National Native Title Tribunal

Registration test decision

Application name	Yilka
Name of applicant	Harvey Murray
State/territory/region	Western Australia
NNTT file no.	WC08/05
Federal Court of Australia file no.	WAD297/08
Date application made	15 December 2008
Date application last amended	N/A

Name of delegate Susan Walsh

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 6 August 2009

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Susan Walsh

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)[1]

[1] Instrument of delegation dated 6 March 2009 pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document comprises my statement of reasons for the decision that I made on 6 August 2009 to accept the application for registration.

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yilka application to the Native Title Registrar (the Registrar) on 16 December 2008 pursuant to s. 63 of the Native Title Act 1993 (Cwlth). This means that that the Registrar must, in accordance with s. 190A, consider the claim made in the application and decide whether or not to accept it for registration. This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on today, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Summary of the decision

I must be satisfied that all the conditions set out in ss. 190B and 190C of the Act are met in order for me to accept the claim in an application for registration: see ss. 190A(6) and (6B).

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement (found in s. 190C(2)) that the application must contain certain specified details and other information and be accompanied by any prescribed documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C, before turning to questions regarding the merit of that material for the purposes of s. 190B.

The claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Application overview

On 17 December 2008, the Tribunal provided a copy of the Yilka application and accompanying affidavit filed in the Court to the State of Western Australia and to the representative body for the application area (the Central Desert Native Title Services Ltd) pursuant to ss. 66(2) and (2A) of the Act respectively.

On 16 February 2009, the applicant provided additional information directly to the Registrar in relation to the requirements of the registration test.

The Tribunal wrote to the applicant's legal representative on 15 April 2009 informing of the delegate's preliminary view that some of the findings in *Harrington-Smith on behalf of the The Wongatha decision People v State of Western Australia* (No 9) [2009] FCA 31 in the Cosmo Newberry application may be relevant to her consideration of the Yilka application. The applicant's legal representative responded with a submission dated 4 May 2009 and further material to support registration of the application.

A copy of the applicant's submissions and additional information dated 16 February 2009 and 4 May 2009 was provided on a confidential basis to the State of Western Australia on 18 June 2009 with an opportunity for the State to comment on the material by 3 July 2009. The State has not provided any comment or submissions in relation to the applicant's materials.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

In making this decision, I have had regard to the application and to the other documents provided by the applicant (identified above under the heading 'Application overview'). I have also had regard to the documents contained in the Tribunal's case management/delegates file WC08/05 (also described as 2008/03061 Vols 01 and 02). Where I have had particular regard to documents within that file I have identified them in this statement of reasons.

I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

I also have not considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

For the reasons that follow, I am **satisfied** that the application meets the procedural condition in s. 190C(2) because of my finding that the application contains the details and other information required by ss. 61 and 62.

I address each of the requirements of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document in the reasons that follow.

I note that I do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not in my view require any separate consideration by the Registrar. Section 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (*Doepel*) is authority, in my view, that my consideration of the requirements of ss. 61 and 62 pursuant to s. 190C(2) simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62 and does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

Turning then to each of the various parts of ss. 61 and 62 which require that the application contain details and other information and be accompanied by any affidavit or other document:

Native title claim group: s. 61(1)

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

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

As I discuss in my analysis of *Doepel* above, I am of the view that the Registrar's task under s. 190C(2) is procedural only. When it comes to s. 61(1), I am of the view that all s. 190C(2) requires is for me to consider whether the application sets out the native title claim group in the terms required by s. 61(1). It is only if the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a subgroup of the native title group, that the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

A description of the persons in the native title claim group is found in schedule A of the application and this is reproduced in my reasons for the merit condition in s. 190B(3) below.

I am satisfied that the description in schedule A is sufficient for the purposes of s. 190C(2). There is nothing on the face of it or elsewhere in the application to indicate that not all persons in the native title claim group are included or that it is a subgroup of the native title claim group. I am therefore satisfied that the requirements of this section are met.

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application **contains** all details and other information required by s. 61(3). The name of the applicant and his address for service are found on pp. 3 and 23 respectively.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application **contains** all details and other information required by s. 61(4). A description of the persons in the native title claim group is found in schedule A of the application.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
>
> Note: Section 251B states what it means for the applicant to be ***authorised*** by all the persons in the native title claim group.
>
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application **is accompanied by the affidavit** required by s. 62(1)(a). This is the affidavit of [name deleted] sworn 4 December 2008 and it makes the statements required by subparagraphs (i) to (iv) respectively.

The note above subparagraph (v) indicates that the affidavit must identify how the authorisation decision complies with either of the two decision-making processes in s. 251B—a process mandated by traditional law and custom or a process agreed and adopted by the native title claim group. In my view, the details required by subparagraph (v) are contained in [name deleted] affidavit at paragraphs 7 to 11 respectively where he provides details of the traditionally mandated decision-making process that the native title claim group complied with to authorise him to make the application and to deal with matters arising in relation to it. I do not undertake any assessment of the merits of that information when considering whether the application is accompanied by an affidavit for the purposes of s. 190C(2). Whether I am satisfied that the applicant is authorised only arises if the application has not been certified pursuant to s. 203BE: see s. 190C(4) and *Doepel* at [73].

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required by s. 62(1)(b). It contains the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

I note again my view that *Doepel* is authority that the consideration of s. 190C(2) does not involve going beyond the application, and in particular does not require some form of merit assessment of the material in determining whether the requirements of s. 190C(2) are met—at [36], [37] and [39].

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

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a). It contains a written description and a map of the area covered by the application (see schedule B and the map in attachment C respectively). It also contains a written description of the areas not covered by the application in schedule B.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b). It contains a map showing the external boundaries of the application area in attachment C.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application contains all details and other information required by s. 62(2)(c). Details and results of searches carried out by or on behalf of the applicant are found in attachment D.

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

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

The application **contains** all details and other information required by s. 62(2)(d). The description of the claimed native title rights and interests is found in schedule E. In my view, the description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **contains** all details and other information required by s. 62(2)(e). A general description of the factual basis is found in schedule F of the application.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f). These details are found in schedule G of the application.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application contains all details and other information required by s. 62(2)(g). These details are found in schedule H of the application.

