



## Reconsideration of Claim

<b>Application name</b>	June Harrington-Smith & Others and State of Western Australia (Darlot)
<b>Name of applicant</b>	June Harrington-Smith, Verna Vos, Richard Ashwin, Brett Lewis, James Calyun, Jodie Harris, Maria Meredith, Dorothy Cooper, Wayne Smith, Andrew Harris, Linden Brownley, Joan Tucker and Pearl Scott
<b>State/territory/region</b>	Western Australia
<b>Federal Court of Australia No.</b>	WAD142/2018
<b>NNTT No.</b>	WC2018/005
<b>Date application made</b>	13 March 2020 (The application was first made on 10 April 2018, and amended on 6 May 2019 – the current application was made on 13 March 2020)
<b>Date of Delegate’s registration decision</b>	25 June 2020
<b>Date reconsideration application made</b>	6 August 2020
<b>Name of Member</b>	Helen Shurven
<b>Date of Decision</b>	21 October 2020

### Claim not accepted for registration

I have decided the claim in the Darlot application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth)<sup>1</sup>. Therefore, the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy ss 190B(5)–(7). It also does not satisfy s 190C(4).

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Helen Shurven

Member of the National Native Title Tribunal pursuant to section 190E of the Act.

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<sup>1</sup> A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

## Reasons for Decision

### Cases Referred To

*Ashwin on behalf of the Wutha People v State of Western Australia (No 4)* [\[2019\] FCA 308](#) (*Wutha*)

*Dann v Yamera* [\[2017\] FCA 513](#) (*Dann*)

*Fesl v Delegate of the Native Title Registrar* [\[2008\] FCA 1469](#); (2008) 173 FCR 150 (*Fesl*)

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

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

*Martin v NTR* [\[2001\] FCA 16](#) (*Martin*)

*McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [\[2019\] FCAFC 238](#)

(*McGlade No 2*)

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

(*Yorta Yorta*)

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

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

### Introduction

- [1] As a member of the National Native Title Tribunal (the Tribunal), I have been asked to reconsider a decision made on 25 June 2020 by a delegate of the Native Title Registrar (the Registrar). The delegate found the Darlot native title claimant application made on 13 March 2020 did not meet the requirements for registration and, therefore, details of the claim were not entered on the Register of Native Title Claims (the Register) (see s 108 and s 190E of the Act).
- [2] If a claimant application complies with the conditions prescribed in ss 190B and 190C of the Act, the Registrar must place the claim on the Register. If the claim does not satisfy all the conditions, the Registrar must not accept the claim for registration. The Tribunal wrote to the applicant on 9 June 2020, outlining that the delegate's preliminary assessment of the claimant application was that it did not meet the relevant conditions. On 17 June 2020, the applicant provided additional material for consideration by the delegate. After reviewing the additional material, the delegate remained of the view that the applicant had not sufficiently addressed all the conditions of the registration test.
- [3] The delegate's 25 June 2020 decision found the Darlot application did not meet the registration conditions at ss 190B(5), 190B(6), 190B(7) and 190C(4) of the Act, and the claim was not accepted for registration. The basis of the request for reconsideration was, in essence, that the delegate should have found those four conditions were met and the claim should have been registered. More detail about the reconsideration application is outlined in this decision.

#### *The history of this claimant application*

- [4] It may assist to understand my reasons for decision if I outline the history of this claim, from when it was first made on 10 April 2018, and the subsequent amendments. A delegate of the Registrar decided on 6 July 2018 that the application made on 10 April 2018 did not meet the

registration condition at s 190C(4) of the Act, and the claim was not accepted for registration. This decision was subject to a reconsideration application, and on 19 September 2018 it was again decided that the claim did not satisfy s 190C(4) and must not be accepted for registration.

[5] Following these decisions in 2018, a representative for the Darlot applicant lodged an amended application on 6 May 2019, which reduced the area of the claim and triggered the Registrar's duty to consider the claim by way of a registration test. On 26 June 2019, a delegate decided that ss 190B(5), 190B(6), 190B(7) and 190C(4) were not met and the amended claim must not be accepted for registration.

[6] I will refer to the three delegate registration test decisions outlined at [2] – [5] as 'the 2020 delegate decision', 'the 2019 delegate decision' and 'the 2018 delegate decision' respectively, to distinguish between them throughout this decision. The applicant refers variously to aspects of some of these decisions in the materials for this reconsideration, and I consider all of the material provided for the three previous decisions, and for the previous reconsideration, to be relevant. The differences between the applicant and the apical ancestors for each claimant application are outlined in Annexure A.

#### *The 6 August 2020 reconsideration application*

[7] A request for reconsideration of the 2020 delegate decision was made on 6 August 2020 by the applicant's representative. The request for reconsideration relied on materials provided for the 2020 delegate decision, as well as additional materials, and the contents of the 2018 delegate decision. A summary of the materials relied upon by the applicant for this reconsideration are outlined at Annexure B. The materials which the 2020 delegate decision did not have the benefit of are:

1. D Vachon, The Darlot Native Title Claim (WAD 142 of 2018) Anthropological Report Addressing Various Matters Identified by the WA State Solicitor's Office, July 2020 (the Vachon 2020 Report)
2. Affidavit of Anthony Beven dated 6 August 2020 (the Fifth Beven Affidavit)
3. The unredacted authorisation meeting minutes of the Darlot Authorisation Meeting 21 February 2020 (the delegate did have the redacted Meeting Minutes)
4. Map of Darlot Claim area in relation to Minnie Creek
5. Affidavit of Brendan Corrigan dated 6 August 2020 (the Corrigan Affidavit)

[8] Having considered the papers the delegate had regard to in the 2020 decision, as well as the materials listed at [7], and all documentation provided by the applicant for the 2018, 2019 and 2020 decisions, this decision sets out my reasons why the 13 March 2020 Darlot claimant application should not be accepted for registration.

*The reconsideration is an independent administrative decision*

[9] My reconsideration of the claim is a fresh and original administrative decision as to whether or not, in my view, the claim application meets all of the conditions for registration specified in ss 190B and 190C of the Act. I am not bound by previous decisions, and it is open to me to adopt, where appropriate, the reasons and conclusions of previous decisions, for example, as to whether or not the claim satisfies any of the conditions. I am not evaluating the 2020 delegate decision as against this decision, or any of the previous decisions from the amended Darlot claims.

