apparent that this group and their native title claim area are situated on the margin between the inland, arid-zone Aboriginal cultures which collectively are often referred to as the Western Desert Cultural Bloc on the one side (to the north, north-west and east) and neighbouring Aboriginal groups with demonstrably non-Western Desert cultural norms and affiliations on the other side (to the south and south west).
>
> 189. This peculiar situation of an Aboriginal group and a native title claim located astride the cultural dividing line between Western-Desert and non-Western-Desert Aboriginal cultures is one shared with all three of the native title claims for which I have previously conducted extensive anthropological connection research - the Ngadju and Western Mirning people of the southern Goldfields and western Nullarbor plain, The Kokatha people of the Woomera-Lake Torrens region of northern South Australia, and the Banjima people of the Eastern Pilbara Region of northwest Western Australia.
>
> 190. It has been my experience that most anthropologists who have focussed their research attention upon the distinction between Western Desert and non-Western Desert Aboriginal cultures at some stage end up 'drawing a line in the sand', an artificial exercise in demarcation which forsakes the geographic reality that such sharply defined boundaries generally exist for hunter-gatherer societies only in

> relation to salient geographic features (such as lakes, Rivers, or mountains) or extensive, intervening tracts of land which will not support continual occupation (usually due to limited water supplies) (see Draper 2016: Chapter 11, 2017a: Chapter 3). From my previous research experience, I have observed that there are local groups along the margins of the Western Desert Cultural Bloc who necessarily 'look both ways' to some degree in terms of the configuration of their societal norms and cultural traditions.
>
> 191. It is my opinion that 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. This is exactly what I would expect a cultural group on the margin between Western Desert and non-Western Desert cultural groups to look like, based upon my previous research experience with the Kokatha (south Australia), Ngadju, Western Mirning and Banjima groups (Western Australia), all of whom occupy borderline positions between the Western Desert on one side, and distinctly non-desert groups on the other.

45 I have no difficulty in accepting the proposition that Aboriginal groups, located on the geographical fringes of an area occupied by a larger cultural group, may display characteristics of that group and of groups in adjoining areas. However that proposition contributes little to the resolution of the present problem. The primary anthropological question is whether the Darlot claim group has a traditional decision-making process. There is also a secondary question concerning so-called "multiple pathways" by which indigenous persons may acquire degrees of recognition in connection with the ownership of traditional rights and interests.

46 As I have said Mr Handley's experience suggests that amongst groups in the Western Desert Cultural Bloc, including groups within the claim area, decisions are made by consensus amongst members. At [182] of his decision the Delegate referred to evidence from Dr Draper and to other aspects of the evidence, pointing out that unlike Mr Handley's evidence, none of it bore specifically upon decision-making. In particular, at [183] the Delegate said:

> 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.

47 The Delegate concluded that:

> 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).

48 Dr Draper has prepared a fourth report, dated 12 August 2018. At para 31 Dr Draper agrees that in his earlier reports he had not dealt with traditional decision-making. In the latest report he addresses that question. At para 6 of his "Executive Summary" Dr Draper says:

> In my opinion, there is no valid anthropological reason to doubt that the Darlot claim registration meeting decision-making process was not valid in traditional cultural terms, or that it did not fall within the normative parameters of the Western Desert Cultural system, particularly in relation to a society on the margin of that cultural system with neighbouring, coastal and hinterland cultural groups. My previous experience that leads me to that conclusion includes the Anangu Pitjantjatjara lands, and with the Kokatha, Ngadju, and Banjima groups, all of whom achieved successful native title determinations. It is also consistent with the previous Wutha native title claim, which passed the native title registration test and all challenges to that decision by following the same decision-making process.

49 Taking this paragraph in isolation, the statement that there is "no reason to doubt" a particular proposition does not establish its correctness. Further, Dr Draper does not describe the relevance of his identified previous experience to the matters in question. Nor does he explain the process by which he reaches his conclusions. However the paragraph must be read in the context of his report as a whole. In considering it, one must keep in mind the fact that both Mr Handley and Dr Draper speak of their observations concerning Western Desert groups. At para 20 Dr Draper outlines his views concerning decision-making amongst both Western Desert and other cultural groups as follows:

> In nearly all of the instances that I have witnessed or in which I have been involved, the nature of the traditional decision-making processes were influenced to some degree, in my opinion, by the particular requirements of authorisation, agreement and sign off required by the party to which the decision was directed (usually a government agency involved in land management or development assessment, or a corporation involved in infrastructure or resource development). However, in my opinion, these decision-making processes have been valid and appropriate as confirmed by the participants, their aboriginal neighbours and peers, and the parties with whom they were dealing.

