National Native Title Tribunal

# Registration test decision

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| Application name | Widi Mob |
| Name of applicant | Irwin Tasman Lewis, Daryl Noel Woods, Errol Leonard Martin, Julie Lewis, Bill Lewis, Gregory Denis Martin and Gloria May Martin |
| State/territory/region | Western Australia |
| NNTT file no. | WC97/72 |
| Federal Court of Australia file no. | WAD6193/98 |
| Date application made | 26 August 1997 |
| Date application last amended | 24 July 2009 (pursuant to leave of the Court dated 12 June 2009) |
| 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 do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

**Date of decision:** 16 December 2009

Susan Walsh

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 16 November 2009 and made **pursuant to s. 99 of the Act.**

# Reasons for decision

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# Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to **not accept** the claim in 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) (the Act), as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

## Application overview

The application has a long procedural history. It was first made when it was lodged with the Native Title Registrar (the Registrar) on 26 August 1997. The application was entered onto the Register of Native Title Claims on that date also. The applicant subsequently amended the details of the application in November 1997 to extend the area it covers (amending to include additional areas was not prohibited under the Act as it was before 30 September 1998).

As a result of the application provisions of the *Native Title Amendment Act 1998*, which commenced on 30 September 1998, the application is taken to have been made to the Federal Court and the requirement that the claim in it be considered for registration under s. 190A was triggered by transitional provisions under that Act.

The application underwent the registration test on two occasions thereafter, 2 May 1999 and 4 July 2000. On both occasions the Registrar's delegate decided that the claim made in the application must not be accepted for registration because it did not meet all the registration test conditions in ss. 190B and 190C. The entry in relation to the claim was removed from the Register of Native Title Claims on 4 May 1999, following the first registration test decision.

The first registration test decision on 2 May 1999 (with a corrigendum issued on 4 May 1999 by the delegate) concerned the claim made in the amended application filed in the Court on 4 March 1999 and was the subject of the review proceedings in *Martin v Native Title Registrar* [2001] FCA 16 (French J), who dismissed the applicant's motion on the basis that His Honour agreed with the delegate that the claim did not meet the registration test conditions in s. 190C(4) (authorisation) and s. 190B(5) (factual basis).

The second registration test decision on 4 July 2000 was triggered when the application was again amended on 14 January 2000. For slightly different reasons in relation to the s. 190B merit conditions of the registration test, the Registrar's delegate again decided that the claim must not be accepted for registration. The second delegate also decided that the authorisation condition was not met.

Because the claim had been refused registration and the entry in relation to it was removed from the Register of Native Title Claims, the Registrar was again required to consider the claim for registration, following commencement of the *Native Title Amendment Act 2007* on 15 April 2007. The Registrar's delegate decided on 24 August 2007 that the claim should not be accepted for registration. In essence, the third delegate was of the same view as the second delegate in relation to the s. 190B merit conditions of the registration test and was also not satisfied that the authorisation condition in s. 190C(4) was met.

The requirement that the claim in the application be considered for registration pursuant to s. 190A(1) has again been triggered. This happened on 27 July 2009 when the Registrar of the Federal Court of Australia (the Court) gave a copy of the Widi Mob amended application filed on 24 July 2009 to the Registrar pursuant to s. 64(4) of the Act (see s. 190A(1)).

The amended application was filed by the new applicant following the decision in *Martin (Dec) v Western Australia (No 2)* [2009] FCA 635 (Barker J) on 12 June 2009 (*Martin No 2*) ordering the replacement of the applicant (who had passed away) with a new applicant under s. 66B and then granting the new applicant leave to amend the application. On 16 September 2009, the Court gave the Registrar copies of three pages missing from attachment B of the amended application. It is the claim in this amended application, including the three missing pages from attachment B, that I now consider for registration under s. 190A.

## Registration test

I am satisfied that subsection 190A(1A) does not apply as the application has not been amended because of an order by the Court under s. 87A (part determinations). I am also satisfied that subsection 190A(6A) does not apply to this new consideration of the claim in the amended application pursuant to s. 190A. This is because the earlier Widi Mob claim is not on the Register of Native Title Claims, having 'failed' the registration test, as discussed above.

Therefore, my consideration of the claim in the amended application filed on 24 July 2009 must proceed in accordance with subparagraphs 190A(6) and 190A(6B), which together provide that I may only accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the 'registration test'.

Pursuant to ss. 190A(6) and (6B), my decision is that the claim in the application **must not** be accepted for registration because it **does not satisfy** all of the conditions in ss. 190B and 190C, as set out in the reasons that now follow. A summary of the result for each condition is provided at Attachment A.

## Information considered when making the decision

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

Of the kinds of material that I must have regard to, I have before me and have considered the information in the application itself. I have also considered the information in other documents provided by the applicant, including that found in documents provided over the years in relation to the application when it previously underwent the registration test (see subparagraph 190A(3)(a)). However, I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4) (see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16]).

I have also had regard to the documents contained in the Tribunal's WC97/72 case management/delegates files (references 2007/01311 & 2009/02014). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons.

I have particularly considered the following documents provided by or on behalf of the applicant, where permitted by law, as explained in *Doepel* at [16]:

- Letter from applicant's former legal representative dated 24 February 1999
- Statements by members of the native title claim group:
  - [name deleted] (3 February 1999)
  - [name deleted] (4 February 1999)
  - [name deleted] (undated)
  - [name deleted] (undated)
- Affidavit by the former applicant[1] dated 1 February 1999, including annexure A, B and C. Annexure C is a genealogical chart prepared on instructions and with the assistance of the deceased applicant and other claim group members (see paragraph 3 of the affidavit)
- Letter from [name deleted] to the Tribunal received 11 June 1999
- Affidavit by the former applicant dated 20 July 1999 with annexure A, which comprises statements dated 4 May 1999 by:
  - [name deleted]
  - [name deleted]
  - [name deleted]
- Letter from the applicant's former legal representative dated 29 August 1999 referring to an interview with [name deleted] and providing a copy of an affidavit prepared following that interview and explaining why the affidavit had not been signed
- Some draft documents provided to the Registrar by the former applicant's advisers in mid-2004 in relation to the provision of a preliminary assessment by a delegate of the Registrar. (I note that the documents provided are clearly marked 'draft' and are in some respects sketchy and incomplete.)

I have also considered an affidavit made by the former applicant dated 24 August 1998 in relation to future act proceedings conducted by the Tribunal in 1998 involving the claim. It is not clear to me after this length of time if this affidavit was in fact also provided by the former applicant to the Registrar for the purposes of the registration test; however I note that it was considered when the application was tested in 1999, 2000 and 2007. It contains relevant information from a significant person in relation to the native title claims of the Widi Mob. In my view, it is therefore appropriate that I have regard to it (as set out at the end of s. 190A(3)).

I informed the applicant on 10 and 12 November 2009 that all of this information was before me in relation to the registration testing of this amended application. I did so because there is now a new applicant and new legal representation since the information was provided to the Registrar. I understand also that the applicant's legal representative had asked the Tribunal to provide details of the information on Tribunal files that may be relevant to the registration test.

I have also considered a submission from Yamatji Marlpa Aboriginal Corporation representative body (the YMAC) dated 2 November 2009 that the application should not be accepted for registration. In the interests of procedural fairness, I provided a copy of this to the applicant on 10 November 2009 and have a submission in reply from the applicant's legal representative ([name deleted]) dated 2 December 2009, the content of which I have considered, as discussed below.

[1] I refrain from naming the former applicant as she is now deceased.

Finally, I have considered a new affidavit recently provided to me by one of the persons jointly comprising the applicant, Irwin Tasman Lewis, dated 7 December 2009.

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;
- 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. 94D of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L).

## Deferring the registration test

On 29 October 2009 the applicant's legal representative sought an extension of time because he could not get affidavits to support the factual basis due in part by difficulty locating one of the proposed deponents and by another undergoing heart surgery and thus being unfit to attend to such matters. The applicant asked for an extension until 2 December 2009 to attend to these matters. The applicant has provided one affidavit and the indications are that more time is needed to provide another affidavit.