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

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(ga). These details are found in schedule HA of the application.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(h). These details are found in attachment I of the application.

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

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and
(b) the previous application was on the Register of Native Title Claims when the current application was made, and
(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

A search of the application area against the Register of Native Title Claims (Tribunal's geospatial report dated 7 January 2009) reveals that there are no previous overlapping applications on the Register of Native Title Claims when the current application was made on 15 December 2008.

Subsection 190C(4)
Authorisation/certification

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

Section 203BE relevantly provides:

(2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
(b) briefly set out the body's reasons for being of that opinion; and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The application **satisfies** the condition of s. 190C(4) because it has been certified under Part 11 by the only representative Aboriginal/Torres Strait Islander body that could certify the application, thereby meeting the requirement in s. 190C(4)(a). Because I am satisfied that the application has been certified pursuant to s. 190C(4)(a), I am not required to consider the requirements of s. 190C(4)(b).

Which representative bodies cover the application area?

Section 190C(4)(a) requires an application to have been certified by all representative bodies recognised under s. 203AD or funded to perform the certification function under s. 203FE(1) that cover the application area or any part of it. The Tribunal's geospatial report dated 7 January 2009 shows that the application area is entirely covered by the Central Desert Native Title Services Ltd (CDNTS) representative body area. To my knowledge there are no other s. 203AD recognised bodies or s. 203FE funded bodies for the application area. Accordingly, CDNTS is the only representative body that could certify the application under Part 11, noting my finding below that it is funded to perform the certification function pursuant to s. 203FE(1).

Attachment R of the application contains a certification of the application by CDNTS. The certification is made and signed by the CDNTS's principal legal officer and is dated 15 December 2008.

Is CDNTS empowered to certify the application?

I note that CDNTS is not recognised under s. 203AD. This is alluded to at the outset of the certification which identifies that the certification is made pursuant to s. 203FE(1).

Section 203FEA(1) of the Act provides that:

> A person or body to whom funding is made available under subsection 203FE(1) to perform a function in respect of a particular area has the same obligations and powers in relation to the performance of that function as a body recognised as the representative body for that area would have in relation to the performance of that function.

I understand that CDNTS is funded under s. 203FE(1) to perform the certification power. I am therefore satisfied that CDNTS is a representative body funded under s. 203FE(1) to perform the certification power and is empowered to certify the application.

Does the CDNTS certification comply with Part 11?

For the certification to satisfy the requirements of s. 190C(4)(a), it must comply with the provisions of subparagraphs 203BE(4)(a), (b) and (c) (if applicable). The text of the relevant provisions of s. 203BE are found at the commencement of these reasons.

Pursuant to s. 203BE(4)(a) the certification contains statements that satisfy s. 203BE(2), that is, CDNTS is of the opinion that the requirements of s. 203BE(2) have been met—CDNTS certifies at paragraph 1 of the certificate that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

Pursuant to s. 203BE(4)(b), the certification includes brief reasons as to why CDNTS holds these opinions—see paragraph 2 of the certificate. The information in paragraph 2 is to the effect that the CDNTS has provided legal and anthropological services within the area covered by the application

since 1996 and is satisfied that the anthropologists who worked with the claim group took all reasonable efforts to ascertain and identify all the members of the claim group, including by exhaustive research undertaken by in-house and external anthropologists. Brief details of the anthropological research undertaken are found in paragraph 2.2. The certificate also provides details of the native title claim group's traditionally mandated decision-making process and how the group complied with that process at paragraphs 2.3 to 2.7.

I note that the provisions of s. 203BE(4)(c) do not apply as there are no overlapping applications.

To conclude, I find that the certification complies with the requirements of Part 11, because it contains the statement of opinions and brief setting out of the reasons for holding those opinions required by s. 203BE(4)(a) and (b).

Information provided by [name deleted]

On 10 December 2008, [name deleted] provided the Tribunal with a copy of a letter he had sent to the representative body, outlining his views that the application is not properly authorised. I have not considered [name deleted] information because of my view that s. 190C(4)(a) does not empower me to 'look behind' the reasons expressed in the representative body's certification for it holding the opinions required by s. 203BE(2) in relation to the applicant's authority or to question the merits of the representative body's certification—see *Doepel* at [80]–[81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31]–[32]. My task at s. 190C(4)(a) is merely to ensure that the certification meets the requirements for a valid certification under s. 203BE(4); it is not to consider whether I am satisfied that the applicant is, in fact, authorised. The Tribunal wrote to [name deleted] on 2 April 2009 and informed him that his information could not be considered by the Registrar.

Merit conditions: s. 190B

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

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

The application **satisfies** the condition of s. 190B(2).

Section 190B(2) requires that the information in the application describing the areas covered by the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

(a) information, whether by physical description or otherwise, that enables the boundaries of:
    i. the area covered by the application ; and
    ii. any areas within those boundaries that are not covered by the application
    to be identified
(b) a map showing the external boundary of the application area

The application **satisfies** the condition of s. 190B(2).

As I noted in my reasons above at s. 190C(2), the application complies with ss. 62(2)(a) and (b) as it contains a written description of the area covered (the external boundary) and areas not covered by the application in schedule B (the internal boundaries) and a map showing the external boundary in attachment C.

The written description of the external boundary and the map showing it are, in my view, sufficiently and reasonably clear to locate the area covered by the application on the earth's surface. Paragraph 10 of schedule B uses metes and bounds and references to the cadastral parcels covered by the application. The A3 colour map in attachment C depicts the external boundary with a bold red outline. The map contains details of underlying cadastral land tenure, major roads and communities. It also has a north point, scale bar, coordinate grid and locality map. There are notes relating to the source, currency and datum of data used to prepare the map. The Tribunal's geospatial report dated 7 January 2009 expresses the opinion that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the comprehensive identification of the external boundary in schedule B and the clarity of the mapping of this external boundary on the map in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the internal boundaries is found in schedule B. This is a generic description that excludes from the application any areas subject to a number of acts defined in the Act and in Western Australian native title and other land legislation. It also excludes land covered by acts described in s. 23B of the Act. It excludes areas where native title has otherwise been extinguished. I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For these reasons, I am satisfied that the information and map in the application required by sections 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of land or waters and the requirements of s. 190B(2) are therefore met.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The application **satisfies** the condition of s. 190B(3).