[10] The dimension of the claim as it is constituted in the 2020 application covers just over approximately 39,500 square kilometres of land and waters, crossing through the Shire's of Laverton, Leonora, Menzies, Mount Magnet and Sandstone in Western Australia. The 2020 delegate decision describes the area as follows (at [1]):

The application covers an area of the Goldfields region in Western Australia, ranging from Lake Darlot in the north to Menzies in the south, with a 20 kilometre-wide 'tail' extending approximately 193 kilometres across and beyond Lake Barlee from the south west corner in a north-westerly direction.

[11] The claim is bordered by, or very near to, the towns of Menzies and Kookynie in the south, Agnew and Leinster to the north west, and contains the town of Leonora in the south east and the town known historically as Darlot to the north east. While the size of the claim has been reduced over the three amended Darlot claims, the geography of the claim has not significantly altered in regards to these towns and the extension of the tail across and beyond Lake Barlee.

## **Future Act affected and other overlap information**

[12] Various notices which cover parts of the claim area have been issued by the State of Western Australia (the State), under s 29 of the Act. I must use my best endeavours to reconsider the application for registration within four months after the notification day specified in the s 29 notices (see s 190E(8) of the Act). When the application for reconsideration was acknowledged, the applicant was advised of all the s 29 notices on foot. Ten of the notices each had a four month closing date of 24 August 2020, and each of those overlapped the claim by 0.42 per cent, or less. There are another two mining lease applications each overlapping the claim by 0.01 per cent or less, and their closing date is 2 November 2020. Given the complexity and volume of materials in this matter, the applicant was advised I would use my best endeavours to make the reconsideration decision on or by 30 October 2020.

[13] The Nyalpa Pirniku registered native title claim overlaps the Darlot application, and the Badimaya Barna Guda People native title claimant application (not registered) overlaps the Darlot claim.

## **Procedural fairness steps undertaken by the delegate and in the reconsideration**

- [14] The applicant, the State, and the Federal Court were advised on 13 August 2020 that the reconsideration process had commenced. The two Native Title Representative Bodies which the claim overlaps, Native Title Services Goldfields (NTSG) and Yamatji Marlpa Aboriginal Corporation, were also advised on the same day.
- [15] The Tribunal noted to the applicant that on reconsideration, a Member could consider not only the information that was before the relevant delegate, but any other information the Member considers relevant. The Tribunal invited the applicant to provide any further information, should they wish to do so, by Friday 28 August. No further information was provided.
- [16] The procedural fairness steps undertaken in the 2020 consideration of the claimant application are outlined in the 2020 delegate decision (at [9]-[21]).

## **Information considered when undertaking the reconsideration**

- [17] In accordance with s 190E(7)(a), the information to which I must have regard is that which the relevant delegate was required to have regard, which is listed at [11], [13]-[14], [18] and [22]-[27] of the 2020 delegate decision.
- [18] I have also taken into account:
- a. the materials considered in the 2018 delegate decision (listed at [5]-[11] of that decision);
  - b. the materials considered in the 2019 delegate decision (listed at [10]-[20] of that decision);
  - c. the information provided by the applicant for this reconsideration (in Annexure B); and
  - d. 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 13 August 2020 (the Geospatial Report).

The Geospatial Report provided an analysis of the description of the claim (Schedule B) and the map provided in the application, and advised that the amended application area has been described with reasonable certainty. The Geospatial Report was based on the application for the amended native title determination application WAD142/2018 Darlot (WC2018/005) as filed in the Federal Court on 13 March 2020.

## Non-contested findings of the delegate

[19] I have independently considered each of the non-contested conditions of s 190B and s 190C, and formed my own opinion. Where I have stated the relevant paragraphs of the delegate's decision, it indicates I have adopted the reasons and conclusions reached in the 2020 delegate decision for those sections of the Act:

- ***s 190B(2) – identification of area subject to native title (adopting [105]–[117] of the 2020 delegate decision);***

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]). The application includes a map and written description (as noted at [18]) which identify the claim area. The Geospatial Report assessed the map and external boundary description and found 'The metes and bounds description by itself and the map are consistent and identify this amended application area with reasonable certainty'. I am satisfied the information and map contained in the application, along with the Geospatial Report, is sufficient for me to conclude the particular land or waters over which native title rights and interests are claimed have been identified with reasonable certainty.

- ***s 190B(3) – identification of native title claim group (adopting [120]–[130] of the 2020 delegate decision);***

In *Doepel* (at [51]), Mansfield J set out the test for this criteria as being 'whether the application enables the reliable identification of persons in the native title claim group'. Mansfield J went on to say that 'Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b)'. As Schedule A to the claimant application contains a description of the persons on whose behalf the application is made (the native title claim group), s 190B(3)(b) applies. For the same reasons as outlined by the delegate, I am satisfied that s 130B(3) is met.

- ***s 190B(4) – identification of claimed native title (adopting [132]–[135] of the 2020 delegate decision);***

I am satisfied the information contained in Schedule E to the application is sufficiently clear to understand what the claimed rights and interests are, in the context of the definition of such rights and interests as set out in s 223 of the Act (*Doepel* at [99] and [123]). I accept the group asserts the following native title rights and interests (and has done so since the original application in 2018):

*Exclusive possession area – the right to:*

- possess, occupy, use and enjoy the lands and waters [of the application area] ... as against the whole world.

*Non-exclusive possession area – the right to:*

- access to the application area;

- camp on the application area;
- erect shelters on the application area;
- live on, use and enjoy the resources of the application area;
- move about the application area;
- hold meetings on the application area;
- hunt on the application area;
- conduct ceremonies on the application area;
- participate in cultural activities on the application area;
- maintain and protect places of significance under traditional laws and customs in the application area; and
- control access to, and use of, the application area by other Aboriginal people who seek access to or use the land and waters in accordance with traditional laws and customs.

- **s 190B(8) – application complies with s 61A(1)-(3);**

Examining Schedule B, Attachments B1 and B2, and E of the application, as well as the Geospatial Report, I am satisfied:

- the Application area is not covered by an approved determination of native title (s 61A(1));
- the Application area does not exclude areas covered by previous exclusive possession acts (s 61A(2)); and
- there is no claim to exclusive possession over previous non-exclusive possession acts areas (s 61A(3))

- **s 190B(9) – no extinguishment etc. of claimed native title (adopting [170] of the 2020 delegate decision);**

I am satisfied the status quo remains as at the time the delegate’s 2020 decision was made and that none of ss 190B(9)(a), (b) or (c) have been offended.

- **s 190C(2) – contains information required for ss 61 and 62 (adopting [29]-[33] of the 2020 delegate decision);**

I am satisfied the application contains all of the prescribed details and other information as required by ss 61 – 62, and accordingly I consider s 190C(2) has been met.