In the particular circumstances of this application, I am of the view that it is in the public interest for this registration test decision to be made without further delay. In relation to my decision not to defer the test, I note:

- the frequency of s. 29 notice activity in the application area requiring that I use best endeavours under s. 190A(2) to finish the registration test, with the current series of notices ending on 12 December 2009 and new notices expiring on 3 and 9 January 2010;
- the long history of the application, including that it has undergone the registration test on three previous occasions;
- the duty to test was triggered again some four and a half months ago (when the Court referred the application to the Registrar on 27 July 2009) and the delays occasioned thereafter due to the requirement that the applicant provide some missing pages to the attachment B description of the boundary.

What now follows is a statement of my reasons for each registration test condition in ss. 190B and 190C. I start my consideration of each condition by quoting from the relevant section of the Act. I then state the outcome of my decision and follow with the reasons for that decision. As I have noted, s. 190B sets out conditions that test particular merits of the claim in the application, whereas s. 190C sets out conditions about 'procedural and other matters'. Section 190C includes the procedural requirement in subparagraph 190C(2) that the application must contain certain details and other information. I consider the s. 190C requirements first, in order to assess whether the application contains the details and other information required by s. 190C(2), before turning to questions that then arise when considering the other parts of s. 190C and the merit conditions in s. 190B.

# *190C Registration: conditions about procedural and other matters*

## *Subparagraph 190C(2): Information etc. required by sections 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.

The application **does not satisfy** the condition of s. 190C(2), because it **does not** contain the details and other information required by s. 61(1) and s. 61(4), as set out in the reasons that now follow.

I turn to each of the various parts of ss. 61 and 62 which relevantly prescribe that the application must contain certain details and other information or that the application must be accompanied by any affidavit or other document. I note that I consider the application against the requirements of s. 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This made some minor technical amendments to s. 62 which only apply to applications made after 1 September 2007 and the Widi Mob application was made before that date on 26 August 1997.

***61(1): Persons who may make application***

The table in s. 61(1) identifies that a claimant native title determination application may only be made by:

> (1) 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 **does not contain** the details and other information required by s. 61(1) for the purposes of s. 190C(2).

***Decision in Doepel***

The decision by Mansfield J in *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [35]–[36] characterised the task for the Registrar in relation to s. 190C(2), when considering the requirements of s. 61, as follows:

> Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains 'all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult. And the identity of those on whose behalf the claimants would enjoy procedural rights under subdiv P of Div 3 of Pt 2 of the NT Act upon registration of the claim would be unclear. It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers*; *Quall v Native Title Registrar* [2003] FCA 145 (Quall v NTR). [35]

In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). *If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration.* In *Edward Landers* at [33], on an application to dismiss an application for determination of native title I said:

> `I have rejected the submission that the Edward Landers' application should be summarily dismissed because it is clear that it was not authorised by the Dieri People under s 251B of the NT Act. But, in my view, it also follows from the need for such authorisation that s 61(4) requires the application to be on behalf of the people who have authorised it. It does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, or the grant of native title to a subgroup of the real native title claim group: see Ward v State of Western Australia (1998) 159 ALR 483 at 541, Risk v National Native Title Tribunal [2000] FCA 1589 at [60], Tilmouth v Northern Territory of Australia [2001] FCA 820; (2001) 109 FCR 240. By excluding from the authorising group, namely the Dieri People, the 87 persons named as the applicant group (or even merely the Dieri Mitha group) in the Dieri Mitha application, that is what the Edward Landers' group has done. The smaller group, as expressed, is not the group of people who should exclusively enjoy the communal native title.'

It is not suggested that the face of the application in this matter raises such difficulties. (*emphasis added)* [36]

### *Description of the native title claim group in the application*

In light of the decision in *Doepel*, I have confined my consideration to the information contained in the application itself identifying the native title claim group. This is found in schedules A and O of the amended application filed on 24 July 2009:

> **Schedule A:**
> The claim is brought on behalf of [25 persons are then named] and their biological descendants.
> Provided that any person who is within the description contained in Section 190C(3) of the *Native Title Act 1993 (As Amended)* is excluded from those persons on whose behalf the claim is brought.
>
> **Schedule O:**[2]
> The amended the *(sic)* description of the claim group (Schedule A) by which any person caught by Section 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this Schedule.

### *Decision in Edward Landers*

In my view, this description in the application poses the very problems that were fatal to the application in *Edward Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 (Mansfield J) (*Edward Landers*) quoted above in *Doepel*. Mansfield J dismissed the Edward Landers application

[2] Schedule O is for the applicant to identify any persons in the native title claim group who belong to any native title claim group for any overlapping application.

for failing to comply with s. 61(1) and s. 61(4). His Honour did so because the description of the native title claim group in schedule A of the application, whilst indicating that the application was made on behalf of the Dieri People native title claim group, nonetheless expressly excluded from that native title claim group the persons named in the overlapping and previously registered Dieri Mitha application, even though it was accepted that the excluded persons also belonged to the Dieri People native title claim group.

The applicant in *Edward Landers* explained that the exclusion was to remove the impediment posed by s. 190C(3) to the registration of the application in light of the previously registered Dieri Mitha application. The applicant contended that this was permissible under s. 61(1) and s. 61(4) on two bases:

> . . . s 61(1) and s 61(4) of the NT Act should be read down to require the expression of a claim group capable of registration under Part 7 of the NT Act, and so must refer to a native title claim group which is expressed in the application, in terms capable of satisfying the Registrar of eligibility for registration.
>
> . . .the expression "native title claim group" in s 61(1) is the group of persons defined by the application as required by s 190B(3) of the NT Act, and may be a different and smaller group than the persons who hold or may be determined as holding the native title claimed, as identified by s 203BE(5)(a) - previously s 202(i)(a). Otherwise, the ALRM contends, the registration requirements introduced by the amending Act would have "raised the bar" so high as to deny registration to all but unassailable claims—both at [34].

Mansfield J rejected both contentions for these reasons at [35] to [40]:

> I do not accept these contentions. The significance of the requirement introduced by s 251B is clear: *Daniel*, and also see *Moran v Minister of Land & Water Conservation for New South Wales* [1999] FCA 1637 per Wilcox J at [48]. *The proper identification of the native title claim group is the central or focal issue of a native title determination application*. It is the native title claim group which provides the authorisation under s 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made. I do not consider the registration procedures as introduced in Pt 7 of the NT Act in 1998 were intended to detract from that focus. Nor do I consider there is any tension between those procedures and s 61 of the NT Act. (*emphasis added)* [35]
>
> *The term "native title claim group" in s 253 is referred to as meaning the group mentioned in relation to the native title determination application in s 61(1). It refers to "all the persons" who authorised the particular applicants to make the claim. In this instance, it is the claim of the Edward Landers' group that they were authorised by the Dieri People. But the application does not then identify the Dieri People as the persons on whose behalf the claim is made, but some only of the Dieri People. I think the requirements of s 61(1) and (4) are clear.* (*emphasis added)* [36]
>
> Registration of a native title determination application gives the claimants the status of being a native title party for the purposes of Div 3 of Pt 2 of the NT Act, and the rights which attach to that status pending the determination of the native title application. Therefore registration of a native title determination application has a particular significance, which in the present context is only temporary until the Edward Landers' application is determined by the Court. *I do not discern from the context of ss 190A, 190B and 190C or from their words anything which would suggest that the clear words of s 61(1) and (4) do not mean what they say.* Nor that the words should

be read down in the way contended by counsel for the Edward Landers' group. (*emphasis added)* [37]