As the application does not name all native title claim group members individually, s. 190B(3)(a) is not applicable.

My consideration must then turn to whether the description in the application meets the requirement in s. 190B(3)(b). This section requires me to be satisfied that the persons in the native

title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. 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). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

At [37], Mansfield J stated that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [sic] any particular person in the identified native title claim group can be ascertained'.

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3). In *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64], Carr J considered a claim group described as:

1. The biological descendants of the unions between certain named people;
2. Persons adopted by the named people and by the biological descendants of the named people; and
3. The biological descendants of the adopted people referred to in paragraph 2 above.

His Honour referred to this method of identification as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55…in relation to definition of areas, apply equally to the issue of sufficient description of the native title group–at [67].

The reference by Carr J to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55] was that:

> The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

The description of the claim group in schedule A of the application before me is in these terms:

> 5. The native title claim group comprises those people:
> (a) who, in accordance with traditional laws and customs, have a connection to the area covered by the application, through:
> (i) their own birth, or long association with the area covered by the application; or
> (ii) the birth, or long association with the area covered by the application, of their ancestors by which they claim country; and
> (b) in respect of whom that claim is recognised according to traditional laws and customs.
> 6.
> (a) The persons referred to in paragraph 5(a)i) include Andrew Watson and Danny Harris.
> (b) The ancestors referred to in paragraph 5(a)ii) are:
> (i) Marnupa;
> (ii) Waltila and Nanuma;
> (iii) Billy Kurlu;
> (iv) Sandy Grey;
> (v) Skipper Elliot; and
> (vi) Charlie Winter.

It is my view that this description is within the bounds of the 'Three Rules' test—I am provided with a starting point, that is, the three factors by which a person may be entitled to claim membership of the native title claim group through:

- their own birth on the application area;
- their own long association with the application area; or
- the birth or long association of their ancestors with the application area.

I note that the six ancestral lines by which persons may be entitled to claim membership are named in the description.

I am satisfied that the description meets the requirements of s. 190B(3)(b) because it provides sufficiently clear information that would allow a factual inquiry of the kind discussed above by Carr J. The starting point for such an inquiry is the three identified alternative bases by which a person is entitled to have a claim to membership of the group recognised according to traditional laws and customs. Such an inquiry may not be easy, but that is not to say it cannot be done on the basis of the information in schedule A.

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

The application **satisfies** the condition of s. 190B(4).

My view is that for a description to meet the requirements of this section, it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] to [92], [95], [98] to [101], [123]. Any assessment of whether the rights can be established prima facie as 'native title rights and interests', as that phrase is defined in s. 223, will be discussed in relation to the requirement in

s. 190B(6). I refer to my reasons below at s. 190B(6) for the text of the schedule E description of the native title rights and interests. It is my view that this description is clear and easily understood and meets the requirements of s. 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **satisfies** the condition of s. 190B(5) for the reasons that follow.

The applicant's factual basis materials

Schedule F of the application provides a general description of the factual basis. Other information relevant to the factual basis is found in schedules A and M. The applicant has also provided the following documents directly to the Registrar in support of the factual basis:

- Draft Yilka Native Title Claim Report dated February 2009 (draft anthropological report)
- Witness statements by [name deleted], [name deleted] and [name deleted], all dated 13 February 2009[2]
- CDNTS submissions dated 4 May 2009
- Annexure 1 to the Yilka Native Title Claim Report, 'Yilka Native Title Claim: Identity of the Claim Group', by [name deleted], dated February 2009 (supplementary anthropological report)[3].

The Wongatha decision

An initial issue that arises in relation to the sufficiency of the factual basis for this Yilka native title claim is the relevance or otherwise of the decision on 5 February 2007 by Lindgren J in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (the *Wongatha* decision). That decision resulted in the dismissal of the Wongatha WAD6005/98 native title application and the dismissal of those parts of a number of other native title applications which overlapped the Wongatha application. It also resulted in the dismissal entirely of the Cosmo Newberry WAD144/98 native title application which fell within the area covered by the Wongatha application. The significance of this is that the Yilka application very much resembles the Cosmo Newberry application:

- the Yilka application is made over exactly the same area as the Cosmo Newberry application;

[2] The applicant's legal representative provided the documents in the first two dot points to the Registrar on 16 February 2009.

[3] The applicant's legal representative provided the supplementary anthropological report to the Registrar on 5 May 2009.

- the Yilka application seeks a determination of the same kinds of native title rights and interests claimed in the Cosmo Newberry application;
- the Yilka application contains a very similar description of the factual basis for the asserted existence of the claimed native title rights and interests to that found in the Cosmo Newberry application;
- the Yilka native title claim is made on behalf of a large proportion, if not all, of the persons who gave evidence in the Wongatha proceedings that they belonged to the Cosmo native title claim group and the factual basis for this Yilka native title claim relies significantly on that evidence.

However, a key difference between the two applications is a new description of the native title claim group on whose behalf the Yilka application is made. This is outlined in the annexure 1 'Identity of the Claim Group' referred to above. In my view, the new description goes some significant way to alleviating particular concerns raised in the Wongatha decision as to the lack of traditional (i.e. pre-sovereignty) laws and customs of an Indigenous society governing the recruitment and composition of the Cosmo native title claim group. In summary the differences between the Yilka native title claim group and the Cosmo native title claim group are:

- The Cosmo 'multiple pathways of connection' has been replaced by a limited set of criteria related to birth/long association of a person or of a person's ancestor; the ancestors being named in the description;
- Ancestral links have moved forward a generation;
- The group is no longer the exclusive/sole adjudicator of membership claims;
- There is no exclusion of any particular person from the native title claim group;
- Membership has been expanded to include some of those identified in the *Wongatha* decision as persons who may hold native title in the application area. Additionally, the annexure 1 'Identity of the Claim Group' report explains why others are not included (in a way that seems plausibly related to the operation of law and custom relating to birth/long association).

Another factor which militates against making too much of the fact that there has been a full hearing and dismissal of the Cosmo Newberry application is that the applicant in those proceedings has appealed the Wongatha decision (see copy notice of appeal dated 5 April 2007 provided by CDNTS on 4 May 2009).