50 I take this passage to mean that traditional decision-making processes may, consistently with traditional laws and customs, be tailored to meet the exigencies of a particular decision. I see no reason to doubt the correctness of that proposition. Dr Draper then gives an account of his work with the Kokatha people in the Woomera region of South Australia, on the "eastern fringe of the Western Desert Cultural area". He gives this account of the process followed in reaching a decision on the protection of Coorlay Lagoon:

> The group discussed it and individuals made comments and recommendations. A consensus view was achieved by assent. This view was then agreed to by Max Thomas (deceased), who

> was acknowledged as the oldest male of the family that carried primary responsibility for cultural knowledge and custodianship of that country. This decision was then relayed to the government and mining company representatives by Mr Thomas, supported by a small group of Yankunytjatjara and Aranda senior men from neighbouring groups with cultural interests in the same tjurkurpa (dreaming tracks involving Coorlay Lagoon).

51 The Woomera region of South Australia is a great distance from the area with which I am presently concerned, even if both can be described as being at the extreme ends of the Western Desert Cultural Bloc area. More importantly, although Dr Draper identifies Max Thomas as the oldest male of the family, carrying "primary responsibility for cultural knowledge and custodianship of that country", he does not identify the basis upon which he infers that Mr Thomas' pre-eminence in the decision-making process was the outcome of traditional laws and customs, rather than other considerations such as respect for him personally. He seems to infer that such pre-eminence was attributable to his family's prominence.

52 Dr Draper then refers to other work with the Kokatha people, concerning cultural heritage research. He says that at various meetings:

> In each case the meetings considered each issue for resolution in turn. The first and last speaker in relation to the discussion was Kokatha chairperson Andrew Starkey representing the senior men and descendants of Max Thomas (now deceased). A vote was taken on each issue, but only adult Kokatha claimants descended from the apical ancestors recognised in the Kokatha native title claim application were allowed to vote. Aboriginal people married into the claimant group who were locally resident in the claim area but not descended from those apical ancestors were not permitted to vote. The decisions as for Coorlay Lagoon, represented the views of the Kokatha community and native title group as a whole in relation to speaking for country.

53 Whilst this statement suggests a prominent position for Mr Starkey in the decision-making process, it does not demonstrate that the final decision was his, alone. If anything it suggests that the decision, "represented the views of the Kokatha community and native title group as a whole". It may well be difficult to distinguish between an identified senior person approving an earlier decision by the group and such person simply announcing the group decision.

54 Dr Draper then refers to his work with the Ngadju People in the southern fringe of the Western Desert region in Western Australia. He attended numerous community meetings, called to resolve native title claim overlap issues, and for the preparation of genealogies, as well as in relation to speaking for country concerning development applications affecting significant cultural sites and traditional country. He says that:

> At such meetings issues were discussed by the group and voted on, but clear precedence was given to the views of the applicants, particularly to the acknowledged senior man Arthur

> Dimer (deceased), the surviving son of Jacob Dimer, who had been a community cultural leader before him. Mr Dimer's endorsement of a decision was essential to its passage in the Ngadju group during the time up until his death.

55 There is a difference between giving precedence to another person's views and accepting that person's "endorsement" as being essential to any decision. Once again there is no explanation as to the basis for the pre-eminence apparently enjoyed by Mr Dimer. Rather, it again seems to have been an inference drawn by Dr Draper. Further, it seems that the precedence was accorded to him as an acknowledged senior man who was the son of a "community cultural leader before him". As I have previously observed the mere announcement of a group decision must be distinguished from approving that decision.

56 Dr Draper has also worked with the Anangu Pitjantjatjara Yankunytjatjara People in the north western corner of South Australia. He facilitated, attended and recorded numerous meetings throughout ten residential communities and many outstations. The meetings were all ultimately related to speaking for country in relation to a wide range of issues. He says that each proposal was discussed in turn at the meetings, and the views of local residents were heard in relation to impact upon their local areas of residence. However only people who were recognised by the group attending as having traditional cultural connections via descent and/or required cultural responsibilities for the area concerned were actually involved in the decision-making. He says that there was typically a most senior (oldest) person from a recognised traditional owner descent line who listened to all of the discussion, and then had the final say, either before or after the vote was taken by those considered culturally eligible to vote. He said that with rare exceptions, decisions were taken by the most senior members of families with recognised local descent and sometimes the oldest or most senior males (usually) of one of those families.

57 Although such a generalisation may go some way towards establishing a more widespread practice, it is difficult to reconcile it with the more specific and geographically relevant evidence of Mr Handley's experience. As I have said it may be quite difficult to determine whether a person's observed standing in connection with decision-making is based upon traditional laws and customs, personal standing or other reasons, and whether he or she is announcing or approving a decision.