As the Second Reading Speech of the Attorney-General (Hansard, House of Representatives, 9 March 1998, p 781) indicates, the introduction of the registration provisions by the amending Act was to ensure only those with "a credible claim" should become eligible as a "native title party". It also sought to avoid in the future that status being accorded to those who had made an application for determination of native title under the old Act, without the need for authorisation under s 251B, and who may have made "ambit and unprepared claims". The representative body was thus obliged by the then s 202(6) to make all reasonable efforts to achieve agreement between overlapping claims. In the case of overlapping claims by different native title claim groups, ultimately it will be a matter to be determined whether a particular native title claim group is entitled to native title. *Section 190C(3)(a) does not prevent registration of native title determination applications by competing native title claim groups. It seeks to ensure that an application for native title by a particular native title applicant is authorised by the native title claim group.* If there are different persons making a claim over the same or partly the same area on behalf of the one native title claim group, it is consistent with giving s 61(1) and (4) their full operation and with s 251B that the legislation intended such registration to be refused. The circumstances of different applicants on behalf of the same native title claim group separately seeking determination of native title over the same, or partly the same, claim area would tend to indicate some flaw in the authorisation process. The proper course, before registration, may be for the native title claim group under its proper processes to substitute new applicants in one or other of the claims under s 66B of the NT Act or to have one or other of the authorised claims amended to avoid any overlap. Hence, in my judgment, the procedural requirement of s 190C(3) does not impose any "unassailable bar" upon registration but is consistent with the proper operation of ss 61(1), 61 (4) and 251B of the NT Act. (*emphasis added)* [38]

The other contention can be dealt with briefly. It was put that par 5 of Sch A to the Edward Landers' application only provisionally excludes some of the Dieri People from the native title claim group. It does have a temporal element. But *it seeks to exclude from the native title claim group on whose behalf the application is made certain members of the native title claim group. It does so, as was acknowledged, not because the excluded persons are not members of the Dieri People, but to secure registration of the application*. (*emphasis added)* [39]

In my view, *s 61(1) and (4) do not permit such an exclusion whether for that reason or otherwise*. The application, for the reasons I have given, does not comply with s 61(1) and (4) of the NT Act. (*emphasis added*) [40]

I have quoted extensively from the *Edward Landers* decision because of my view that the information in the application before me as to the identification of the native title claim group raises the same difficulties as that suffered by the application in *Edward Landers* and is to be distinguished from the application considered by Mansfield J in *Doepel*. In *Doepel*, His Honour found that it was 'not suggested that the face of the application in this matter raises such difficulties'—at [36] (my emphasis).

***Exclusion appears on the face of the Widi Mob application***

Before the most recent amendment of the Widi Mob application, the native title claim group was described as 25 named persons and their biological descendants. In their affidavits filed in the Court in May 2009 to replace the deceased applicant and to amend the application, the seven

persons who now make up the new applicant all deposed to their membership of the Widi Mob native title claim group, either as a person named in schedule A or a descendant of a person named in schedule A. They further deposed that the native title claim group who authorised the replacement of the former applicant is 'generally described as the Widi Mob'[3] and its membership comprised the 25 named persons in schedule A (although some people had passed away) and the numerous biological descendants of the named persons.[4]

This identification of the persons in the native title claim group as those of the 25 persons who are alive and all of the biological descendants of the 25 persons was, in my view, the subject of a significant amendment by the insertion of the proviso at the end of schedule A. The effect of the proviso is explained in schedule O, so that if any of the named persons or their descendants belong to a native title claim group in an overlapping application that fits the description in s. 190C(3), then that person is excluded from the native title claim group.

This stated and express exclusion on the face of the application is, in my view, strikingly similar to that which was before Mansfield J in *Edward Landers*. It poses a fundamental problem for the application satisfying me that the application contains the details and other information required by s. 61(1). This is because of my view, supported by *Edward Landers* and *Doepel*, that this clearly stated contraction in the application in the membership of the 'native title claim group', so as to remove any impediment to registration posed by s. 190C(3), is not permitted by s. 61(1) or indeed by s. 61(4).

This contraction of the native title claim group is not something that I have had to search for outside of the terms of the application; it is on the face of the application that I am alerted to the potential difficulties for this application under s. 61(1).[5]

In my view, this is one of the rare cases where an application cannot comply with the procedural condition in s. 190C(2) relating to s. 61(1). This is because the addition to schedule A of a provision that excludes persons who also belong to applications that meet the conditions specified in s. 190C(3) has the effect of apparently excluding persons who are part of the real 'native title claim group'. As discussed in *Doepel* at [36] it is a case where the description of the native title claim group in the application indicates 'that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration.'

For these reasons, I am not satisfied that the application contains the details and other information required by s. 61(1) for the purposes of s. 190C(2).

***Decision in Martin No 2***

In my respectful view, it does not appear that this issue was sufficiently canvassed or argued before Barker J when his Honour granted leave to amend the application in *Martin No 2*. I am of the view that it would be wrong in law to for me to simply adopt, or not disagree with, the

[3] See [7] Errol Leonard Martin, sworn 1 May 2009.
[4] See [8]–[10], [21], [23] and [24] Errol Leonard Martin, sworn 1 May 2009.
[5] Although I do have a submission from the representative body (Yamatji Marlpa Aboriginal Corporation) dated 2 November 2009 as to members in common with overlapping applications, I do not consider it here, but where I am allowed to, namely in relation to the conditions in ss. 190C(3) and (4).

findings made in *Martin No 2*. What the law requires of an administrative decision maker when a similar issue has been or is to come before a Court, was recently canvassed in the decision in *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 (*Cadbury*):

> . . . A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue. . . . I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627. [18]
>
> Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include: (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter. [19]
>
> Now, in this case I fear that the delegate was intending to place too much emphasis on the judge's or judges' findings. . . . To proceed on the basis that it is unlikely that the Registrar will depart from the court's findings and, that there is a public interest in avoiding inconsistent fact findings, indicates to me that there is a real risk that the delegate was not going to decide for herself the issues that must be decided to dispose of the opposition proceedings—*Cadbury* at [20].

In my view, the statutory scheme set out in s. 190A in relation to considering applications for registration against the conditions in ss. 190B and 190C imposes a clear duty for me to decide for myself whether this application meets the statutory criteria to enable it to be accepted for registration.

There are findings by Barker J in *Martin No 2* that are potentially relevant to my consideration of this and other registration test conditions:

> In the circumstances, the inclusion of the proviso to Sch A of this application is reasonably seen to be a provision that makes it clear that the applicants do not intend to include as a member of the claim group, any person who was a member of the native title claim group for any previous application if (a), (b), (c) of s 190C(3) apply. In that sense the proviso is a clarifying and incidental provision. [108]
>
> In circumstances such as these I do not consider that it is necessary for the applicants to undertake a task that the Registrar may be required later to perform for the purposes of registration, in order to definitively identify every person who is not included within the claim group. [109]
>
> What is of key importance in a case such as this, is that the claim group has been defined with sufficient particularity. This is not a case where the claim group is described by reference to the descendents of some long ago apical ancestor. Rather, it is a case where named living (or

> recently deceased) persons and their biological descendants constitute the claim group. The exception is in respect of any persons who may fall within the description of persons to whom s 190C of the Act applies. In my view, there is no uncertainty about the description of the claim group in the proposed amended claimant application—at [110].

Earlier in the decision at [59], His Honour noted that authorisation 'must be by all the persons who constitute the native title claim group in respect of the common or group rights or interests comprising the particular native title claim'[6] referring to Lindgren J in *Harrington-Smith v Western Australia* (No. 9) [2007] FCA 31 (*Harrington-Smith*) at [1172]. However, the words referred to from this passage of *Harrington-Smith* actually said 'the common or group rights and interests comprising the particular native title claimed', in turn a reference to the definition of the 'native title claim group' in s. 61(1).

In *Harrington-Smith* at [1216] Lindgren J found that:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).

This finding followed a consideration by Lindgren J of the decision in *Edward Landers* and the related decision by Mansfield J in *Dieri People v South Australia* (2003) 127 FCR 364; [2003] FCA 187 that s. 61(1) and s. 61(4) of the NTA do not permit the making of a claim by something less than the real native title claim group, as that term is defined in s. 61(1).