It is also my view that the Registrar's task at s. 190B(5) is clearly not to supplant the Court's role—in assessing the sufficiency of the factual basis under s. 190B(5) it is not for her to determine whether native title exists. The Registrar is not to evaluate the factual basis as if it were evidence provided in support of the claim and the applicant is not required to provide evidence of the type which would prove all of the facts necessary to succeed in their native title claim: *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (French, Moore and Lindgren JJ) (*Gudjala FC*) at [92].

I finally note that it would be erroneous for me to simply adopt, or not disagree with, the findings made in the *Wongatha* decision: *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 at [18] (*Cadbury*). The *Wongatha* decision and its findings may indeed be relevant to the issue at hand before me, namely, the sufficiency of the factual basis in this new Yilka application. However, in my view, I should attach little or no weight to those findings. In summary, my reasons for this are:

- Although there are some similarities between what a Court must consider in determining the existence or otherwise of native title and what I must consider to be satisfied that a sufficient factual basis is provided, the two tasks are fundamentally different. It would be wrong for me

to approach my task in assessing the sufficiency of the factual basis under s. 190B(5) in the way a Court approaches its task under s. 223;

- In any event, although the *Wongatha* decision saw the dismissal of the Cosmo Newberry application, it did not result in a finding that native title does not exist in the area it covered. The Court clearly left open the making of fresh native title applications by refraining from determining that native title does not exist there;
- The new claim is supported by expert anthropological opinion that was not before the Court (these are the February 2009 Yilka native title claim report, which contains significant input from [name deleted], and the annexure 1 'Identity of the Claim Group' report, authored by [name deleted]);
- Although the new claim relies on a similar factual basis to that before the Court in *Wongatha*, it does contain a significantly different description of its native title claim group. This new description in my view significantly alleviates the Court's concerns about the lack of traditional (i.e. pre-sovereignty) laws and customs of an Indigenous society governing the recruitment and composition of the Cosmo native title claim group.
- The findings in the *Wongatha* decision have formally been challenged on appeal by the Cosmo Newberry applicant.

Registrar's task under s. 190B(5)

I am not, as the Registrar's delegate, to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis', I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was recently approved in *Gudjala FC* at [83]–[85].

The Full Court in *Gudjala FC* commented that a sufficient factual basis for the assertions in s. 190B(5) must 'be in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and must be something 'more than assertions at a high level of generality'—at [92]. The Full Court also said that providing a sufficient factual basis does not require the applicant to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92]. The Full Court concluded that the applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

The Full Court indicated at [93] of *Gudjala FC* that if the Registrar were to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim', that would be erroneous.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the material as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the supporting evidentiary affidavits in relation to the factual basis (apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5)). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

I note also my view that *Doepel* is authority that I should approach the task by analysing 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to *Doepel* at [132] where Mansfield J said that it is correct for the Registrar to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention to the task at hand. If the factual basis supports the three sub-assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three sub-assertions before concluding whether overall the requirements of the section are met.

Subsection 190B(5)(a)— that the native title claim group have, and the predecessors of those persons had, an association with the area;

I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have, and their predecessors had, an association with the application area.

I understand from comments by Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) that a sufficient factual basis for this proposition needs to address:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- that there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96]. I note that the elements discussed by Dowsett J at [52] and that referred to by the Full Court at [96] appear referable to it being asserted that there is a cohesive community of people who observe 'traditional'[4] law and custom and who are associated with the application area over the period since sovereignty.

Dowsett J in *Gudjala* indicated that it may not suffice for individual members of the group to speak only about their own association and that of their families and predecessors since European settlement—at [52]. My own view is that I would be prepared to treat information of this kind from individuals within the claim group as illustrating or providing concrete examples as to how the whole group and its predecessors are associated with the area over the period since sovereignty. This kind of information may assist overall to provide a sufficient factual basis, if considered in conjunction with the entirety of the asserted facts.

A summary of the facts said to support this particular assertion is found in schedule F. In essence the association is said to be shown by the fact that the native title claim group and their predecessors are people of the Western Desert and that they are connected to the application area, both in isolation and in its context in a wider area or areas of which it forms an undifferentiated part. Principally their connection arises as a result of their beliefs that *Tjukurrpa* are responsible for the existence and form of the landscape and it is their responsibility to protect the places on the area associated with the *Tjukurrpa* and to prevent the improper disclosure of beliefs and practices which relate to places associated with the area. Four *Tjukurrpar* sites are named in paragraph 24. Paragraph 25 of schedule F refers also to physical presence, use of resources, actions taken to protect places on the application area by the group and their predecessors. Paragraph 26 refers to

[4]The meaning of 'traditional', as it appears in s. 223(1)(a), is the subject of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta HC*).

the historical and considerable time depth of the various aspects of their connection with the area covered by the application.

Schedule A of the application says that the native title claim group comprises the people who under traditional laws and customs have a connection to the application area through their own birth, their own long association or the birth or long association of their ancestors by which they claim country. The six ancestral lines are identified as Marnupa, Waltila and Nanuma, Billy Kurlu, Sandy Grey, Skipper Elliot and Charlie Winter. The supplementary anthropological report provides cogent information about these six ancestral lines and the associations of these persons with the application area and the wider regional society of the Western Desert Cultural Bloc. The supplementary anthropological report explains how current members of the native title claim group are descended from these ancestral lines.