58 Dr Draper has conducted research related to native title connection and cultural heritage management with the Banyjima People in the eastern Pilbara, on the north-western fringe of the Western Desert. Again, he attended and recorded many meetings at which decisions were taken. Sometimes the meetings were community meetings of Banyjima men and women. Sometimes they were "men only" meetings. Issues were discussed generally by the attendees who were either

descended from local apical ancestors, or adopted or married into the group and accepted as legitimate traditional owners. Sometimes a vote was taken by show of hands or by verbal assent. However the discussion always included a primary contribution, as well as a final endorsement or rejection by the acknowledged leader Slim Parker, the senior spokesperson on these issues for the influential locally-descended Parker family. My earlier comments again apply.

59 At para 26 Dr Draper summarises his experience as follows:

> In summary, in my 30 years of experience with Western Desert groups making cultural decisions about speaking for country, including in relation to native title claims, I have observed the central Western Desert practices (APY lands) as well as groups whose traditional country and cultural identity occur on the eastern, southern and north western margins of the Western Desert Cultural group. There was considerable variation in these individual experiences, from region to region, and in relation to different decision-making frameworks and issues. However, there are common elements, which in my opinion are shared by the Wutha/Darlot group.
>
> In every case the issues at hand were discussed by the attending adult members of the group who considered that they had cultural responsibilities and associations with the land and activities proposed. In every case those people who were descended from known local apical ancestors were automatically regarded as traditional owners with the most decision-making power in the group in such issues. In nearly all cases, a small group of senior elders from these families, and ultimately a single male elder from this select group, had the final say in the matter. In the native title context, this was invariably a senior applicant for the claim as well. People with alternative, "multiple pathway" claims to connection to country and traditional owner status invariably were assessed by this inner group and its core constituency of local descendants, and either accepted or rejected as having that status through individual consideration, and not simply according to a rule of local conception, birth or length of residence despite a family origin elsewhere.

60 I do not reject Dr Draper's opinion, based on his experience, that one person may be pre-eminent in the decision-making process. Nor do I exclude the possibility that pursuant to traditional laws and customs, one group member may be the ultimate decision-maker or must ultimately agree to a group decision. However I also cannot reject Mr Handley's observations, which observations are also directly related to activities in the claim area and specific in nature. Just as I accept Dr Draper's evidence that there may be groups in which decisions are made by individual members, I also accept that Mr Handley has, in his experience, seen numerous examples of decision-making by consensus. I do not accept attempts by Dr Draper to discount Mr Handley's evidence, implicitly on the basis of his alleged inexperience. See Dr Draper's latest report at paras 34, 35 and 37. In paras 40 and 41, Dr Draper says that he sees no reason to doubt Geoffrey Ashwin's claim to be the ultimate decision-maker but offers no explanation as to why that should be the case. Further, at para 42, he acknowledges that he has encountered no "specific and detailed explanation of why the ultimate decision-making status should be the oldest male descendant of Telpha Ashwin".

61 It may be that at a later stage, the Federal Court will have to make a final decision concerning this issue. That decision may involve the acceptance or rejection of some or all of the evidence given by Dr Draper and Mr Handley. For present purposes, however, I find myself unable to reject either Mr Handley's evidence of his direct and relatively recent observations or Dr Draper's conflicting views. Whilst their evidence establishes that some groups in the Western Desert Cultural Bloc have traditional decision-making processes, such evidence offers no clear basis for inferring the nature of any such decision-making process pursuant to the traditional laws and customs of the traditional owners of the area presently under consideration. In those circumstances, it is difficult to be satisfied that at the meeting, authorisation was given in accordance with traditional laws and customs.

62 However other considerations also lead me to that conclusion. The circumstances surrounding the calling of the claim group meeting and its conduct are not entirely consistent with the assertions made by Geoffrey Ashwin, and adopted by Ralph Ashwin and June Harrington-Smith. Further, Mr Ashwin's claims are not always clear or consistent. The notice of meeting was said to be for the purpose of authorising an application on behalf of the Darlot claim group for a determination of Native Title. The claim group was described as Aboriginal persons descended from:

- Telpha and her union with Arthur Cranbrook Ashwin
- Jumbo Harris – Thampa (Aboriginal name)
- Daisy Cordella – Kugila (Aboriginal name)
- Trixie Wheelbarrow
- And those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.

63 The purpose of the meeting was said to be:

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.

64 The notice further provided:

> 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.