I note also that at [280] to [281], Lindgren J is critical of applicants who 'redefined' their claim group by amending it to 'exclude problematical ... members', including people who were otherwise members of the claim group but were excluded simply to pass s. 190C.

I refer also to these comments by Lindgren J in *Harrington-Smith* criticising claims which did not contain a description of the 'native title claim group', as defined in s. 61(1), so as to avoid the impediments to registration posed by s. 190C(3):

> Again, the artificiality of the distinction between the Claim groups is indicated. Subsection 190C(3) of the NTA and the very fact of propounding different group claims make it desirable to avoid membership of multiple groups, yet the creation of the Claim groups by the process of aggregation, coupled with the existence of overlaps, makes multiple memberships virtually inevitable, unless there is a power not to admit to membership exercisable by reference to NTA considerations—at [2475].

These comments from *Harrington-Smith*, in my view, accord with what was said in *Edward Landers* at [39] to [40] in relation to the amendment of the application to exclude certain people 'not because the excluded persons are not members of the Dieri People' but 'to secure registration of the application'. Mansfield J concluded in *Edward Landers* at [40] that ss. 61(1) and 61(4) 'do not permit such an exclusion whether for that reason or otherwise'.

***Conclusion***

If it is argued that these kinds of issues can only ultimately be resolved at the trial and should not concern me at this early stage or in the exercise of the administration function laid out in s. 190A, this is not such a case, because the contraction of the real 'native title claim group' appears on the

[6] My emphasis.

very face of the information in the application. Nor, in my view, would such an approach be consistent with *Doepel*. I refer again to the decision in *Edward Landers* and to these comments by Mansfield J at [37]:

> I do not discern from the context of ss 190A, 190B and 190C or from their words anything which would suggest that the clear words of s 61(1) and (4) do not mean what they say.

I note that it may be contended that the proviso in schedule A does not result in the exclusion of real people. Rather it is there merely to put the issue beyond doubt and is a 'clarifying and incidental provision', as discussed in *Martin No 2* at [108]. I refer to my reasons below at s. 190C(3) and s. 190C(4), where I find that real people are excluded from the group by use of the formula set out in the proviso. There is nothing on the face of the application which would appear to justify the exclusion under traditional law and custom. The information that I have reviewed indicates that it represents an artificial re-defining of the native title claim group to avoid the consequences of s. 190C(3). Indeed, as explained below, it has the unintended effect of excluding some of the persons jointly comprising the applicant.

I do not feel that I can follow or find probative the findings of Barker J in *Martin No 2* as it seems to me that His Honour's reasons do not indicate that the issue raised by the amended description was put to His Honour on the basis of the findings in *Landers* and *Harrington-Smith*.

***61(3): Applicant's name and address***

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

The application **contains** the details and other information required by s. 61(3) for the purposes of s. 190C(2). The names and address for service of the seven persons comprising the applicant are found on pp. 2 and 13 of the form 1 application.

***61(4): Applications authorised by persons***

> A native title determination application that persons in a native title claim group authorise the applicant to make must:
> (a) name the persons; 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 **does not contain** the details and other information required by s. 61(4) for the purposes of s. 190C(2).

In the usual course, I am not required to undertake any assessment, other than to find if there is procedural compliance in the sense that the application either names the persons in the native title claim group or contains a description of those persons. In the usual course, I would undertake a merit assessment of any description at s. 190B(3).

However, it must follow in my view that if the application does not comply with the preceding and related provisions of s. 61(1), then it cannot then comply with s. 61(4). In fact, *Edward Landers* makes it clear that the stated contraction of the 'native title claim group' by effectively removing any persons who are in fact part of that group because of their membership of any overlapping native title claim and so as to remove any impediment to registration by s. 190C(3), offends the requirements of s. 61(4).

For the reasons I have provided in relation to s. 61(1) it is also my view that I can not be satisfied that the application contains the details and information required by s. 61(4), as it is clear on the face of the description identifying the native title claim group in the application that it does not include all persons in the 'native title claim group' who authorised the applicant and therefore does not include an appropriate description of the native title claim group.

***62(1): Claimant applications***

***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 entry in the National Native Title Register, 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

(v) stating the basis on which the applicant is authorised as mentioned in (iv).

The application **is accompanied** by the affidavit required by s. 62(1)(a) for the purposes of s. 190C(2). Affidavits by the seven persons comprising the applicant stating the things required by subparagraphs 62(2)(a)(i) to (v) were filed in the Federal Court in May 2009 when the applicant sought leave to replace the former applicant under s. 66B and to amend the application.

***62(1)(b):***

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

The application **contains** the details and other information required by s. 62(1)(b), being those details and other information stipulated in subparagraphs s. 62(2) (a) to (h).

***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** the details and other information required by s. 62(2)(a) for the purposes of s. 190C(2). A description of boundaries of the application area and any areas within those boundaries not covered by the application is found in schedule B and attachment B of the application.

***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** the details and other information required by s. 62(2)(b) for the purposes of s. 190C(2). A map showing the boundaries of the application area is found in attachment C of the application.

***62(2)(c):***

> The application must contain the details and results of all searches carried out 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** the details and other information required by s. 62(2)(c) for the purposes of s. 190C(2). The applicant procvides details and results of searches in a land tenure report dated 4 March 1998 as an attachment to the application.

***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** the details and other information required by. 62(2)(d) for the purposes of s. 190C(2). A description of the claimed native title rights and interests is found in schedule E of the application. The description provided is not merely 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.

***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** the details and other information required by s. 62(2)(e) for the purposes of s. 190C(2). A general description of the factual basis is found in schedule F of the application.

***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** the details and other information required by s. 62(2)(f) for the purposes of s. 190C(2). These details are found in schedule G of the application.

***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** the details and other information required by s. 62(2)(g) for the purposes of s. 190C(2). These details are found in an attachment to schedule H of the application.

***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** the details and other information required by s. 62(2)(h) for the purposes of s. 190C(2). These details are found in an attachment to schedule I of the application.

## *Subparagraph 190C(3): no previous overlapping claim groups*

> 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).

***What I may consider in relation to this condition***

I am not restricted to the information in the application in my consideration of this section: *Doepel* at [16].

***Identity of overlapping applications***

The application covers a large area in the Geraldton region of Western Australia. Its external boundary extends along the Western Australian coast in the vicinity of Dongara (south of Geraldton). The boundary then travels:

- inland from the coast north to a point just north of Bullaroo where there is a significant area of overlap with the Mullewa Wadjari Community native title application (WAD6119/98). (There is also an overlap with the Wajarri Yamatji native title application (WAD6033/98) in these northern reaches);
- west to a boundary that is roughly parallel with the Great Northern Highway, where there is another significant overlap with the Badimia People native title application (WAD6123/98); and
- south to a point within the town of Dalwallinu, where there is a slight overlap along the northern boundary of the Yued native title application (WAD6192/98) and also with the Single Noongar Claim (Area 1) native title application (WAD6006/03).

I note that there are also significant areas that overlap the Amangu People native title application (WAD6002/04) and the recently filed West Badimia People native title application (WAD139/09). The overlap with the Amangu claim occurs in the north–western reaches of the Widi application, including along the coast around Dongara. The overlap with the West Badamia application occurs in the centre of the Widi application, west of the overlap with the Badamia application.

The precise details relating to these overlaps are found in the Tribunal's geospatial assessment and overlaps analysis dated 29 September 2009 (the Geospatial report) and in the Tribunal's

mapping of the native title claims in the Geraldton and South West regions, available on the Tribunal's website.

***Submission from the YMAC***

I have a submission from the YMAC dated 2 November 2009 that the application cannot meet the condition in s. 190C(3), due to the existence of members in common with the overlapping Amangu and Badamia applications. In my view, the submission incorrectly identifies the date 'made' for the current Widi Mob application for the purposes of identifying any previously registered native title applications that were on the Register of Native Claims when the Widi application was made. The YMAC identifies the date 'made' as 24 July 2009, this being the date that the amended Widi application was filed in the Court. The case of *Western Australia v Strickland* (2000) FCR 33; [2000] FCA 652 (*Strickland Full Court*) is authority however that the current application under s. 190C(3)(b) (i.e. the amended Widi mob application that I am considering for registration) was 'made' when it was lodged with the Native Title Registrar on 26 August 1997, not when it was recently amended—*Strickland Full Court* at [12]–[22], [35], [41] to [52].