The factual basis is further supported by the following statements from members of the claim group:

- [Name deleted] (witness statement dated 13 February 2009) was born on the application area, as was her mother, [name deleted]. [Name deleted] said to [name deleted] that the country of her birth is her *Ngurra*, which means 'home'. Many people have told [name deleted] that the Yilka area is her *Ngurra*. This also means that [name deleted] is *ngurarrangka* or belonging to this country. [Name deleted] mother also told her that [name deleted] Dreaming is one of the four named in schedule F. [Name deleted] mother said to her: *nyuntu Tjukurrpa Ngiyarri*. [Name deleted] spent her early childhood living on the application area with her family. They lived off the land, attended ceremonial gatherings and moved about to find new water. [Name deleted] was taken away by the white man when she was about eight years old and eventually sent to the Mount Margaret mission. She returned to live on her country for most of the 1960s. She has always maintained her contact with her country, living nearby and visiting it with her husband when they could. No one disputed that she was the owner for this country. [Name deleted] returned again in 1989, where she has lived ever since.
- [Name deleted] (witness statement dated 13 February 2009) is the son of [name deleted], who told him she was born in Yilka country and whose mother's mother is the Yilka ancestor, [name deleted], also born on the application area. [Name deleted] has some association with the country of his father, but he does not have any say for it, nor does he talk for it, despite being descended from a traditional owner for it. [Name deleted] country is that covered by the Yilka application. He spent the first ten years of his life there and his first memories are of this place. He camped out there as a kid and his mother used to tell the kids about the country. She would tell them this is their country as well. Other people in this part of the world (the Warburton people) have always supported his people living on the Yilka application area—'They know we know the country and look after it.' [5] Mr Murray accepts that many people have rights and interests in the application area—they can come and go and hunt. They don't need permission if they are living here now, but this is because we have told them where they can and can't go. However, for those who don't live here 'it is proper that they talk to us before using our land. You see those with the people from the east. They stop and have a word.' [6]

[5] See 38 of Mr Murray's statement.

[6] See 46 of Mr Murray's statement.

- [Name deleted] (witness statement dated 13 February 2009) was born on the application area in 1942. His mother took him to his birth place and told him his *Tjukurrpa*, which comes through the Tjirrkarli region and down towards Yilka. His rights in the application area arise because he was born there and it his home; that is his culture. He lives there and looks after it, like his grandfather and grandmother before him. He describes his connections to other Indigenous peoples to the north and east (Warburton and Tjirrkali). I infer that [name deleted] is connected with a wider regional system (the Western Desert Cultural Bloc).

I am satisfied, based on the material before me, that the claim group currently have an association with the application area as a whole. I am also satisfied, based on the material before me, that there is a sufficient factual basis to support the assertion that the predecessors of the claim group had an association with the application area.

Subsection 190B5(b) that there exist traditional laws and customs acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

I am **satisfied** that the factual basis is sufficient to support the assertion in s. 190B(5)(b).

The language of the assertion in subparagraph (b) pretty much mirrors that found in s. 223(1)(a). In my view, I must therefore be satisfied that the factual basis is sufficient to support an assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' in this statement highlights that its meaning in ss. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly, as was discussed by Dowsett J in *Gudjala* at [26], the factual basis provided by an applicant must pay attention to *Yorta Yorta HC* and in Full Court decisions since as to what is meant by rights and interests being possessed under 'traditional' laws and customs. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC* who noted that one question, amongst others, which needs to be addressed in the factual basis materials is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of the case law which has developed around the requirement in 223(1)(a) that native title rights and interests must be possessed under 'traditional' laws and customs:

- For laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.
- A society is a body of people united in their acknowledgement and observance of laws and customs with normative content.
- The acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time.

- The relevant inquiry is whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty; it is not whether the *community* that existed at sovereignty continued to exist over the subsequent years with its members continuing to acknowledge and observe at least some of the pre-sovereignty laws and customs relating to land.
- Change or adaptation of traditional law and custom may be acceptable; however the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional, i.e. they are not the laws and customs of the normative system at sovereignty.[7]

Having regard to the authorities, it is my view that the factual basis provided by an applicant to support the assertion in s. 190B(5)(b) needs to address that the traditional laws and customs giving rise to the claim to native title rights and interests have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I note that Dowsett J was of the view that the factual basis materials for this assertion must address:

- That the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—*Gudjala* at [63];
- That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—*Gudjala* at [65] and see also at [66] and [81];
- That explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—*Gudjala* at [66] and [81].

This aspect of Dowsett J's decision was not criticised by the Full Court—see [71]–[72] and again at [96].

Schedule F provides the following information in relation to this particular assertion:

- The fundamental concept in the belief system of the people of the Western Desert is the *Tjukurrpa* which explains the formation of the landscape as evidenced by its particular features and lays down the rules or principles by which people both relate to and conduct themselves in relation to the land and by which people otherwise conduct themselves.
- The laws and customs of the people of the Western Desert, including the members of the claim group, are given normative force by widespread commitment to the *Tjukurrpa* and the high value of the sacred among the people of the Western Desert and a fear of being ostracised or punished for breach of those laws and customs.

[7] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta HC*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr FC* and *Bennell FC*.

- The *Tjukurrpa* provide a framework for country through constellations of sites associated with particular *Tjukurrpa*, and the relevant *Tjukurrpa* for the application area are those identified in paragraph 24.
- The laws and customs of the people of the Western Desert, including the members of the claim group, include rules for recognition of a person holding rights and interests in relation to an area through the various means described in schedule A of the application.
- There are other laws and customs relating to the exercise of traditional authority over the area, strangers and visitors may be refused access to or have conditions imposed on their access, the asking of permission by strangers before visiting an area, some areas may be restricted on the basis of gender, age and knowledge. These and other laws and customs are described in more detail in paragraphs 37 and 38.

These general facts are supported by the additional factual basis materials provided by the applicant:

- The witness statements referred to above all describe the deponents' membership of the native title claim group including through their birth on the application area, the ancestral connections they describe or their long association with the application area.
- They all identify the *Tjukurrpa* that connects them to the application area. They describe the inter-generational transfer of knowledge about the *Tjukurrpa*. It is asserted that they and their antecedents observe the laws and customs of a wider regional society, which I infer to be the Western Desert Cultural Bloc (WDCB).
- The witnesses say that other Indigenous people to their north and east (Warburton and Tjirrkarli) acknowledge and accept that the Yilka claim group have the right to speak for this country under traditional laws and customs. I infer that the witnesses are talking about other people of the Western Desert who acknowledge that the Yilka claim group are the people who have the right to speak for the application area.
- The anthropological materials provided to support the factual basis provide information about the existence of traditional laws and customs that date back to sovereignty, which, in the case of Western Australia, is 1829. There is reference to European observations and those writing about the region, including the writings of historians, anthropologists and ethnographers which support that the area is located within a wider cultural horizon, identified by researchers as the WDCB. [8]
- The application area falls on the other side of the 'Berndt line' found in *Wongatha* to constitute the western boundary of the WDCB at sovereignty and the WDCB is the society governing the application area at sovereignty.[9]
- There is evidence of the WDCB existing in relation to the application area from the earliest time of European settlement, including the information recorded about the Aboriginal man, Tjurata, who was born on the claim area circa 1880 and who provided this information to Daisy Bates and other information about his father Wiwin, also coming from the same area circa 1855 or possibly earlier. It can be inferred that the information recorded by Daisy Bates in relation to Tjurata and his society would have applied to his father and father's father and this takes the evidence in relation to the society back to sovereignty in 1829. The society discussed is clearly that of the WDCB, noting that Bates recorded that Tjurata and others in his group travelled