- **s 190C(3) – no previous overlapping claim groups (adopting [35]-[37] of the 2020 delegate decision).**

The current status of the claimant application in terms of overlaps is described at [13] of this decision. I am satisfied no member of the claim group for the current application is also a member of any previous overlapping claim group at the time the current application was made.

## Contested findings of the delegate

[20] Having formed my independent opinion about the non-contested conditions, as outlined at [19] above, the remainder of these reasons outline my independent conclusions regarding whether or not I am satisfied that the claimant application meets the conditions set out in ss 190B(5), (6) and (7), and 190C(4) of the Act. As Barker J outlined in *Dann*, the Tribunal's task is 'not one of finding in all respects the real facts on the balance of probabilities, or on some other basis, and...should not supplant the role of the Court when adjudicating upon [such] matters' (at [21] citing *Doepel*). I will deal with each of the contested conditions in turn.

### Section 190B(5) – factual basis for claimed native title

[21] The legislation states that to meet s 190B(5):

the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[22] As is outlined in *Doepel* (at [17]):

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests.

[23] My focus then, is to ascertain the factual basis on which the claim is asserted (for example, in relation to the claim group's association with the area), and whether it is sufficient to support the assertions in s 190B(5). Facts must be sufficient to support each of the conditions of s 190B(5) (as outlined at [26]-[38] below).

[24] For this reconsideration, in relation to s 190B(5), the applicant relied upon:

- i. Their 3 April 2020 submissions (at 18-51)
- ii. The Vachon 2020 Report
- iii. The 2018 delegate decision (at [59]-[60], [67], [81])
- iv. Their 6 August 2020 submissions (at 13-40)

[25] I address each condition of s 190B(5) below, in the context of those assertions.



*Section 190B(5)(a) The factual basis supporting the claim group's present association with the application area and the predecessors' association with the application area*

[26] The 2018 delegate accepted the original claimant application did meet this condition. For example, the delegate outlined that (at [52] and [70]):

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.

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.

[27] For the 2018 delegate decision, the State argued that the facts only supported, at best, an association with an area in the north of the claim, and not with other parts of the claim (at [54] of the 2018 delegate decision). The 2019 and the 2020 delegate decisions both outline what they considered to be defects in the applicants materials in relation to the factual basis supporting this condition. For example, uncertainty with the claim group composition and the association of the claim group to the claim area, particularly in the south of the claim area.

[28] I am looking at this matter afresh, noting that the claim group composition for the 2020 claimant application is described substantially differently from that put forward in the 2018 and 2019 claimant applications, and the boundary of the 2020 claimant application is slightly smaller than in either the 2018 or 2019 claimant application.

[29] The reconsideration application relies on paragraphs [59]-[60], [67] and [81] of the 2018 delegate decision. Paragraph [81] is a concluding paragraph, taking into account the claim group composition, and the factual basis material, and deciding that:

...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'.

[30] Paragraphs [59]-[60] and [67] of the 2018 decision, which are relied upon in the reconsideration application, refer to witness statements and information provided about the 2018 claim group. It has not been made clear to me how that information relates to the 2020 claimant application, and as noted above, the applicant group and the description and list of apical ancestors are not the same in the 2018 and 2020 applications.

[31] The 2020 claimant application, at Schedule E, refers to

rights and interests...held by and activities in exercise of those rights and interests...undertaken by the native title claim group and their predecessors in accordance with traditional laws and customs of the group at and from the time of first contact in about the 1890s and earlier to the time of assertion of sovereignty in 1829.

This is further explained in Schedule F, which asserts the ‘native title claim group and their ancestors are members of a society that have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the Claim Area’.

[32] Looking through all of the available materials, I am satisfied that an Indigenous society existed at the time of European contact. The question then is, whether there is a link between members of that society, the current ancestors as claimed, and the geographical area of the claim?

[33] Looking at the additional material provided for this reconsideration, I note part of the brief for the Vachon 2020 Report was to ‘provide genealogies that identify the connection between the contemporary claim group and the Apical ancestors listed in the Form 1’, and connections to the claim area. The report refers to a ‘Darlot tribe’ and that ‘Europeans did differentiate Aboriginal groups’ (at [32]). There are brief references to some of the ancestors listed in the Darlot application, as outlined by the examples I have extracted in the table below, but largely the information provided is broad and not particularly linked to the Darlot claim application:

Ancestors	Vachon 2020 paragraph	Vachon 2020 footnote
(i) <b>Matjika</b> – the mother of <b>Didardi</b> (aka <b>Darugadi</b> ) and <b>Tjubung</b> , and grandmother of siblings Telpha aka Wonaton Ashwin and Jumbo Harris [descendant families include the Ashwin and Harris families]	Matjika at [191] Telpha at [167] [190] -[191] Jumbo Harris at [190]	Telpha at footnote 300 and 339
(iii) Billy and Mary Ann – the parents of Daisy Cordella, Maggie (aka Wilgie), Julia aka Mundai, Amy aka Jinan Rex and Trilby aka Manuga Weeties and second wife Mary (mother of		Daisy Cordella at footnote 332

<b>Ancestors</b>	<b>Vachon 2020 paragraph</b>	<b>Vachon 2020 footnote</b>
Anne, Maniwa and Winnie)		
(x) <b>Jenny</b> – the mother of Beaman (aka Charlie), Thadi and Dinah Evans	Beaman at [189] Thadi Evans at [189]	Footnote 220
(xiv) Siblings <b>Andy Fisher, Fanny Wack Lloyd</b> and <b>Natha</b> [descendant families include Redmond, Kelly and Scadden]	[113]	Footnote 303
(xvi) Skipper Sandy (aka Turada) and Molly (aka Beeku)	[73], [83]-[84], [106], [108], [110], [113] and [189]	Footnotes 129, 134, 141, 201, 206-207, 220, 223 and 258
(xvii) <b>Paddy Pjindarri</b> (aka Tjintarti) and Alice		Footnote 220
Lenny Ashwin (Ninardi)	Note that Lenny Ashwin (Ninardi) and his connection with the geographical area (around Leonora for example (at para [222]), was included as an apical ancestor in the 2018 and 2019 claim, but not in the 2020 claim.	Footnote 367
<b>Applicants</b>	<b>Vachon 2020 paragraph</b>	<b>Vachon 2020 footnote</b>
Verna Vos		Footnote 346

[34] In the 2020 decision, the delegate had difficulty with the composition of the claim group, noting there were uncertainties which then made it difficult to assess s 190B(5). The delegate stated (at [141])

...the nature of the applicant’s additional material, much of which has been created for other applications entirely, has required me to search within the material for information relevant to this application. In my view, in addition to the issues with the claim group description, the absence of factual basis material which speaks directly to this claim group and this application area has consequences for the application’s ability to meet s 190B(5).