***What constitutes a 'previous' application under subparagraphs 190C(3)(b) and (c)***

*Strickland Full Court* also provides authority that for an application to be a 'previous application' and thus require a consideration of whether I am satisfied that there are no members in common with the 'current application' being considered for registration, the 'previous application' must meet all of the criteria defined in subparagraphs s. 190C(3)(a), (b) and (c)—at [9].

As I have noted, the current Widi Mob application was 'made' when it was lodged with the Native Title Registrar on 26 August 1997. It is therefore only those overlapping applications entered on the Register before this time that may be 'previous' applications for the purposes of subparagraph 190C(3)(b). Further, it is only those overlapping applications which remain entered on the Register following application of the registration test to those claims, as at the date of this registration test decision in relation to the current application, which will satisfy the condition in subparagraph 190C(3)(c).

***Overlapping applications which meet all of the criteria in s. 190C(3)(a), (b) and (c)***

It follows in my view that the Amangu application is not a previous application because it was not made until 2004, some years after the Widi Mob application was made. For the same reasons, none of the Wajarri Yamatji, Single Noongar Claim (Area 1) or the West Badamia applications are overlapping applications as they were all made after the Widi mob application was made.

Only three of the seven overlapping applications satisfy both conditions in subparagraphs s. 190C(3)(b) and (c), thereby requiring a consideration of whether I am satisfied that there are no members in common between the two applications. They are:

- Mullewa Wadjari Community WAD6119/98
- Yued WAD6192/98
- Badamia People WAD6123/98

All three applications were:

- made and entered on the Register of Native Title Claims before the Widi Mob application was made on 26 August 1997, thus satisfying s. 190C(3)(b); and

- were not removed from the Register as a result of passing the s. 190A registration test, thus satisfying s. 190C(3)(c).

***Mullewa Wadjari Community and Yued***

My examination of the Register extracts for the overlapping and previously registered Mullewa Wadjari and Yued native title applications does not reveal any overt commonality between those claim groups and the Widi Mob application and I am not provided with any adverse information indicating the existence of common members. For the purposes of s. 190C(3) I am satisfied that there are no members in common between the claim groups in these applications and the claim group as described in the Widi Mob application.

***Badamia People***

As I have noted, the YMAC has provided information that there are members in common between the Widi Mob and Badamia applications. The submission in reply from the applicant's legal representative dated 2 December 2009 is that the Badamia application is not a previous application in the sense discussed in s. 190C(3) as it did not pass the registration test until after the Widi Mob application was made on 26 August 1997.

For the reasons I have given, this submission is wrong. In my view, the authority of *Strickland Full Court* at [51],[55]–[56] is that if the Badamia application:

- was on the Register before the current application was made;
- was not removed as a result of being accepted for registration under s. 190A; and
- this took place before my s. 190A consideration of the current application (i.e. the decision I make today),

then the Badamia application is a previous application that requires me to consider the issue of common members.

I have searched the entry that appears in the Register of Native Title Claims for the Badamia application. This search reveals that the Badamia application:

- was first made and entered onto the Register on 4 October 1996 (some time before the Widi Mob application was made the following year in August 1997) and
- was not removed from the Register after passing the registration test in s. 190A on 20 July 2000 and then again on 12 April 2002.

The latter dates accepting the Badamia application for registration occurred before the registration test decision that I make today in relation to the amended Widi Mob application. On the authority of *Strickland Full Court* I must therefore be satisfied that no person included in the native title claim group for the Widi Mob application was a member of the native title claim group for the Badamia application. This is because the Badamia application is a 'previous' application in the sense required by subparagraphs 190C(3)(a), (b) and (c).

The YMAC submission that there are members in common between the Widi Mob and the Badamia native title claim groups is based on 'instructions from the Badamia working group and claim group at various meetings since the claim was filed, information in the YMAC genealogy database, and from past dealings with the Martin and Lewis families and other claimants in the Widi Mob claim.'

YMAC state that the former applicant belongs to the Lewis family and is the child of [name deleted] and [name deleted]. The YMAC state that the former applicant married a Badamia man named [name deleted]. YMAC state that the children of the former applicant and [name deleted]:

> are recognised as Badamia people and are welcome within the Badamia native title claim. The Badamia connection reports acknowledge that [the former applicant's] descendants are included in the claim group. They are listed in YMAC records as being [name deleted], Errol Leonard Martin, [names deleted]. Gregory Denis Martin and Errol Leonard Martin are listed as applicants on the Widi Mob claim.

I do have information before me about the identity of the Widi Mob native title claim group provided by the Widi Mob applicant. In 1999 the former applicant provided information which verifies that she is the child of [name deleted] and [name deleted], as is stated in the YMAC submission. I refer to an affidavit by the former applicant sworn on 1 February 1999 to support that she was authorised by the native title claim group, in which she provided key information identifying the membership of the native title claim group:

> . . . I am so authorised by my siblings, my cousins, their descendants and my descendants, who comprise the native title claim group, to make this application and to deal with the matters arising in relation to it.

I refer also the genealogical chart at annexure "C" to this affidavit, which, the former applicant deposed:

> was prepared upon instructions and with the assistance of myself and other members of the native title claimant group, together with research of existing ethnographic studies and historical documents by Dr Melanie von Bamberger, using her expertise as an anthropologist.

I note that the Martin surname is allocated in the applicant's genealogical chart to the former applicant, who is also identified as one of the eight children of [name deleted] and [name deleted]. The genealogical chart names [name deleted] as a child of the former applicant. [Name deleted] is identified by the YMAC as a child of the former applicant and is indeed one of the seven persons comprising the new Widi Mob applicant.

Both [name deleted] and [name deleted] state in the affidavits they made earlier this year seeking leave to replace the applicant that they are the children of the former applicant. [Name deleted] has annexed to "C" of his further affidvavit made on 12 May 2009 the copies of a number of forms completed and signed by 12 descendants who attended the authorisation meeting. Of these 12 persons:

- [Name deleted] (named in the YMAC submission as a child of the former applicant and [name deleted])
- [name deleted]
- [name deleted] and
- [name deleted]

all state in their signed forms that the person they are descended from is the former applicant, thus entitling them to membership of the Widi Mob native title claim group.

However, any argument that there are members in common between the Widi Mob and Badamia applications (on the YMAC information this would appear to comprise the offspring of the former applicant and any further children born to those persons) ultimately fails by operation of

the formula in schedule A that 'any person who is within the description contained in s. 190C(3) is excluded from those persons on whose behalf the claim is brought.'

That this is how the formula is intended to operate is further explained by the statement in the amended schedule O of the Widi Mob application that:

> The amended . . . description of the claim group (Schedule A) by which any person caught by s. 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this schedule.

Schedule O, relevantly to s. 190C(3), is the place in the application for the applicant to provide:

> details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.

It is my view that the YMAC information indicating the existence of common members would have posed significant problems for the application meeting s. 190C(3), but for the formula in schedule A. The YMAC information clearly names the former applicant's offspring as persons belonging to the Badamia native title claim group. The information emanates from the representative body for much of the area covered by the Widi Mob and Badamia applications. It appears that the YMAC has undertaken genealogical and historical research into the genealogies of the various families asserting native title in its region and their ancestral ties to known Aboriginal persons in the region after European settlement (as would be expected in light of its statutory functions and responsibilities under the Act).