[8] See [146]–[147] of the draft anthropological report.
[9] At [148]–[149].

from their tribal lands around the Yilka application area to other lands in the vicinity of the Western Australian border with South Australia to participate in ceremonies and initiation practices.[10]

- For the application area itself Bates recorded that particular places within the landscape of the application area was linked to Tjurata and some of his close kin, including a clustering of sites on, and to the near north and north-west of the application area.[11] Reference is made to Bates' statement that 'every pool, spring or lake in every tribe is associated with the family or group occupying the vicinity, or with some individual member of that family, whose birth occurred beside the pool, etc. such pool belongs to the family of the person born there as long as the family exists'.[12]
- The draft anthropological report explains that these detailed accounts are evidence that traditionally, there were several levels of organisation and affiliation in the Western Desert and these systems applied in the Yilka application area as for elsewhere in the Western Desert, with rights and interests in land being located at the upper organisational level of the WDCB itself.[13]
- It is asserted that the relevant society at sovereignty from which the rights and interests of the Yilka native title claim group arise and which has had a continuing vitality and existence since then is the WDCB. The membership of the six ancestral lines with the WDCB, including the traditional laws and customs, governing recruitment of current members and their consequent rights and interests in the application area are explained in the supplementary anthropological report.
- The witness statements provide further support for this part of the factual basis in that they show how these laws and customs are practised by them in relation to the application area and as members of a larger regional society to their north and east, which I infer to be the WDCB. They all describe how they have the right to regulate access to and use of the application area, both in relation to strangers who first get permission and in relation to regular visitors who know from long experience where they may go and how they may use the land, because the traditional owners have told them where they can go to hunt and other things. This is well explained in [name deleted] statement at [43]–[47].

Based on all the material before me, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group that give rise to the claimed rights and interests.

Subsection 190B(5)(c)—that the native title claim group have continued to hold native title in accordance with those traditional laws and customs

I am **satisfied** that the factual basis is sufficient to support the assertion in s. 190B(5)(c).

I take the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging

[10] At [153].
[11] At [155].
[12] ditto.
[13] At [156].

and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

Gudjala indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society at European settlement in the application area observing identifiable laws and customs.

The anthropological materials and the witness statements, discussed above, provide examples of how the claim group have continued to observe and acknowledge traditional laws and customs, including those that govern their interactions with other Indigenous persons to their north and east and which importantly deal with their belief in the *Tjukurrpa* and how their ownership of the land and their right to control access to and use of their country is regulated within a wider regional system, identified in the anthropological materials as the WDCB. These materials point to a sufficient factual basis for the assertion that these are the traditional laws and customs in existence in relation to the application area from the time of sovereignty, namely, the WDCB and that this is the society to which the native title claim group belong.

Having regard to all of these materials, examples of which I have referred to above, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way.

To conclude, the application **satisfies** the condition of s. 190B(5) overall because I am satisfied that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5), as set out in my reasons above.

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **satisfies** the condition of s. 190B(6) because of my finding below that, prima facie, at least some of the claimed native title rights and interests can be established. Only those rights and interests that, prima facie, can be established are to be entered on the Register of Native Title Claims—see s. 186(1)(g) and the note to s. 190B(6).

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> . . . Section 190B(6) requires some measure of the material available in support of the claim—at [126].

> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
>
> . . . s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

Right exists under traditional law and custom in relation to any of the land or waters under claim

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta HC* and other cases as to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group (my emphasis).

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of the section will be met. Only those rights and interests I consider, prima facie, can be established will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which prima facie supports the existence of the claimed rights and interests under the ***traditional*** laws and customs acknowledged and observed by the native title claim group. See the discussion above in relation to this topic at s. 190B(5).

Right is a native title right and interest in relation to land or waters

It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in s. 223(1) and settled by case law, most notably *Ward HC* that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests ' in s. 223(1) prima facie cannot be established.

Right has not been extinguished over the whole of the application area

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a

number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*).

Schedule E is in these terms:

Interpretation

18. In this Schedule, the following words and phrases have the following meanings:

"**exclusive right**" means the right of possession, occupation, use and enjoyment of land and waters to the exclusion of all others;

"**non-exclusive rights**" means the rights to:

(a) enter and remain on land and waters;
(b) use and enjoy land and waters;
(c) take and use the resources of land and waters;
(d) live on the land and waters;
(e) erect permanent structures on land and waters;
(f) share or exchange or trade resources of the land and waters;
(g) maintain and protect places and objects of significance on the land and waters;
(h) protect resources;
(i) protect the habitat of living resources;
(j) be acknowledged as the traditional Aboriginal owners of the land and waters;
(k) be consulted about any activity that may impact upon a place of significance to the native title claim group;

"**related Aboriginal person**" means a person who, in accordance with the traditional laws acknowledged and traditional customs observed by the native title claim group, is recognised by members of the native title claim group as:

(a) a member of an Aboriginal group from a nearby area;
(b) a person who is closely related to a member of the native title claim group, including a spouse; and
(c) an Aboriginal person with ritual authority who is a member of an Aboriginal group from a nearby area;

"**resources**" does not include minerals or petroleum wholly owned by the Crown;

"**rights of related Aboriginal persons**" means rights exercisable by a related Aboriginal person subject to the rights and interests of the native title claim group and include:

(a) in relation to a member of an Aboriginal group from a nearby area – rights of access to, and rights to hunt, fish and gather the natural resources on the land and waters of the native title claim group, subject to the permission of members of the native title claim group;
(b) in relation to a person who is closely related to a member of the native title claim group, including a spouse – rights of access to, and to hunt fish and gather the natural resources on, the land and waters of the of the native title claim group; and
(c) in relation to an Aboriginal person with ritual authority who is a member of a group from a nearby area – rights to act, in accordance with traditional laws, customs and practices, in relation to the maintenance and protection of sites associated with the travels of an ancestral being which passes through the land and waters of the native title claim group.