I have similarly struggled with this issue, with both the materials provided previously, and with the additional materials provided for this reconsideration.

[35] The Vachon 2020 report, for example, had a wide brief, and was created to address ‘various matters identified by the WA State Solicitor’s Office’. The application for the reconsideration

asks me to consider the report generally, and does not direct my attention to any specific passages or evidence within the report. While that is not necessarily fatal to a claim application or reconsideration, my task for the purposes of this condition is to assess whether the native title claim group have, and the predecessors of those persons had, an association with the area. The significance of the table at [33] above is that the apical ancestors and applicants who are mentioned in the Vachon 2020 Report are exemplified in the table, and reference to them in the Report is mostly brief. Without consistent information about the claim group, their predecessors and the area, it is difficult for me to make an assessment for this condition in an affirmative manner.

- [36] Based on the available information, I am not satisfied that there is a link between members of the society at sovereignty, the current ancestors as claimed, and the geographical area. I conclude there is not a factual basis sufficient to support the assertion that the claim group have, and their predecessors had, an association with all of the claimed area.

*Section 190B(5)(b) The factual basis supporting the assertion that there exists traditional laws acknowledged and customs observed by the native title claim group, which give rise to the native title rights and interests claimed*

- [37] Having drawn my conclusions in relation to s 190B(5)(a), I will now turn to s 190B(5)(b). Considering the factual basis for this condition is broadly cast in the materials provided in the claimant application and additional materials for this reconsideration, and is not specifically targeted to the relevant society and the existence of the relevant pre-sovereignty society, I adopt the conclusion of the 2020 delegate in relation to s 190B(5)(b). Specifically, the delegate stated (at [159]) that:

...there is insufficient information to show that the laws and customs observed at the time of settlement still yield authoritative norms which are followed by the claim group. This means that even if the issues arising from the claim group description were overcome, the factual basis material is such that s 190B(5)(b) is not met.

*Section 190B(5)(c) Factual basis supporting continued observance of traditional laws and customs*

- [38] This condition relies on whether there is a sufficient factual basis to support the assertion at 190B(5)(b) that there exists traditional laws and customs which give rise to the claimed native title rights and interests. Like the delegate, I had concerns about the materials provided which clearly related to different claims (for example, the Wutha claim), and I was concerned that the materials relied generally on broad assertions of similarities with other Western Desert claims. As outlined in *Martin* (at [29]):

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

followed from his conclusion in relation to that paragraph that he could not be satisfied that there was a factual basis set out for the assertion referred to in par (c).

[39] Having drawn my conclusions in s 190B(5)(b), I find it is appropriate to adopt the 2020 delegate's conclusions in relation to s 190B(c), namely (at [160]) that 'As I am unable to be satisfied about the existence of traditional laws and customs for the purposes of s 190B(5)(b), it follows that I am unable to be satisfied as to the continuity of any such laws and customs, and so s 190B(5)(c) is not met'.

## **Section 190B(6) – prima facie case for the claimed native title rights and interests**

[40] As described in s 190B(6) of the Act, I must be satisfied that '...prima facie, at least some of the native title rights and interests claimed in the application can be established'. If the claim is accepted for registration, only those claimed native title rights and interests that can, prima facie, be established must be entered on the Register. Only those registered rights and interests are taken into account for the purposes of: negotiation in good faith in a 'right to negotiate' process (see s 31(2)); and when dealing with criteria for making arbitral body determinations in a 'right to negotiate' process (see s 39(1)).

[41] For this reconsideration, in relation to s 190B(6), the applicant relied upon:

- i. Their 3 April 2020 submissions (at 52)
- ii. Their 6 August 2020 submissions (at 13-40)

[42] In *Gudjala 2007* (at [85]), the Court referred to the role of s 223(1) in relation to s 190B(6). Section 223(1) defines 'native title rights and interests', and makes it clear that a right or interest is one that is held under traditional laws acknowledged, and customs observed, by the claim group. In *Gudjala 2007*, the Court went on (at [86]) to refer to findings in *Yorta Yorta*, that:

...it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question.

[43] Having concluded that I am not satisfied the factual basis is sufficient to support the assertions by the applicant that the rights and interests claimed are traditional, then it follows that I cannot be satisfied s 190B(6) has been met. I cannot be satisfied the factual basis is sufficient for me to consider the rights and interests claimed have been established, prima facie, as native title rights and interests, held according to traditional laws and customs of the claim group for the purposes of s 190B(6).

## **Section 190B(7) – Is there evidence that a member of the claim group has or had a traditional physical connection with the claim area?**

[44] To meet the requirements of 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 a traditional physical connection with any part of the land or waters...

[45] *Yorta Yorta* at [185] described 'tradition' as follows:

Meanings relevant to customs and practices given by the *Oxford English Dictionary*...of "tradition" are: "a long established and generally accepted custom or method of procedure having almost the force of law; an immemorial usage; the body (or any one) of the experiences and usages of any branch or school of art or literature, handed down by predecessors and generally followed ... an embodiment of old established custom or institution". Tradition, myth and legend are often indistinguishable, but the mere existence of either of the latter...however venerated by repetition, will not suffice of itself to establish native title rights and interests possessed under traditional laws or customs by people claiming a relevant connection with the land.

[46] For this reconsideration, in relation to s 190B(7), the applicant relied upon:

- i. Their 6 August 2020 submissions (at 13-40)

[47] I was not satisfied that *traditional* laws and customs existed as claimed for the purposes of s 190B(5), and so I cannot be satisfied s 190B(7) has been met. I adopt the 2020 delegate's reasoning and conclusion (at [168]) that:

In *Gudjala 2009*, Dowsett J observed that it 'seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'. Applying this guidance, and given my finding at s 190B(5)(b), that I am not satisfied of the existence of traditional laws and customs, I cannot be satisfied that any member of the claim group holds, or previously held, the requisite physical connection with the application area in accordance with traditional laws and customs. This means s 190B(7) is not met.

## **Section 190C(4) – authorisation**

[48] 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.

[49] Section 190C(4)(a) does not apply, so I direct my attention to s 190C(4)(b). I must consider and conclude whether each of the persons comprising the applicant are a member of the Darlot native title claim group and have been authorised by all the other persons in the group to make the Darlot native title claimant application and deal with matters arising in relation to it. As such, I examine below who is the applicant, whether they were authorised by all the other persons in the native title claim group, and who is the native title claim group.