Although not presently relevant because the Amangu application is not a previous application, I do note that the information in the applicant's genealogical chart about the great-grandparental and great-great-grandparental lines for the Martin, [name deleted],Woods, [name deleted] and Lewis families does indicate a biological line of descent from the apical ancestor identified by the YMAC as an Amangu apical ancestor. The YMAC information about the former applicant's parents and her maternal grandfather matches that found in the genealogical chart annexed to the former applicant's affidavit dated 1 February 2009. I make these points to illustrate that the YMAC information generally matches the applicant's own genealogical information (although there is no doubt dispute about the traditional affliations of the ancestors identified on the one hand as Widi and on the other as Amangu). It appears to confirm that the YMAC information in relation to the Badamia connections of the Martin offspring is overall accurate.

***Applicant's submission on the issue of common members***

The applicant's legal representative has submitted in response to the YMAC information that the Badamia application was not a previous application under s. 190C(3) (I believe that I have adequately addressed this argument above). The applicant's response to the YMAC does not reject the factual matters in the YMAC submission, except to say that there is 'nothing said as to how this proposition of fact is relevant to any part of the registration test. It is submitted that it has no relevance.' It is submitted, that:

> there are additional legal issues as to the proper application of the subsection and in particular what the words "*member of the native title claim group"* mean[7]. Mere "*inclusion"* in the claim group plainly cannot be enough because those words are used in the earlier part of the

[7] This I believe is a reference to this term where it appears in the chapeau to s. 190C(3.)

paragraph. That different words are used suggests a different notion is conveyed. (*emphasis in original)*

***My consideration of applicant's submission***

I understand the applicant's submission in reply to argue that because the word 'included' is only used in relation to the membership of a person in the current application, but not when discussing membership of a previous application, it must be established as a matter of fact that someone is a member of a previous native title claim group before I can reach a view that I can not be satisfied that there are no common members between the two applications.

In summary, I believe that the applicant submits that something more than the information from YMAC is required as to the membership of the former applicant's descendants in the Badamia native title claim group; it is simply not enough that they have been identified as part of that group due to the genealogical and connection research work undertaken by the YMAC.

I do not understand the legislation to mean anything other than what it clearly states. An application will only meet this condition, if I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application, where such previous application meets the criteria set out in subparagraphs 190C(3)(a), (b) and (c).

Generally on what it means for an administrative decision maker to be satisfied, I refer to *Minister for Immigration v Eshetu* [1999] HCA 21, 197 CLR 611 at [653]–[657] that the decision-maker can be satisfied a relevant statutory condition is met if:

- that satisfaction is based on findings or inferences of fact which are supported by some relevant probative material or logical grounds; or
- the opinion is such that it can be formed by a reasonable delegate who correctly understands the meaning of the law under which s/he acts.

In my view the information from the YMAC outlines relevant probative material indicating that the former applicant had children with [name deleted], a Badamia man. It is telling in my view that the applicant does not in any way refute the genealogical information in the YMAC submission, nor do they provide any information to support that the offspring of the former applicant and [name deleted] do not belong to the Badamia native title claim group.

I have considered the entry for the Badamia application on the Register of Native Title Claims. The Badamia native title claim group is described as 'those Aboriginal people biologically descended from the following deceased ancestors', including a person named [name deleted].

I have no reason to doubt that there is a biological link from the Badamia ancestor [name deleted] to [name deleted] and thus to the children he had with the former applicant (or indeed any of the other 12 ancestral lines named in the Badamia application) in light of the YMAC information that this is so and in the absence of the applicant responding with cogent information that they are not members of the Badamia native title claim group.

But as I have said the memberhip of the former applicant's offspring in the Widi Mob native title claim group was the subject of a significant amendment in 2009 by inclusion of the formula at the end of schedule A excluding from the claim group any of the persons identified in the first part of the description 'who is within the description contained in s. 190C(3)'. The new formula thus

saves the application from failing to comply with the provisions of s. 190C(3). Otherwise the weight of the information before me would mean that I could not be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous Badamia application.

***Other information before me***

Finally, I note two other common surnames that arise when comparing the information available to me about the members of the Widi Mob and Badamia claim groups:

- one of the Badamia applicant persons is [name deleted]. The former applicant's genealogical chart identifies that a sister of [name deleted] married [name deleted] and their three children ([names deleted]) are all identified in schedule A of the Widi mob application.
- One of the 12 persons who attended the Widi authorisation meeting and signed a form attesting that she is a descendant of a person named in schedule A is [name deleted]. '[Name deleted]' is a surname that features prominently in the details entered on the Register for the Badamia native title claim; four of the Badamia applicant persons bear that surname and one of the deceased ancestors in schedule A is named [name deleted].

These common surnames may well have required an explanation, but for the formula in schedule A.

***Conclusion***

Overall my consideration of whether there are members in common with any previous overlappling application is ultimately not difficult due to the native title claim group description in schedule A of the Widi application that expressly excludes from the native title claim group any person who is a member of an overlapping application that fits the description in s. 190C(3). What my analysis of the information does show is that certain people have been excluded from the Widi Mob claim group because of the formula. This then indicates that the formula operates to exclude real people and it is my view that it was added to the description of the claim group for the purpose of the claim passing this condition. There is no suggestion that such exclusions are based on any real consideration under traditional law and custom.

On the basis of the exclusion clause in schedule A and the statement in schedule O, I am therefore satisfied that there are no members in common between the current Widi Mob application and the three previous applications referred to above.

## *Subparagraph 190C(4): identity of claimed native title holders*

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

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

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

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

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

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

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

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

For the reasons set out below, I am **not satisfied** that the requirements set out in s. 190C(4) are met.

***What is needed to satisfy s. 190C(4)***

An application may comply with the condition in s. 190C(4) if it has been certified under Part 11 by any representative body that could certify the application—see subparagraph 190C(4)(a). The application has not been certified and does not meet the condition in s. 190C(4)(a).

It is therefore necessary that I consider the application against the requirements of s. 190C(4)(b). Schedule R of the application refers me to the material filed in the Court to support the recently successful motion under s. 66B of the Act to replace the original applicant with a new applicant made up of seven persons—see *Martin No 2*. The applicant has provided me with copies of the affidavits filed by the seven applicant persons in relation to their claimed authority from the rest of the native title claim group to make the application and to deal with matters arising in relation to it. In my view, the information in the application and the affidavits filed in the Court comprise the information that is required under s. 190C(5).

Although my view is that the application contains the information required by s. 190C(5), it is still necessary for me to consider the substantive condition in s. 190C(4)(b)—*Doepel* at [78]. I am not limited to the information in the application or accompanying s. 62(1)(a) affidavits when considering this condition—see *Strickland v Native Title Registrar* (1999) 168 ALR 242 at pp. 259-60, approved on appeal to the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [78]. See also *Doepel* at [78] that 'the interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' This then is one of those registration test conditions where I may have regard to information outside the application.

***What is needed to satisfy s. 190C(4)(b)***

Turning then to what is required by s. 190C(4)(b), I must be satisfied, firstly, that the applicant is a member of the native title claim group and, secondly, that the applicant is authorised by all the

other persons in the native title claim group. I turn now to consider the two limbs of the authorisation condition in s. 190C(4)(b).

***First limb of s. 190C(4)(b) – the applicant is a member of the native title claim group***

For the reasons that follow, I am **not satisfied** that the applicant is a member of the native title claim group.

Schedule A states that the application is brought on behalf of 25 named persons and their biological descendants, provided that any person who is within the description in s. 190C(3) is excluded from those persons on whose behalf the claim is brought.

Each of the seven persons jointly comprising the applicant (s. 61(2)(c)) has sworn an affidavit that they are a member of the native title claim group, either because they are named in schedule A or because they are a biological descendant of a named person:

- Gloria Lewis (5 May 2009) (also known as and identified in the application as Gloria May Martin) states that she is one of the persons named in schedule A;
- Irwin Tasman Lewis (1 May 2009) states that he is named in schedule A;
- Darryl Woods (7 May 2009) states that he is named in schedule A;
- Bill Lewis (29 April 2009) and Julie Lewis (1 May 2009) state that they are the son and daughter respectively of another of the 25 persons named in schedule A;[8]
- Errol Leonard Martin (1 May 2009) and Gregory Denis Martin (6 May 2009) state that they are sons of the former applicant (who is named in schedule A).