Native title where it is wholly recognisable

19. In relation to the lands and waters of the area covered by the application, except for the area covered by the Yamarna Pastoral Lease 3114/854 and Reserve 24980, the native title rights and interests is the exclusive right and includes the rights of related Aboriginal persons.

Native title where it is partially recognisable

20. In relation to the lands and waters of the area covered by the application and covered by the Yamarna Pastoral Lease 3114/854 and Reserve 24980 the native title rights and interests are the non-exclusive rights and include the rights of related Aboriginal persons.

Thus the Yilka application identifies that it claims the exclusive native title of possession, occupation, use and enjoyment over areas where it has not been extinguished or where any extinguishment must be disregarded and also claims the identified non-exclusive rights where there has been extinguishment of the exclusive native title. The native title claimed includes the rights of related Aboriginal persons as defined in paragraph 18. I turn to consider these two rights as follows. To assist the reader, I identify at the outset of my consideration of each right whether or not I consider that, prima facie, it can be established:

Native title where it is wholly recognisable

19. In relation to the lands and waters of the area covered by the application, except for the area covered by the Yamarna Pastoral Lease 3114/854 and Reserve 24980, the native title rights and interests is the exclusive right and includes the rights of related Aboriginal persons.

Outcome: Prima facie established.

Ward HC is authority that the 'exclusive' right is potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA. The applicant takes account of extinguishment issues by not claiming the exclusive right over the Yamarna pastoral lease and Reserve 24980.

Ward HC states that:

> a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others— at [88].[14]

Sampi v State of Western Australia [2005] FCA 777 states*:*

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> . . . the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.*** It is not a necessary condition of the existence of a right of exclusive use and occupation

[14] See also *Ward HC* at [90] – [93].

> that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (emphasis added).

Griffiths FC indicates at [127] that what is required to prove the exclusive right claimed in the Yilka application is to show how, under traditional law and custom, being those laws and customs derived from a pre–sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that it is also:

> important to bear in mind that ***traditional law and custom***, so far as it bore upon relationships with persons outside the relevant community ***at the time of sovereignty***, would have been framed by reference to relations with indigenous people (emphasis added).

I examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist and for the particular assertions therein, including, pertinently to the inquiry at s. 190B(6), that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

A review of that same material indicates to me that, prima facie, the exclusive right is shown to exist under traditional law and custom over those areas where it has not been extinguished or where any extinguishment must be disregarded (i.e. over all of the application area except for the Yamarna pastoral lease and Reserve 24980). I refer to the following information which in my view prima facie supports the existence of the exclusive right, including the rights of related Aboriginal persons:

- The WDCB is the society that existed in the application area at sovereignty and which has continued to exist in a substantially uninterrupted way since that time.
- The Yilka native title claim group are peoples of the Western Desert and they derive their traditional laws and customs from the WDCB. It is these traditional laws and customs which have determined the membership of the native title claim group.
- Membership of the native title claim group depends on having a connection with the application area through birth or long association with it or the birth/long association of a person's ancestors, being the six ancestral lines identified in schedule A of the application.
- A key tenet of the WDCB acknowledged and observed by the native title claim group and their predecessors in a substantially uninterrupted way since sovereignty is that:
  - *Tjukurrpa* are responsible for the existence and form of the landscape, and continue to be a presence or influence in the application area, and at places associated with it;
  - the native title claim group must protect the places on the area associated with the *Tjukurrpa* and also have the responsibility to prevent the improper disclosure of beliefs and practices which relate to these places;
- *Tjukurrpa* associated with the area include:

Tjukurrpa	**Translation**
Kungkarrungkarru	Seven sisters, the Pleiades
Ngiyari	Mountain (or Thorny) Devil
Parnparnparlarla	Crested Bell Bird
Warnampi	Water Serpent

- These *Tjukurrpa* (and others not named in the application due to their culturally restricted status) are the sites and rockholes for which the native title claim group are traditional owners under the traditional laws and customs of the WDCB.
- The traditional laws and customs acknowledged and observed by the native title claim group include laws and customs that:
  - They are the persons recognised by others as having traditional authority in respect of the application area and its *Tjukurrpa*.
  - Strangers and visitors may be refused access to or have conditions imposed on access to sites or only be allowed access if accompanied by persons with recognised authority over the area. If strangers wish to visit an area they should ask before visiting.
  - Access to some places, sites and areas is restricted on the basis of gender, age and ritual knowledge.
  - Sanctions are imposed for wrongful presence on or use of country by strangers and for wrongful presence on a site by any person in breach of cultural restrictions applicable to the site or for breach of other cultural restrictions and requirements.
  - The statements by [name deleted], [name deleted] and [name deleted] dated 13 February 2009 support that they have the right to speak for the application area under the traditional laws and customs of a wider regional system to which they belong (which they do not name but I can infer to be the WDCB). I note that the *Wongatha* decision establishes that the application area falls within the boundaries of the WDCB. I refer to the following information from these three members of the native title claim group:
    - [Name deleted] states that her mother [name deleted] was born on Yamarna, east of the Cosmo Newberry Community. Her mother told [name deleted] that her dreaming is Mountain Devil. Her mother said to [name deleted]: *nyuntu Tjukurrpa Ngiyarri*. [Name deleted] was also born on the application area and she was told by her mother and other Aboriginal people that this country is her *ngurra* or home. *Ngurra/ngurarrangka* means 'belonging to this country'. [Name deleted] has the right to travel to other places; however, it is the place where she was born that is her *ngurra* under traditional law and custom. When she goes to other places she must ask permission. She was taught this by her mother and other Aboriginal people and she teaches this to her children and grandchildren.
    - [Name deleted] is the son of [name deleted]. He spent the first ten years of his life on the country of his mother. He visited it when living away and has lived there since 1989. It is his country too. His mother taught him this. It is his country because it was his grandmother's country and his mother's country. It is his *ngurra*, his home. Under his law he has rights and responsibilities for his country. He has the right to speak up for this country. He looks after it. Other Aboriginal people from Warburton support their claims to this country. It is their home and they don't have to ask anyone's permission to live there. He accepts that there are others who have the right to come on to his country and to hunt there, but their Aboriginal law is that for those to whom it is not home, they need to ask permission. There are Aboriginal people who live here now who do not need permission to hunt and gather. They know where they can go and where they can't go, because the traditional owners for the application area have told them about it. But for others it is proper to talk to the traditional owners before using their land. People from the east will stop in and have a word.