65 Taken at face value, the notice could only be understood as an invitation to participate in the decision-making process. There is no suggestion that such decision was to be taken other than by those who chose to attend the meeting. Of course, it may be argued that those to whom the notice was directed would be aware of the special position occupied, as he claims, by Geoffrey Ashwin. However one might still have expected that there would have been some mention of it in the notice.

66 It seems that at some stage, an agenda was circulated, although there is no evidence as to the extent of such circulation. A copy is attached to Mr Sceghi's affidavit. It sets out the resolutions which were to be put to the meeting, or so I infer. Clauses 7.1-7.5 propose the following resolutions:

> 7.1 The persons present at this meeting confirm they are descendants of:
>
> (a) Telpha and her union with Arthur Cranbrook. Ashwin;
>
> (b) Jumbo Harris - (aka Thampa);
>
> (c) Daisy Cordella - (aka Kugila);
>
> (d) Trixie Wheelbarrow.
>
> who claim native title in relation to the land and waters of the area shown in the NNTT Map tabled at this meeting and marked "A" described as "the claim area".
>
> 7.2 The meeting acknowledges that:
>
> (a) Telpha and Jumbo Harris (aka Thampa) are children of Darugadi (aka Thurraguddy) and Murni whose mother was Matjika;
>
> (b) Daisy Cordella (aka. Kugila) is the daughter of Billy and Mary-Ann;
>
> (c) Trixie Wheelbarrow is the daughter of Jimmy Wheelbarrow, the son of Inyarndi and his traditional wife Maude,
>
> and they, their ancestors and descendants have, by Tjukurrpa and continued acknowledgement of their traditional laws and customs, been connected, and remain connected, to the land and waters of the claim area.
>
> 7.3 The meeting resolves:
>
> (a) 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.
>
> (b) The aboriginal persons comprising the native title claim group on whose behalf the application shall be made are the descendants of:
>
> (i) Telpha and her union with Arthur Cranbrook Ashwin;
>
> (ii) Jumbo Harris - (aka Thampa);
>
> (iii) Daisy Cordella - (aka Kugila);

(iv) Trixie Wheelbarrow;

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

(c) That the name of the application shall be "Darlot" native title claim and the name of the claim group shall be ''Darlot'' claim group.

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

(e) Mr Ron Harrington-Smith 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.

7.4 The meeting acknowledges that under the traditional laws and customs of the Darlot claim group there is a process of decision making for authorising the making of their native title determination application. The traditional process recognises the authority of the eldest surviving son of Telpha to consult with Elders and claim group members in a meeting or meetings held for that purpose to decide to authorise the making of an application and deal with matters in relation to the claim to native title.

7.5 The meeting acknowledges:

(a) Geoffrey Ashwin is the eldest surviving son of Telpha;

(b) the Elders of the claim group are:

(i) Geoffrey Ashwin;

(ii) Ralph Ashwin;

(iii) June Harrington-Smith;

(iv) Gay Harris;

(v) Luxie Hogarth;

(vi) Lorraine Barnard.

(c) Geoffrey Ashwin and the Elders have consulted and agreed in accordance with the traditional laws and customs of the claim group to make the Darlot native title claim; and

(d) this meeting has been held, and decisions at this meeting have been made in accordance with the traditional laws and customs of the Darlot claim group to authorise the making of the Darlot native title claim.

67 It seems that at some stage, there was a change of plan. The minutes of the meeting relevantly record the following:

…

8. The chairperson explained the purpose of the meeting was as advertised in public

notices in the West Australian on 2 and 21 February 2018; the Kalgoorlie Miner on 2 and 16 February 2018; and the Koori Mail on 17 February 2018 to consider the authorisation of the making of a native title determination application by the Darlot native title claim group over an area of land and waters identified as the Darlot claim area.

…

11.10 Gay Harris spoke and said she did not want her father Jumbo Harris to be named as an apical ancestor and wanted his name taken off any application. Mr Viner QC said, in that case, that will be done. Gay Harris then left Leonora Recreation Centre and took no further part in the meeting.

12. The chairperson then asked if anyone wanted to move a motion to name the apical ancestors and authorise an application by a claim group.

13. Ralph Ashwin moved; seconded by June Harrington-Smith:

13.1 THE MEETING ACKNOWLEDGES THAT:

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

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

(c) Daisy Cordella (Kugila) is the daughter of Bill and Mary-Ann;

(d) 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 Tjukurrpa and continued acknowledgement of their traditional laws and customs been connected and remain connected to the land and waters of the claim area.

13.2 The chairperson asked for a vote on a show of hands. The motion was carried by a show of hands without dissent.

14. Geoffrey Ashwin said that as the eldest surviving male descendant of Telpha after Lenny Ashwin and Raymond Ashwin had passed on their traditional authority to him, he considered the Darlot claim area was the traditional country of his ancestors and their descendants and of the other proposed apical ancestors and their descendants.