I am satisfied that Gloria Lewis (aka Gloria May Martin), Darryl Woods and Irwin Tasman Lewis are members of the native title claim group as their names are all found in schedule A and there is no information before me to indicate that the formula at the end of schedule A operates to exclude them on the basis that they are members of any previous application described in s. 190C(3).

I am satisfied that Bill Lewis and Julie Lewis are members of the native title claim group in light of their affidavits stating that they are the children of a person named in schedule A. There is no information before me to indicate that the formula at the end of schedule A operates to exclude them on the basis that they are members of any previous application described in s. 190C(3).

I am not satisfied that Errol Leonard Martin and Gregory Denis Martin are members of the native title claim group. I note their affidavits stating that they are the sons of the former applicant, who is in turn one of the 25 persons named in schedule A. These two persons would otherwise qualify as members of the native title claim group on the basis of their biological descent from a person named in schedule A, but for their exclusion by operation of the formula at the end of schedule A. As I have explained in my reasons above under s. 190C(3), the formula that has been added to the end of schedule A appears to operate to exclude the offspring of the former applicant on the basis that they are members of the native title claim group for the previous Badamia application.

It follows that I cannot be satisfied that the applicant is a member of the native title claim group, because it appears that two of the individuals making up the applicant have been excluded by the formula in schedule A.

[8] I refrain from naming their parent, as he is now deceased.

***Second limb of s. 190C(4)(b) – the applicant is authorised by all the other persons in the native title claim group***

For the reasons that follow, I am **not satisfied** that the applicant is authorised by all the other persons in the native title claim group.

It is the applicant's case that they are authorised to make the application and to deal with matters arising in relation to it by the rest of the native title claim group, as a result of an agreed and adopted decision making process that culminated at an authorisation meeting attended by the members of the native title claim group on 9 April 2009, where those in attendance voted to replace the former applicant with seven persons. It is asserted that the decision making process followed an agreed and adopted process because there are no traditional laws and customs which mandate how decisions of this kind could be made, thus complying with s. 251B(b).

There is information in the supporting affidavits to indicate that the authorisation decision was made following a validly agreed and adopted process of decision making, where there are no traditional laws and customs which mandate how the decision is to be made and where every reasonable opportunity has been extended to the members of the native title claim group to participate in the authorisation of the new applicant.[9]

The information I have considered shows that the membership of the native title claim group is relatively compact being essentially an extended family network from a common set of grandparents, as depicted in the genealogical chart, such that extending a reasonable opportunity of the kind discussed in the case law would not have been difficult or onerous. Although the notice that was sent around before the meeting talked about a 'vote for a Director for the Widi Group for Native Title Claim', there is information that those in attendance had it clearly explained to them by the lawyer in attendance what it meant if they decided to vote to authorise a replacement applicant for their native title claim.[10]

However, I am not satisfied that the applicant is authorised to make the application and to deal with matters arising by all the other persons in the native title claim group because:

the formulaic exclusion added to the native title claim group description has resulted in the real exclusion of persons who participated in the authorisation process in April 2009

the application also omits persons previously identified as part of the native title claim group

My reasons in relation to this now follow.

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[9] *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) at [26] and [71]–[72] ( Logan J) recently distilled some relevant principles from earlier case law on the requirements of s. 251B. See also *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25], Stone J; *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790 (*Wharton*) at [34], Emmett J; *Noble v Mundraby* [2005] FCAFC 212 at [18] and *Noble v Murgha* [2005] FCAFC 211 at [34], North, Weinberg and Greenwood JJ.

[10] See Errol Leonard Martin 1 April 2009 at [24]–[33] and the signed forms at "C" of Mr Martin's two affidavits dated 1 April 2009 and 12 May 2009.

***Applicant not authorised because of the formulaic exclusion added to the native title claim group description***

I should note that it appears unlikely that the persons who participated in the authorisation process in April 2009 intended or understood the consequences of the formulaic exclusion added to the native title claim group description. Namely, that it would result in the exclusion of a key element of the native title claim group and/or the authorising persons (the offspring of the former applicant, including two of the persons comprising the applicant).

As I have set out in my reasons for s. 190C(3), the information that I have considered is that the Widi Mob 'native title claim group', as defined in s. 61(1), comprises a number of inter-related families who are the grandchildren of [name deleted] and [name deleted] and the offspring of those grandchildren. The grandchildren are the former applicant, her siblings and her cousins, as shown on the genealogical chart provided in her affidavit dated 1 February 1999.

[Name deleted] is identified in the genealogical chart as the child of [name deleted] and [name deleted] of the Irwin River. [Name deleted] is identified as the child of [name deleted] and [name deleted]. [Name deleted] is identified as the child of [name deleted] and an unnamed Aboriginal woman. This second ancestral line back to [name deleted] is identified in the YMAC submission as having an Amangu identity, although this is not stated in the applicant's genealogical chart. I should note that I do not regard this information as adverse to the applicant in relation to the authorisation of this application. This is because it seems clear that the Widi Mob rely on their descent from [name deleted] and [name deleted] of the Irwin River as giving rise to their Widi Mob identity (refer to paragraph 15 of the affidavit of the former applicant dated 24 August 1998 and paragraphs 6–7 of the affidavit provided by Irwin Tasman Lewis on 7 December 2009).

In her affidavit dated 1 February 1999, the former applicant identified that the asserted native title claim group who authorised her to make the application are 'my siblings, my cousins, their descendants and my descendants, who comprise the native title claim group'—at [4]. The genealogical chart identified that the former applicant had seven siblings and twenty four cousins. The twenty five persons named in schedule A are all found on the genealogical chart as either a sibling or cousin of the former applicant.

However, this identification of the native title claim group was significantly changed in my view by the addition of an exclusion clause or formula at the end of schedule A to the effect that if any of the 25 named persons or their biological descendants 'is within the description of s. 190C(3)' they are excluded from the native title claim group. The statement in schedule O explains that this formula operates to exclude any person who belongs to an overlapping application that is a previous application for the purposes of s. 190C(3).

I have found in my reasons under s. 190C(3) that:

- but for the formula, there would be an overlap in membership between the Widi Mob and Badamia native title claim groups;
- the information I have considered is to the effect that this is a real exclusion of persons, namely the offspring of the former applicant and her Badamia husband, including two of the persons who jointly comprise the applicant and another four persons who attended the authorisation meeting.

The information from the YMAC as to the potential impact of the exclusion clause on the membership of the Widi Mob native title claim group was not before Barker J when he decided in *Martin No 2* that the conditions of s. 66B were satisfied in relation to the motion to replace the deceased applicant with a new applicant, and when His Honour further gave leave to amend schedule A to provide for the potential exclusion of persons who belong to overlapping claim groups.

In my view, the presence of this information significantly affects my consideration of the authorisation condition. I note my view that absent the fundamental problems posed by this exclusion of real persons who otherwise appear to be part of the Widi Mob native title claim group, I could likewise have been satisfied that the new applicant is authorised to make the application and to deal with matters arising in relation to it, as is discussed in *Martin No 2* at [15]–[64].

However, in light of the information that I have considered, I am not satisfied that the applicant is authorised to make the application and to deal with the matters arising in relation to it, because all of the information I have considered indicates to me that there has been an unacceptable contraction to the membership of the native title claim group who participated in the authorisation of a new applicant in April 2009. In other words:

- although the right people may have authorised (subject to the concerns I express below about an earlier contraction in the membership of the group when the application was amended in 2000);
- the application was then amended by insertion of the formula or exclusion clause in schedule A with the effect of excluding real people who had participated in the authorisation of the applicant.

To conclude, all of the information that I have considered is to the effect that there is a real risk that the application is not made on behalf, or does not include, 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'

***Applicant not authorised because the application omits persons previously identified as part of the native title claim group***

I have analysed the genealogical chart attached to the former applicant's affidavit dated 1 February 1999, with the amended applications filed on 4 March 1999 and 14 January 2000. The description of the named persons in schedule A of the 4 March 1999 amended application names the 32 persons identified in the genealogical chart, including the former applicant, her seven siblings and her twenty four cousins.