[50] The consideration of s 190C(4) is intimately tied to s 190C(5), which states that if the application has not been certified under s 190C(4)(a) (which this application has not), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless a) there is a statement in the application to the effect that the requirement in s 190C(4)(b) has been met; and b) the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met are set out.

[51] In order to be satisfied that s 190C(4)(b) is met, one of the decision making processes outlined in s 251B must be identified and complied with, and the requirements of s 190C(5) must also be met. 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, which are, in summary, through:

- a traditional decision making process following traditional laws and customs of the persons in the claim group, which must be complied with in relation to authorising such decisions; or
- an agreed and adopted decision making process which is agreed to and adopted by the persons in the claim group in relation to authorising such decisions.

[52] For this reconsideration, in relation to s 190C(4), the applicant relied upon:

- i. Their 3 April 2020 submissions
- ii. The Fifth Beven affidavit (at [14]-[20], [23]-[31])
- iii. The Unredacted Authorisation Meeting Minutes
- iv. The Corrigan 2020[A] Report (particularly at [19])
- v. The Corrigan 2020[B] Report (at 2-7)
- vi. The Corrigan 2020[C] Report (at 13-24, 27-31, 43)
- vii. The Corrigan Affidavit (at [4]-[11])
- viii. The Applicants Additional Submissions (to the preliminary assessment) (at 8-23)
- ix. *Ashwin on behalf of the Wutha People v State of Western Australia (No 4)* [2019] FCA 308 (*Wutha*) (at [251]-[252])
- x. *McGlade (formerly Wanjurri-Nungala) and Others v South West Aboriginal Land & Sea Aboriginal Corporation and Others (WAD 525 of 2018) (No 2) (McGlade No 2)* (2019) 374 ALR 329 (at [61], [76], [203])

xi. The Map attached to the 6 August 2020 submissions

*Does the application satisfy s 190C(5)?*

[53] Schedule R to the Darlot application outlines, relevantly to this condition, that there:

is no process of decision making under traditional laws and customs of the claim group that must be complied with for making decisions under the Native Title Act (Cth) such as authorising persons to make the native title application and to deal with matters arising under the application.

Schedule R also states that at the authorisation meeting on 21 February 2020 the claim group:

at the meeting agreed to and adopted a process of decision making for amending the native title claim and authorising persons to make the application and to deal with matters arising under the application as follows:

- (i) By consensus by persons present at the meeting following discussion amongst those present where particular respect is given to the knowledge and seniority of elders;
- (ii) If no consensus is reached, then a decision will be made by a majority vote by a show of hands.

[54] A point of contention from each of the Darlot claim applications is whether or not the decision making process followed to authorise the applicant to make the Darlot claim was a traditional decision making process, or an agreed and adopted decision making process. Each of the delegates who have made decisions in relation to this claim have struggled with this point based on the evidence available to them. A 2018 report by Dr Draper outlined that a traditional process did exist, however, that report was contrary to Dr Corrigan's 2020[C] Report, which concluded there was not a traditional process (and which the 2020 delegate decision did not have the benefit of). Given the detail provided in Dr Corrigan's report, the information in Schedule R to the application, and the unredacted Authorisation Meeting Minutes, I find that information and evidence more compelling and consistent to that of Dr Draper.

[55] I conclude a traditional decision making process does not exist and that a contemporary decision making process was adopted for the purposes of the authorisation meeting. For the purposes of s 190C(5), I am satisfied the *applicant* is a member of the native title claim group and that a contemporary decision making process was adopted for the authorisation meeting. Whether the authorisation process itself meets the relevant conditions is examined below.

*Who is the applicant?*

[56] The persons as follows constitute the applicant for the purpose of the Darlot claim application: June Harrington-Smith, Verna Vos, Richard Ashwin, Brett Lewis, James Calyun, Jodie Harris, Maria Meredith, Dorothy Cooper, Wayne Smith, Andrew Harris, Linden Brownley, Joan Tucker, Pearl Scott.



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

[57] 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). The reconsideration papers provided by the applicant refer to the cases *Noble* and *Fesl* in support of interpretations of s 251B, however, in my view, nothing turns on those for the purposes of this reconsideration decision.

[58] The delegate was satisfied that all members of the applicant are members of the native title claim group as it is constituted for the 2020 claim application. Looking at the s 62 affidavit provided by each applicant, I note each person outlines they: are a member of the applicant; believe all the statements in the application are true; and are authorised by the native title claim group to make and deal with the application.

[59] I am satisfied the evidence supports that all members of the applicant are members of the Darlot native title claim group.

*Who is the native title claim group?*

[60] The identity of the native title claim group itself, as described in the 2020 claim application, is problematic. As the delegate noted, the claim group has largely been constructed from desktop reviews. There is nothing in the additional materials provided for this reconsideration which changes this observation. In fact, the additional material provided for this reconsideration serves to emphasise that the claim group description (for the purpose of notification for an authorisation meeting) was generated largely from desktop considerations and review of documents and what has been accessed from the internet. Materials are included that go back to 2018 and are related to the Wutha claimant application. In my view, on the basis of the available evidence, I cannot conclude those people asserted to comprise the claim group, in accordance with traditional laws and customs, are the Darlot native title claim group.

*Did all the persons in the native title claim group have reasonable opportunity to authorise the making of the Darlot claim?*

[61] I must be satisfied that a reasonable opportunity was given to all persons in the native title claim group to participate in authorising the applicant to make the application. Schedule R to the application sets out a brief explanation about the authorisation process (see [53] above), and the steps taken in the authorisation process are outlined at Annexure C to this decision.

[62] The delegate (at [86]) was concerned that:

There has also been no explanation provided as to why a number of the apical ancestors and descendant families identified by Corrigan and included in his proposed claim group description were not included in the meeting notice. In my view, this may also have had the consequence of excluding people from the authorisation meeting.

[63] Dr Corrigan’s report (of 7 January 2020) (the Corrigan A Report) was the basis for the recommended claim group description. There were differences between the recommended claim group description, and what was actually advertised for the authorisation process (see

for example as outlined in the 2020 delegate's decision at [72]-[73]). The delegate goes into detail about the difficulties as she saw it in the authorisation process (at [77]-[97]), and I adopt those observations and reasons.