15. Geoffrey Ashwin moved: seconded Janet Hombergen

15.1 THE MEETING RESOLVES:

(a) 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.

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

(i) Telpha and her union with Arthur Cranrook Ashwin:

(ii) Lenny Ashwin (Ninardi):

(iii) Daisy Cordella – (Kuglia):

(iv) Inyarndi (Yinnardi): and

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

(c) That the name of the application shall be "Darlot" native title claim and the name of the claim group shall be "Darlot" claim group.

(d) That Geoffrey Ashwin, Ralph Ashwin and June Harrington-Smith be authorised to make the native title determination application on behalf of the persons comprising the Darlot clam group.

(e) Mr Ron Harrington-Smith 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.

15.2 The Chairman asked for a vote on the show of hands. The motion was carried by a show of hands without dissent.

68 I should make a number of points concerning the minutes. Firstly, it seems that Ms Harris' views and preferences displaced the intended outcome of the meeting. Presumably as a result of her actions, the descendants of Jumbo Harris were excluded from the claim group. Secondly, I note that para 14 of the minutes records that Geoffrey Ashwin claimed some sort of traditional authority, and that he considered that the descendants of the proposed apical ancestors were the traditional owners of the relevant area. However he did not claim authority over the group generally. Whilst it might be argued that he endorsed the resolution recorded in para 13.1, there is no suggestion that he purported to authorise the resolution recorded in para 15.1, although he moved it. His claim at the meeting fell well short of that made in the agenda and that made in his affidavit. In moving the resolution recorded in para 15.1, he may have demonstrated leadership, but he was effectively inviting those present at the meeting to make the ultimate decision.

69 The three persons comprising the Applicant have sworn affidavits concerning the decision-making process. Geoffrey Alfred Ashwin swore that:

9. The native title claim group has a traditional decision-making process for the purposes of s.251B(a) NTA by which the eldest living male descendant of Telpha Ashwin can speak and has responsibility for the land and waters of her traditional country which 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 Schedule E of Form 1 relating to this native title determination application.

10. Lenny Ashwin, grandson of Telpha, when he died on 20 February 2006 was the eldest living male descendant having that traditional authority.

> 11. Raymond William Ashwin, a grandson of Telpha, succeeded Lenny Ashwin having that traditional authority and when Raymond died on 18 March 2012, Raymond conveyed his authority to me as the eldest living male descendant of Telpha and I succeeded to and now have that traditional responsibility for the Darlot claim area and decision making authority, in relation to it, in consultation with claim group elders and families.
>
> 12. Decisions affecting native title rights and interests are made in consultation with families of claim group members and for the purposes of this native title determination application, decisions are made by me in consultation with my fellow applicants, elders and members of the native title claim group who meet together at an authorisation meeting held for that purpose.
>
> 13. For the purpose of holding a consultation and authorisation meeting to authorise the making of this native title determination application, public notices of the holding of an authorisation meeting in Leonora on 23 February 2018 were placed in the West Australian, Kalgoorlie Miner and Koori Mail newspapers. Annexed to the affidavit of June Rose Harrington-Smith, sworn 22 March 2018 and filed in this court for the purposes of this Form 1 native title determination application are copies of those advertisements.
>
> 14. Out of respect for bereavement in a claim group family and ill health, the proposed authorisation meeting to be held on 23 February 2018 was delayed until, and was held at Leonora on, 9 March 2018. Public notices of the delayed authorisation meeting were published in the West Australian and the Kalgoorlie Miner on 24 February 2018. Annexed to the affidavit of June Rose Harrington-Smith is a copy of each of the notices advertising the delayed meeting. In addition to the advertisements, prior to 23 February 2018 and in the customary way, claim group members were advised of the delayed meeting by word of mouth and telephone as far as possible.
>
> 15. On 9 March 2018, the authorisation meeting for this native title determination application was held at Leonora which I attended. 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. Annexed to the affidavit of June Rose Harrington-Smith is a record of the persons who registered their attendance at the authorisation meeting.