- [Name deleted] was born on the Yilka claim area in 1942. His mother told him that he was *marrura* [little wallaby] *Tjukurrpa* [this Tjukurrpa comes through Tjirrkarli region and down towards Yilka]. This is his Dreaming. He lived in Yilka country as a little boy with his family, where they camped all around. He returned there with his own children in the early 1970s. He left in the mid-1980s when the homelands movement came in. He went to Tjirrkarli, the country of his mother and grandparents. Because [name deleted] was born on Yilka country he can claim it; it is his home; once you are born on a place, you own that place. It is really important to know the country. You do this by living there, camping out and hunting the country. You have got to learn the country and its Tjukurrpa (Dreaming). The Tjukurrpa goes from generation to generation. It has to be passed on; that's the Law. He can't go onto other people's country. If he wants to hunt on country that is not his own, he talks to the owners and they take him around. The same applies to those who want to use his country.

Native title where it is partially recognisable

20. In relation to the lands and waters of the area covered by the application and covered by the Yamarna Pastoral Lease 3114/854 and Reserve 24980 the native title rights and interests are the non-exclusive rights and include the rights of related Aboriginal persons.

Outcome: Prima facie established, except for the right to be acknowledged as the traditional Aboriginal owners of the land and waters.

In my view, the same factual information that I have reviewed for the exclusive right, prima facie establishes the existence of the non-exclusive rights, including the rights of related Aboriginal persons, with one exception. The exception is that described at (j) as the right to 'be acknowledged as the traditional Aboriginal owners of the land and waters'. It is my view that *Alyawarr FC* is authority that a right in these terms is incapable of precise definition or enforcement and is therefore not a native title right that can properly be the subject of a determination under the Act. It follows in my view that it cannot, prima facie, be established under s. 190B(6).

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

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

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

I have taken the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being

'traditional' as discussed in Yorta Yorta. I note also that at [29.19] of the explanatory memorandum to the Native Title Amendment Act 1998, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, the witness statements by [name deleted], [name deleted] and [name deleted], recounted in my reasons at ss. 190B(5) and (6), provide satisfactory evidence of the requisite traditional physical connection.

The three witnesses all clearly belong to the native title claim group. [Name deleted] and [name deleted] describe being born in the bush on the application area and living there with their families in traditional ways. All three witnesses describe their life-long connection with the application area and their traditional affiliations within a wider regional system, which I infer to be the Western Desert peoples or Western Desert cultural bloc. They know the *Tjukurrpa* for their country and its special places. They were taught these things by their parents. They look after their country. They teach these things to their young ones, as was taught to them by their old people.

On the basis of this material, I am satisfied that these three members of the native title claim group currently have or previously had a traditional physical connection with a part of the land or waters covered by the application.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

(4) However, subsection(2) and (3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(5) the application states that ss. 47, 47A or 47, as the case may be, applies to it

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the the application **does not** offend the provisions of s. 61A(1) because there are no determinations of native title over the application area.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. In my view the the application **does not** offend the provisions of s. 61A(2) because paragraph 15 of schedule B expressly excludes any areas covered by a previous exclusive possession act, as defined in s. 23B.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3) because it is clear from the description of the claimed native title rights and interests that the exclusive native title of possession, occupation, use and enjoyment is only claimed over areas where it has not been extinguished or where any extinguishment must be disregarded.

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

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

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

Reasons for s. 190B(9)(a):

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

Schedule Q states that there are no claim is made to ownership of any minerals, petroleum or gas wholly owned by the Crown.

Reasons for s. 190B(9)(b)

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

The application is located well inland of the coast of Western Australia and does not cover any offshore places

Result for s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c) as I am not aware, and the material before me does not disclose, that the claimed native title rights and interests have otherwise been extinguished. I note also that schedule B, paragraph 15(e) excludes any areas where native title have otherwise been wholly extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Yilka**
NNTT file no.	**WC08/5**
Federal Court of Australia file no.	**WAD297/08**
Date of registration test decision	**6 August 2009**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **met**
	re s. 61(1)		**met**
	re s. 61(3)		**met**
	re s. 61(4)		**met**
	re s. 61(5)		**met**
	re s. 62(1)(a)		**met**
	re s. 62(1)(b)		**Aggregate result:** **met**
		s. 62(2)(a)	**met**
		s. 62(2)(b)	**met**
		s. 62(2)(c)	**met**
		s. 62(2)(d)	**met**
		s. 62(2)(e)	**met**
		s. 62(2)(f)	**met**
		s. 62(2)(g)	**met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(ga)	met
		s. 62(2)(h)	met
s. 190C(3)			met
s. 190C(4)			Overall result: met
	s. 190C(4)(a)		met
	s. 190C(4)(b)		N/A

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		MET
s. 190B(3)		Overall result: MET
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	met
s. 190B(4)		met
s. 190B(5)		Aggregate result: met
	re s. 190B(5)(a)	met
	re s. 190B(5)(b)	met
	re s. 190B(5)(c)	met
s. 190B(6)		met
s. 190B(7)(a) or (b)		met
s. 190B(8)		Aggregate result: met
	re s. 61A(1)	met

Test condition	Subcondition/requirement	Result
	re ss. 61A(2) and (4)	**met**
	re ss. 61A(3) and (4)	**met**
s. 190B(9)		**Aggregate result:** **met**
	re s. 190B(9)(a)	**met**
	re s. 190B(9)(b)	**met**
	re s. 190B(9)(c)	**met**

[End of document]