- [64] Dr Corrigan's report of 3 April 2020 (the Corrigan B Report) asserts the changes between the claim description and that which was advertised were not material to the description of the claim group for the purposes of the authorisation process (at 3-4 and 6-7 for example). He also states at the authorisation meeting on 25 February there were 118 people present from a range of families. Dr Corrigan's Report of 3 April 2020 is cast broadly in terms of the explanation of how the differences in the claim group descriptions can be accounted for, apart from referring to 'further discussion and sharing of understandings' (at 4). The report refers to one of the 2020 applicants as a 'key claimant' and puts emphasis on the fact that this applicant has no issue with the membership of the claim group. However, it is not outlined how or why that person is key, and why one person's view of the constitution of the claim group should over-ride the concerns of others (see [67] and the unsolicited information).
- [65] The 3 April submissions in support of the 2020 Darlot claim also refers to the native title claim description in that application being 'consistent with western desert laws and customs in a form which has been followed in other neighbouring claims' (at 13). This rationale is repeated in various reports and evidence provided for the 2020 claim application and in the additional material provided for this reconsideration (as well as for the previous amended claims). The submissions refer to previous registration decisions in other matters (at 16 for example) and point to the importance of 'consultation with the claim group to determine whether the associate [sic] by birth or long association is of a kind recognised under the group's traditional law and custom...' It is apparent though that such consultation has not been undertaken to any significant extent in relation to the Darlot claim.
- [66] Given that I am not satisfied the native title claim group has been defined clearly, the authorisation process is also problematic. The delegate was concerned that much of the material related to the authorisation meetings had been redacted. I have the benefit of the unredacted meeting minutes, as well as the additional affidavits and reports from the meeting facilitator (Mr Beven) and the anthropologist who developed the apical ancestor list for the purposes of the claim and authorisation process (Dr Corrigan). In his 6 August 2020 affidavit, the meeting facilitator outlines, broadly speaking, that as there were no complaints made to those persons responsible for organising and holding the meeting, the issue of the membership of the claim group is not problematic. I do not accept that argument, as it does not follow that people always raise complaints - they may be aggrieved, and remain silent.
- [67] Also, unsolicited information provided in regards to the 2020 claim application (and as referred to in the 2020 delegate decision) shows a complainant asserting that rights and interests over geographical areas of the Darlot claim were held by a particular family and that family was concerned they were not recognised at the 21 February authorisation meeting. They complained twice in March 2020, by email setting out their concerns, to the Native Title Services Goldfields. The 3 April submissions in support of the 2020 Darlot claim outlines that the 'claim group has now been substantially amended to include a wider group of persons' (at 4). It is asserted this has been done to address the issue raised in previous registration test

decisions regarding the ‘inclusiveness’ of the native title claim group. However, merely asserting a native title claim group exists is not sufficient for the purposes of claim authorisation and registration. The persons must, in accordance with established traditional law and customs, be demonstrated to be a member of the claim group.

[68] For the purposes of s 190C(4) and s 190C(5), I am satisfied the *applicant* is a member of the native title claim group as it is defined for the purposes of the 2020 Darlot claim application. I am not satisfied the applicant has been *authorised* to make the application, and deal with matters arising in relation to it, by all the other persons who comprise the native title claim group.

## Conclusion

[69] I reaffirm this is a fresh and original decision as to whether or not, in my view, the claim meets all the conditions for registration specified in ss 190B–190C. I conducted a reconsideration of the claim made in this application against each of the conditions contained in s 190B and s 190C, in accordance with s 190E.

[70] For the reasons outlined above, I give notice that the Registrar should not accept the claim for registration. For the purposes of s 190E(11), my opinion is the claim does not satisfy all the conditions outlined in s 190B and s 190C of the Act.

[71] A summary of the result for each condition is provided at Annexure D to these reasons.

*End of reasons*

## Annexure A

2018 application	2019 application	2020 application
<b>Constitution of Applicant Group</b>		
<ol style="list-style-type: none"> <li>1. Geoffrey Alfred Ashwin</li> <li>2. Ralph Edward Ashwin</li> <li>3. June Harrington-Smith</li> </ol>	<ol style="list-style-type: none"> <li>1. Geoffrey Alfred Ashwin</li> <li>2. Ralph Edward Ashwin</li> <li>3. June Harrington-Smith</li> </ol>	<ol style="list-style-type: none"> <li>1. June Harrington-Smith</li> <li>2. Verna Vos</li> <li>3. Richard Ashwin</li> <li>4. Brett Lewis</li> <li>5. James Calyun</li> <li>6. Jodie Harris</li> <li>7. Maria Meredith</li> <li>8. Dorothy Cooper</li> <li>9. Wayne Smith</li> <li>10. Andrew Harris</li> <li>11. Linden Brownley</li> <li>12. Joan Tucker</li> <li>13. Pearl Scott</li> </ol>
<b>Apical Ancestors</b>		
<p>The Claim is brought on behalf of the Darlot claim group comprising those aboriginal persons who are the descendants of:</p> <ol style="list-style-type: none"> <li>(a) Telpha and her union with Arthur Cranbrook Ashwin;</li> <li>(b) Lenny Ashwin (Ninardi);</li> <li>(c) Daisy Cordella (Kugila);</li> <li>(d) Inyarndi (Yinnardi); and</li> <li>(e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the</li> </ol>	<p>The Claim is brought on behalf of the Darlot claim group comprising those aboriginal persons who are the descendants of:</p> <ol style="list-style-type: none"> <li>(a) Telpha and her union with Arthur Cranbrook Ashwin;</li> <li>(b) Lenny Ashwin (Ninardi);</li> <li>(c) Daisy Cordella (Kugila);</li> <li>(d) Inyarndi (Yinnardi); and</li> <li>(e) those persons recognised by those ancestors and descendants as being adopted according to the traditional laws and customs of the claim group.</li> </ol>	<p>The Claim is brought on behalf of the Darlot claim group comprising:</p> <ol style="list-style-type: none"> <li>(a) Those Aboriginal people who are recognised under traditional law and custom as having rights in some or all of the Claim Area on one or more of the following bases: <ol style="list-style-type: none"> <li>(i) Biological and/or socially recognised descent from one or more of the owners, under traditional law and custom, or some or all of the Claim Area at the time of non-Aboriginal settlement;</li> <li>(ii) their own or an ancestor's birth on the Claim area;</li> <li>(iii) their own or an ancestor's migration to and long association</li> </ol> </li> </ol>