70 In their affidavits Ralph Ashwin and June Harrington-Smith adopted those paragraphs.

71 In para 9, Mr Geoffrey Ashwin seems to claim that Telpha's eldest living male descendant has "traditional authority for making decisions concerning rights and interests of the kind claimed" in the application. In para 11, he claims that he now has that authority. However, in that paragraph, he also seems to qualify the power, saying that he has the "traditional responsibility for the Darlot claim area and decision making authority, in relation to it, **in consultation with claim group elders and families**" (emphasis added). In para 12, Mr Ashwin claims that such decisions are to be made by him in consultation with "my fellow applicants, elders **and members of the native title claim group who meet together at an authorisation meeting held for that purpose**" (emphasis added). To my mind, Mr Ashwin here describes three different decision-making processes. It is not clear whether the relevant authority is to consult with claim group members in a meeting called to decide to authorise

an application, or whether Mr Ashwin claims to be entitled to make such a decision after consultation. Paragraph 7.5(c) of the agenda seems to contemplate Mr Ashwin and the elders consulting about, and agreeing to the application being made. There is no reference to claim group members. Nor is there any suggestion that the decision was Mr Ashwin's, alone. Further, para 7.3 of the agenda seems to contemplate the meeting (of the claim group) authorising the application. In reality, it is true to say, as the Delegate said, that there is no explanation as to how Telpha's eldest male descendant acquired responsibility for all lands and waters claimed, and to make decisions concerning traditional rights and interests. No such assertion was made at the meeting where other claim group members could have challenged it.

72 The focus must be on events which actually occurred at the meeting. I have previously pointed out that the notice of meeting suggested that the claim group members were being called together to approve the application. There was no suggestion that such authorisation involved any other step. The minutes record a decision to that effect. Although Mr Ashwin claimed "traditional authority", he did not purport to exercise it with respect to the authorisation resolution, whatever that authority might be. Further, he moved the authorisation motion, strongly suggesting that he was recommending a favourable decision by the meeting, not the acceptance of a decision previously made by him, or by him and the elders. Nor did he suggest any right of veto. There is no suggestion of consultation with elders or claim group members, although Mr Ashwin seems to suggest that the meeting was, in effect, such consultation.

73 In my view, a member of the claim group, attending the meeting, would not have inferred from the events at that meeting, that Mr Ashwin was claiming some pre-eminence in the decision-making process. Of course such a member may have had previous knowledge of the matters asserted by Mr Ashwin. However the proceedings at the meeting, as recorded, do not support the assertion that the decision was taken in accordance with Mr Ashwin's view as to his authority. Further, there is uncertainty concerning the precise nature of his claimed authority and no explanation of its source. These concerns lead me to conclude that I cannot be satisfied that there was, and is a decision-making process which, under traditional laws and customs, must be complied with in authorising the Applicant to make the application and otherwise to deal with associated matters.

74 Although the Delegate was not satisfied that there was a relevant process for decision-making mandated by traditional laws and customs, he concluded that the process followed at the meeting was agreed to, and adopted by those at the meeting. I have reached the same conclusion, and for the same reasons. Although the Applicant challenges the Delegate's decision that the authorisation was so adopted, that challenge seems to be to the Delegate's conclusion that the decision was not

made pursuant to a traditional decision-making process. I do not understand the Applicant to submit that the rejection of that part of its case leads to the conclusion that there was no purported authorisation pursuant to s 251B(b). On that basis, I must consider whether such authorisation was by all of the other members of the native title claim group.

75 It is well-established that a sub-group of a larger group of persons, which larger group has the common or group rights and interests comprising a particular native title claim, cannot generally qualify as a native title claim group. The exception will be where the sub-group, alone, has rights in relation to a defined area. See *McKenzie v South Australia* (2005) 214 ALR 214 at [41]. See also *Risk v National Native Title Tribunal* [2000] FCA 1589; *Brown v South Australia* [2009] FCA 206 at [19]-[20] and *Walker v South Australia* [2014] FCA 962 at [29]. Once this proposition is accepted, it is clear that the present application is misconceived.

76 At the time of advertising the meeting, the descendants of Jumbo Harris were included in the claim group. The agenda demonstrates that when it was prepared, that position remained unchanged. The minutes disclose that at the commencement of the meeting, Jumbo Harris was still identified as an apical ancestor. The only reason that his name does not appear in the application as an apical ancestor is that his daughter, Gay Harris, did not want him to be so named. Ms Harris' departure from the meeting did not necessarily lead to any later resolution being invalid. However the meeting's subsequent removal of Jumbo Harris' name as an apical ancestor resulted in the claim group description in the application differing from that which had previously been accepted. The undisputed evidence is that Jumbo Harris is a relevant apical ancestor, so that his descendants are necessarily members of the relevant native title claim group. One can only infer that the removal of his name was, at best, out of deference to Ms Harris' wishes. By leaving the meeting, she may have voluntarily given up her capacity to participate further in it, but her conduct could not change the proper description of the traditional owners of the relevant area. There is simply no doubt that the initial inclusion of Jumbo Harris as an apical ancestor reflected the views of other traditional owners, and those advising them, as to the effect of traditional laws and customs.

77 The cases to which I have referred suggest that the Court might well strike out the application in its present form. However that is not my concern. I am concerned only with the application of s 190C(4)(b) and particularly, whether all of the other persons in the native title claim group authorised the making of the application. The departure of Ms Harris did not change the nature of the meeting. However the amendment of the list of apical ancestors did so. Once Jumbo Harris' descendants were excluded from the claim group, they had no business at the meeting, save to the extent that they might have claimed descent from some other apical ancestor. Although the

Applicant submits that s 190C(4)(b) requires only authorisation of the application by the claim group as identified in the application, I reject that view for the reasons previously given. Section 190C(4)(b) requires authorisation by all members of the native title claim group according to traditional laws and customs as alleged in the application, not simply those identified as such in the description of the claim group in that document. Normally, but not always, one would expect that the description would reflect the traditional laws and customs upon which the relevant claim depends as identified in the application. However, in some cases, the application, itself, might disclose an inconsistency. In others, extrinsic evidence may establish that the identified claim group does not reflect traditional laws and customs. In the present case, the exclusion of Jumbo Harris' descendants from the claim group led to its composition not being in accordance with traditional laws and customs. There was no sensible basis upon which the native title claim group, according to traditional laws and customs, could authorise an application which wrongly described that group. Put another way, the amendment of the claim group description led to the exclusion of Jumbo Harris' descendants from those who could, by resolution at the meeting, authorise the application. As they were necessarily part of the native title claim group, the group which voted at the meeting could not comprise all members of the native title claim group other than those comprising the Applicant. I am not satisfied as to the authorisation required by s 190C(4)(b).

COMPOSITION OF CLAIM GROUP

78 At paras [198]-[211] the Delegate considered various issues concerning the composition of the claim group, including the issues concerning Jumbo Harris' descendants. He refers to the fact that some evidence suggests that Telpha had two brothers, Jumbo Harris and Albert Dandy, and that no explanation had been given for the absence of the latter's descendants from the claim group. I know nothing about Albert Dandy. The Delegate also noted that Telpha's children by Wurnal have, with one exception, been excluded from the claim group, without any explanation. He also noted issues concerning the descendants of a sister and three half-sisters of another apical ancestor, Daisy Cordella. These issues were all raised by Western Australia, submitting that these matters should be explored and resolved before acceptance for registration.

79 For its part CDNTS made submissions concerning claims based on the so-called multiple pathways. This concept seems to involve recognition by the traditional owners of persons having some interests in the relevant area, based on association with it, other than association based on descent. The Delegate noted that the Court has, in some cases, recognised persons as holding native title rights and interests derived from such multiple pathways. However he also noted that Dr Draper had previously opined that the Darlot people do not admit group membership through multiple

pathways, "unless there is the underlying qualification of descent from a local apical ancestor". I consider that with the exception of the issue concerning Jumbo Harris' descendants, these issues should properly be left for resolution by the Court.

CONCLUSION

80 In the circumstances, the Native Title Registrar should not accept the application for registration.

SECTION 190C(3)

81 Given my views concerning s 190C(4), it is not necessary that I consider the problems posed by the filing and acceptance of the Kultju claim for the purposes of s 190C(3). However, as similar situations may arise in the future, I should make some observations in the hope that they may assist delegates. I proceed on the assumption that there is an overlap of claim areas and of claim group membership, without deciding either question.

82 In my view, the decision of the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33 resolves most problems arising out of s 190C(3). It is true that the case concerned applications which had been filed prior to the commencement of the *Native Title Amendment Act (1998)* (the "1998 Act"). It is also true that the 1998 Act contained extensive transitional provisions. Nonetheless the question for consideration in *Strickland* was the application of the newly enacted s 190C(3) to such prior applications. The Court considered the transitional provisions but concluded, at [40], that they did not address the "present problem". The Court considered that the term, "when the current application was made", should be given its "general meaning". That approach led the Court to conclude that each application was made when it was filed, that is prior to the commencement of the 1998 Act. Once it is accepted that the Court attributed to those words their "general meaning", there can be no basis for giving them any other meaning when applied to applications filed after the commencement of the 1998 Act, at least if the word "application" is understood to mean an application for a determination as to the existence of native title. See *Strickland* at [41]—[52].