2018 application	2019 application	2020 application
claim group.	<p><b>Note:</b> leave was sought to amend the application to change the description of the native title claim group but leave was not granted at the time of the 2019 registration test decision.</p>	<p>with the Claim Area; or</p> <p>(iv) the holding of religious, sacred or ritual authority under traditional law and custom for one or more places on the Claim Area.</p> <p>(b) The descendants of the following ancestors are recognised under traditional law and custom as having rights in some or all of the Claim Area under categories (i) or (ii) above:</p> <p>(i) <b>Matjika</b>—the mother of <b>Didardi</b> (aka <b>Darugadi</b>) and <b>Tjubung</b>, and grandmother of siblings Telpha aka Wonaton Ashwin and Jumbo Harris [descendant families include the Ashwin and Harris families];</p> <p>(ii) <b>Didardi</b> (aka <b>Darugadi</b>), <b>his wife Biddy and his other wives</b>—the parents of Telpha Ashwin, Kweelah, Tommy Geegu, Tommy Jones, Peter Inkie and Jilyu Fanny;</p> <p>(iii) <b>Billy and Mary Ann</b>—the parents of Daisy Cordella, Maggie (aka Wilgie), Julia aka Mundai, Amy aka Jinan Rex and Trilby aka Manuga Weeties and second wife Mary</p>

2018 application	2019 application	2020 application
		<p>(mother of Annie, Maniwa and Winnie);</p> <p>(iv) <b>Ngoonjul</b> and his wife <b>Inyarndi</b>—the parents of Jimmy and Paddy Wheelbarrow, Alice (mother of Minnie Bubbamura), Rosie Jones/Tjalajuti (the mother of Alice);</p> <p>(v) <b>Julia</b> (aka Bindinni mother of Sarah Brown and others);</p> <p>(vi) <b>Honeybee</b>—the mother of Frank Shepherd from Wongawol;</p> <p>(vii) <b>Mother of Ruby Shay, Lily</b>—[descendant families include Bingham];</p> <p>(viii) <b>Dididi and Yibadu</b>—parents of Spider and Minnie Narrier;</p> <p>(ix) <b>Wungal and Garudi</b> from Wongawol—the parents of Minne Green;</p> <p>(x) <b>Jenny</b>—the mother of Beaman (aka Charlie), Thadi, and Dinah Evans</p> <p>(xi) <b>Mary Naringa</b>—the mother of Jessie Patterson, Ivy Wiluna and Grace Regan nee Wiluna;</p> <p>(xii) Siblings <b>Relia King, Aleck Barnard and Rita Thompson</b>— [descendant families include King, Barnard and Thompson];</p>

2018 application	2019 application	2020 application
		<p>(xiii) Siblings <b>Ruby</b>—the mother of Genevieve Kilmurray—and Mary Anne Constable;</p> <p>(xiv) Siblings <b>Andy Fisher, Fanny Wack Lloyd and Natha</b>—[descendant families include Redmond, and Scadden];</p> <p>(xv) Siblings <b>Nobby Nixon and Milibindi</b> (aka Alice)—the mother to Isobell and Ted Evans;</p> <p>(xvi) <b>Skipper Sandy</b> (aka Turada) and <b>Molly</b> (aka Beeku);</p> <p>(xvii) <b>Paddy Pjindarri</b> (aka Tjintarti) and Alice;</p> <p>(xviii) <b>Willie Weeties</b>;</p> <p>(xix) <b>Hill siblings: Roly, Snowy, Maisie, Willie, Johnny, Matja/Maudie</b>;</p> <p>(xx) <b>George Rex (Rix)</b>;</p> <p>(xxi) <b>Roger Clarke</b> (aka Roger Reid);</p> <p>(xxii) <b>Tony Green</b>;</p> <p>(xxiii) <b>Dwyer siblings: Dinny and Vinegar</b>.</p>

## Annexure B

Section	Materials Relied Upon
s 190B(5)	<ol style="list-style-type: none"> <li>1. Submissions made to the National Native Title Tribunal on 3 April 2020 in support of the registration of the Darlot Native Title Claim (<b>Applicant Submissions</b>)               <ol style="list-style-type: none"> <li>a. At paragraphs [18] – [51] (particularly [23])</li> </ol> </li> <li>2. D Vachon, The Darlot Native Title Claim (WAD 142 of 2018) Anthropological Report Addressing Various Matters Identified by the WA State Solicitor’s Office, July 2020 (<b>Vachon 2020</b>)</li> <li>3. 2018 delegate decision (6 July 2018)               <ol style="list-style-type: none"> <li>a. [59]-[60], [67]-[68], [70], [81], [149]-[150]</li> </ol> </li> <li>4. Response to the Delegate’s Preliminary Assessment on 17 June 2020 (<b>Applicant Additional Submissions</b>)               <ol style="list-style-type: none"> <li>a. [13]-[40]</li> </ol> </li> </ol>
s 190B(6)	<ol style="list-style-type: none"> <li>1. Submissions made to the National Native Title Tribunal on 3 April 2020 in support of the registration of the Darlot Native Title Claim (<b>Applicant Submissions</b>)               <ol style="list-style-type: none"> <li>a. At paragraph [52]</li> </ol> </li> <li>2. Response to the Delegate’s Preliminary Assessment on 17 June 2020 (<b>Applicant Additional Submissions</b>)               <ol style="list-style-type: none"> <li>a. [13] – [40]</li> </ol> </li> </ol>
s 190B(7)	<ol style="list-style-type: none"> <li>1. Response to the Delegate’s Preliminary Assessment on 17 June 2020 (<b>Applicant Additional Submissions</b>)               <ol style="list-style-type: none"> <li>a. [13] – [40]</li> </ol> </li> </ol>
s 190C(4)	<p><i>Form of meeting notice</i></p> <ol style="list-style-type: none"> <li>1. Affidavit of Anthony Beven dated 6 August 2020 (<b>Fifth Beven Affidavit</b>)               <ol style="list-style-type: none"> <li>a. [23]-[29]; [30]-[31]</li> </ol> </li> <li>2. Unredacted Authorisation Meeting Minutes</li> </ol> <p><i>Claim group composition</i></p> <ol style="list-style-type: none"> <li>3. Response to the Delegate’s Preliminary Assessment on 17 June 2020 (<b>Applicant Additional Submissions</b>)               <ol style="list-style-type: none"> <li>a. [8]-[20]; [21]-[23]</li> </ol> </li> <li>4. Unredacted Authorisation Meeting Minutes</li> <li>5. B Corrigan, Revised Report on the Claim Group Description for the purpose of notification for an Authorisation meeting in the Darlot native title determination application – Federal Court proceeding WAD142/2018, 7 January 2020 (<b>Corrigan 2020 [A]</b>)               <ol style="list-style-type: none"> <li>a. [19]</li> </ol> </li> <li>6. Report of Dr Brendan Corrigan on Delegate’s Preliminary Assessment, 16 June 2020 (<b>Corrigan 2020 [C]</b>)               <ol style="list-style-type: none"> <li>a. [43]; [27]-[31]</li> </ol> </li> <li>7. Map attached to Applicant Additional Submissions</li> <li>8. Affidavit of Brendan Corrigan dated 6 August 2020 (<b>Corrigan Affidavit</b>)               <ol style="list-style-type: none"> <li>a. [4], [5], and [6]</li> </ol> </li> </ol>