83 I should add that at [51], the Court considered the transitional provisions concerning the operation of s 29, although that section had no relevance for matters then under consideration. Nor does it have any present relevance. However at [51], the Court observed:

> Item 11 (7) prescribes the order of consideration of claims affected by the same s 29 notice (that is, overlapping claims), that is to say, the order in which the claims were registered. The object of this provision, as the explanatory memorandum states (Ch 35.38), is that the first claim which satisfied the new registration test (including s 190c(3)) will be registered; and claims considered after that claim is registered will not be able to be registered if they do not satisfy the condition in s 190c(3). It is true that the principle of retesting claims in the order in which their details were entered on the Register has not been made expressly applicable

> to other applications, or to amended or combined applications. But it does provide an appropriate analogy to be applied in order that a fair application of s 190C(3) may be achieved in the case of old claims.

84 The Full Court also considered the time at which the "consideration of the previous application under s 190A" would have taken place. At [55]-[56], the Court said, concerning s 190C(3)(c):

> 55 It appears that this provision could have two possible meanings:
>
> (1) that the entry in relation to the earlier application is still on the Register and has been tested under s 190A at the time that the Registrar applied the registration test to the current application; or
>
> (2) that the entry in relation to the earlier application is still on the Register and was tested under s 190A before the new application was made.
>
> 56 We agree with the Attorney-General's submission that the first suggested interpretation is preferable, as a matter of language and of convenience. As a matter of language, the phrase used in s 190C(3)(b) - "when the current application was made" - does not appear in s 190C(3)(c). As a matter of the practical operation of the provision, if it were the case that the previous application had to be considered under s 190A before the current application was made, then no application actually made before 30 September 1998 would ever fail this aspect of the test, since no application was, or could have been, tested before that date. This would mean that the enactment of Item II as a transitional provision was unnecessary and futile in respect of the s 190C(3) requirement.

85 Notwithstanding the reference to the transitional provisions, it seems that the Court again gave the relevant words their natural meaning. There can be no basis for giving them different meanings, depending upon whether the application was made before or after the commencement of the 1998 Act. The Applicant submits that, for present purposes, the decision of the Full Court in *Strickland* determines the proper application of s 190C(3). However CDNTS submits to the contrary seeking to distinguish the Full Court's decision in *Strickland* on a number of grounds, namely:

- that the decision should be seen in the context of "multiple applications and their amendment by combination, some of which events occurred before the statutory amendments, and others thereafter" and the transitional provisions;
- because of the "novel circumstances" that arise in the present case, namely:
  - (a) an earlier claim was refused registration under s 190A;
  - (b) a subsequent claim which concerned a common apical ancestor and concerned part of the same area as the earlier claim was accepted for registration; and
  - (c) following the registration of the subsequent claim, a request for reconsideration for the earlier claim has been made.

86 I have already explained my reasons for concluding that the context of the Full Court's decision in *Strickland* does not, for present purposes, undermine the persuasive nature of the reasons. As to the alleged "novel circumstances", it is difficult to see how they could justify substituting for the Full Court's view as to the general meaning of the words, a different view. No basis has been established for a construction which departs from that adopted by the Full Court.

87 At paras 22-24, CDNTS submits:

> 22. Central Desert submits that in the context of the reconsideration of a registration decision, the request for reconsideration should be seen as the "current application" for the purposes of s 190C(3). This is because under s 190E the Member undertaking the reconsideration is not reviewing the decision of a Delegate or Registrar, but is required to independently assess the claim against the relevant statutory conditions.
>
> 23. Further, when considering a claim, the NNTT:
>
> (a) must have regard to any information to which the Registrar was required to have regard under subsections 190A(3) to (5) in considering the claim: and
>
> (b) may have regard to any other information which the NNTT regards as appropriate in reconsidering the claim.
>
> 24. Therefore, the point in time at which the NNTT must be satisfied that there has been no duplication of claimants for the purposes of s 190C(3) should be the date in which Darlot Applicant requested a reconsideration of the registration. At this date, the Kultju Claim had been registered.

88 The submission that the word "application" refers to the application for reconsideration of the Delegate's decision is untenable for textual reasons. In s 190C(2) the word "application" clearly relates to an application pursuant to ss 61 and 62. It seems most unlikely that in s 190C(3), the word had a different meaning. Further, it is clear that s 190C relates to consideration by the Registrar of such an application, whilst s 190E deals with applications for reconsideration. The function referred to in s 190C is in performance of the duty imposed upon the Registrar by s 190A. That section clearly deals with consideration of applications under ss 61 and 62, not applications under s 190C.

89 Upon the assumptions which I have made, the "current application" is the Darlot application for a determination as to the existence of native title. The Kultju application covers the whole or part of the area claimed in the current application. However, when the current application was made, there was no entry on the Register of Native Title claims relating to the Kultju claim. In those circumstances, s 190C(3) was not engaged.

90 I should add one other comment. The Applicant and CDNTS made extensive references to events which occurred in connection with the Kultju claim. I see no basis for treating those matters as being relevant for present purposes.