9. B Corrigan, Anthropological Report concerning amendments to the Claim Group Description in the Darlot native title determination application in Federal Court proceeding WAD142/2018, 3 April 2020 (**Corrigan 2020 [B]**)
  - a. [2]-[7]

*Decision-making process*

10. Report of Dr Brendan Corrigan on Delegate's Preliminary Assessment, 16 June 2020 (**Corrigan 2020 [C]**)
  - a. [13]-[24]
11. Affidavit of Brendan Corrigan dated 6 August 2020 (**Corrigan Affidavit**)
  - a. [7]-[11]
12. *Ashwin on behalf of the Wutha People v State of Western Australia (No 4)* [2019] FCA 308 (**Wutha**)
  - a. [251] and [252]
13. *Noble v Mundraby* [2005] FCAFC 212
  - a. [18]
14. *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469; (2008) 173 FCR 150 (*Fesl*)
  - a. [70] and [71]
15. Unredacted Authorisation Meeting Minutes
  - a. Pages 3-4 and 17

*Conduct of the meeting*

16. Affidavit of Anthony Beven dated 6 August 2020 (**Fifth Beven Affidavit**)
  - a. [14]-[20]
17. *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238 (**McGlade No 2**)
  - a. [61], [76], [203]

## Annexure C

### Authorisation process steps

Date	Action	Source
20/01/2020	Request made to place notice as an ad in the West Australian.	First affidavit of Anthony Beven, dated 20/02/2020 at 4 and attachment AB2 to that affidavit.
20/01/2020	Request made to place notice as an ad in the Kalgoorlie Miner.	First affidavit of Anthony Beven, dated 20/02/2020 at 5 and attachment AB3 to that affidavit.
22/01/2020	Notices run in the West Australia and Kalgoorlie Miner.	First affidavit of Anthony Beven, dated 20/02/2020 at 4-5 and attachments AB2 and AB3 to that affidavit.
05/02/2020 12/02/2020	Notice runs in the Kalgoorlie Miner.	First affidavit of Anthony Beven, dated 20/02/2020 at 4-5 and attachments AB2 and AB3 to that affidavit.
Prior to the meeting	Mr Beven consulted with NTSG about the meeting agenda and provided them with a copy of the meeting notice.	Fifth affidavit of Anthony Beven, dated 06/08/2020 at 30.
Prior to the meeting	Mr Beven received numerous communications from members of the claim group who said they had seen the notice but could not attend. All but a few agreed with the proposed resolutions and wished to have their apologies noted.	Fourth affidavit of Anthony Bevan dated 03/04/2020, at 5 and attachment AB5.
21/02/2020	Authorisation meeting in Leonora.	First affidavit of Anthony Beven, dated 20/02/2020 at 3 and attachments AB1 to that affidavit.
	Some attendees left the meetings for short periods and some people in attendance did not vote on every resolution as they were out of the room or chose not to participate.	Fifth affidavit of Anthony Beven, dated 06/08/2020 at 14.
	The agenda was publicised prior to the meeting and each attendee was provided with a copy when they arrived at the meeting. Agendas were also displayed prominently on	Fifth affidavit of Anthony Beven, dated 06/08/2020 at 16-17.

	the walls. The meeting followed the order of the agenda.	
	All attendees were afforded opportunities to participate, speak to agenda items, ask questions and vote.	Fifth affidavit of Anthony Beven, dated 06/08/2020 at 18.
	Rob Powrie, Acting Principal Legal Officer for NTSG attended the meetings and addressed the claim group re representation.	Fifth affidavit of Anthony Beven, dated 06/08/2020 at 31.
<b>First meeting</b>		
	86 attendees. Passed resolutions re: <ul style="list-style-type: none"> <li>• the decision making process;</li> <li>• amending the claim boundary;</li> <li>• entering into an agreement with Nyalpa Pirniku; and</li> <li>• amending claim group description.</li> </ul>	Second affidavit of Anthony Beven, dated 24/02/2020 at 6-8.  Unredacted Authorisation Meeting Minutes, pages 3-8.
	Various claim group members gave apologies for family members.	Fourth affidavit of Anthony Beven dated 03/04/2020, at 6 and attachment AB5.
	Register of attendees taken.	Fourth affidavit of Anthony Beven dated 03/04/2020, at 8 and attachment AB6.
	Mr Beven and Wayne Smith – Chairperson of the first meeting, advised the First Meeting was only for members of the existing claim group.	Fourth affidavit of Anthony Beven dated 03/04/2020, at 10.
<b>Second meeting</b>		
	117 attendees. Passed resolutions re: <ul style="list-style-type: none"> <li>• the decision making process;</li> <li>• replacing the applicant and authorising the new applicant to make the claim;</li> <li>• amending the claim boundary; and</li> <li>• entering in to an agreement with Nyalpa Pirniku.</li> </ul>	Second affidavit of Anthony Beven, dated 24/02/2020 at 9-11.  Unredacted Authorisation Meeting Minutes, pages 16-21.
	Register of attendees taken.	Fourth affidavit of Anthony Beven dated 03/04/2020, at 12 and attachment AB7.

24/02/2020	Interlocutory application filed seeking to replace the applicant.	
11/03/2020	Federal Court Order made amending the applicant.	

## Annexure D

### Summary of registration test result

<b>Application name</b>	Darlot
<b>NNTT No.</b>	WC2018/005
<b>Federal Court of Australia No.</b>	WAD142/2018
<b>Date of decision</b>	21 October 2020

### Section 190B conditions

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Not met
	re s 190B(5)(a)	Not met
	re s 190B(5)(b)	Not met
	re s 190B(5)(c)	Not met
s 190B(6)		Not Met
s 190B(7)(a) or (b)		Not met
s 190B(8)		Met
s 190B(9)		Met

### Section 190C conditions

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
s 190C(2)		Met
s 190C(3)		Met
s 190C(4)		Not met
S 190C(5)		Met