However, when the application was amended in January 2000, seven of the persons formerly named in the application had been removed from the description of the persons in the native title claim group, despite their apparent membership of the actual native title claim group. As I explain above it appears to be the case that the actual native title claim group is asserted to comprise all of the grandchildren of [name deleted] and [name deleted] and their descendants. The reasons for the exclusion of seven grandchildren and their descendants is not explained. I do note however that the excluded persons did not, when the application was amended in February

1999, provide a signed document or other statement that they authorised the former applicant to make the application.

The significance of this information is that it indicates a contraction in the membership of the native title claim group in 2000 to exclude a number of individuals who are otherwise part of the Widi Mob native title claim group. The excluded individuals are [name deleted] (the former applicant's brother), [names deleted] (the former applicant's cousins, being the children of [name deleted]) and [name deleted] (the former applicant's cousin and child of [name deleted] and [name deleted]). The removal of their names from schedule A of the application effectively resulted in the removal also of their descendants, despite the evidence in the former applicant's affidavit that the native title claim group comprised not only herself, her siblings and cousins, but their descendants as well, who are all in turn descended from [name deleted] and [name deleted].

In my view, there is a real risk that the native title claim group described in the application in January 2000 and before its amendment earlier this year did not include all the relevant persons entitled to participate in the application as part of the native title claim group. The authorisation of the new applicant to make the application and to deal with matters arising in relation to it was therefore, in my view, compromised even before the authorisation events earlier this year. I note that this information does not appear on the face of the application now being considered for registration and is thus not available to me under s. 190C(2).

***Conclusion***

It is my view that I must give the term 'native title claim group' in s. 190C(4)(b) the meaning found in s. 61(1):

> all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

As I discussed in my reasons at s. 190C(2), the case law clearly supports that there must be a 'coincidence' (cf *Harrington-Smith* at [1216]) between:

- the native title claim group defined in s. 61(1);
- the claim group defined in schedule A of the application; and
- all of the persons who authorised the making of the application

To conclude, I am not satisfied that the application meets the requirements of the authorisation condition in s. 190C(4)(b) because:

- two of the persons who jointly comprise the applicant (s. 61(2)(c)) are excluded from the native title claim group, due to operation of the formula in schedule A, such that I am not overall satisfied that the applicant is a member of the native title claim group;
- all of the information that I have considered is that the addition of the formulaic exclusion to schedule A has resulted in the real exclusion of a key element of the persons who participated in the authorisation of a new applicant in April 2009 (the Martin offspring), such that I am <u>not</u> satisfied that:
  - the application names or describes a 'native title claim group' as required by s. 61(1) and s. 61(4), as I explain in my reasons above at s. 190C(2);

- the application is brought on behalf of all the persons in the native title claim group, as defined in s. 61(1) or that it is brought on behalf of all the persons who authorised the applicant in April 2009;
- I am additionally concerned that the membership of the native title claim group suffered an unacceptable contraction when it was amended in 2000 to remove some of the grandchildren of [name deleted] and [name deleted], despite the weight of the applicant's information that the Widi Mob native title claim group includes all of those persons and their descendants.

# *190B Registration: conditions about merits of the claim*

## *Subparagraph 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.
>
> Sections 62(2)(a) and (b) provide that the application must contain:
> (a) information, whether by physical description or otherwise, that enables boundaries of:
> (iii) the area covered by the application; and
> (iv) any areas within those boundaries that are not covered by the application
> to be identified;
> (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i).

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

I note that the most recent amendment of the application has not seen any change in the area it covers or in the details required by ss. 62(2)(a) and (b).

The information and map required to be in the application because of ss. 62(2)(a) and (b) are found in schedules B and C, and in the respective attachments provided for those schedules. Attachment B contains a description of the external boundaries of the application area by reference to a series of geographic coordinates and also, in part, by reference to local government area boundaries and the high water mark, where it traverses the coast. The map in attachment C is an A3 size document. It shows the external boundary using a bold black outline, with the application area hatched within that boundary line. The map shows the Western Australian coastline, background cadastral and other tenure, the names of many towns and some key roads and watercourses. It has a legend (not that useful, noting that the map is a black and white copy), scale bar and north point. It references some geographic coordinates. It also contains notes relating to the source of some of the information depicted therein, currency and datum of the data used to prepare the map. Similar data is found in the attachment B list of geographic coordinates.

Starting firstly with the information required by s. 62(2)(a)(i), I can work out where the external boundary is on the earth's surface, having regard to the map in attachment C and when I read it in conjunction with the written description in attachment B. I note that the Geospatial report states the view of the relevant Tribunal geospatial specialist that the map and description are consistent and identify the application area with reasonable certainty.

For areas not covered by the application within the external boundaries referred to above (these are the areas referred to in s. 62(2)(a)(ii)), the applicant provides a generic description in schedule

B of the application. This description excludes areas covered by certain tenures where native title claims cannot be made, because of the Act (e.g. s. 23B of the Act), except where any extinguishment must be disregarded (e.g. because of the application of ss. 47, 47A or 47B of the Act). In my view, this written description of areas not covered is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For the reasons set out above, I am 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.

## *Subparagraph 190B(3): Identification of native title claim groups*

> 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 **does not satisfy** the condition of s. 190B(3).

***Which limb of s. 190B(3) applies***

The description of the native title claim group is in these terms:

> The claim is brought on behalf of [25 persons are then named] and their biological descendants.
> Provided that any person who is within the description contained in Section 190C(3) of the *Native Title Act 1993 (As Amended)* is excluded from those persons on whose behalf the claim is brought.

Schedule O offers the following explanation as to the operation of the second paragraph of the description in schedule A:

> The amended . . . description of the claim group (Schedule A) by which any person caught by Section 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this Schedule.

Although the description names some members of the native title claim group, others are not named, such that it is necessary to consider the application against the requirements in subparagraph 190B(3)(b).

***My consideration of the requirements of s. 190B(3)(b)***

The description provides, in my view, sufficient information to allow a factual inquiry to ascertain whether a person is in the group, as discussed in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64] (Carr J).

It can be seen from the information in schedule A and schedule O of the application that the claim group in the application is the 25 named persons and their biological descendants minus any such persons that would cause the Widi Mob application not to meet the condition specified in s. 190C(3). That this is how the description is intended to operate is fortified by the statement in schedule O to the effect that there are no members in common between the Widi Mob application

and any previous application due to the specific exclusion of any such person from the claim group, as described in schedule A.

I note *Doepel* at [51] that when considering the requirements of s. 190B(3), I am to look for a description that 'enables the reliable identification' of the persons in the native title claim group either by naming those persons or describing them with sufficient clarity—at [51].

Mansfield J also said in *Doepel* at [37] that:

> My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration.

***This matter distinguishable from Doepel***

Ordinarily it would not be appropriate therefore to consider the correctness of the description of the native title claim group. However, as I explain in my reasons at s. 190C(2) under s. 61(1) and s. 61(4), this is an exceptional case, distinguishable on the facts from those in *Doepel*. In *Doepel* there was nothing on the face of the application before Mansfield J to indicate that the native title claim group described in that application did not include all of the required persons, as defined by s. 61(1) (indeed a wider consideration of other material reinforced Mansfield's view that there was nothing to indicate that the description was incorrect). In the application before me, as explained above, it is clear on its face that certain members of the native title claim group, as defined in s. 61(1), have been omitted from the native title claim group identified in the application. This is due to the exclusion of any person who is included in the Widi Mob native title claim group, but who was also a member of the native title claim group for any previous overlapping application described in s. 190C(3).

I refer to the analysis that I undertook in my reasons above at s. 190C(2) in relation to s. 61(1) and s. 61(4). Information identifying the native title claim group is required to be <u>in</u> the application under s. 61(4), which relevantly provides:

> A native title determination application that ***persons in a native title claim group authorise the applicant to make*** must:
> (a) name the persons; or
> (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular persons is one of those persons. (*emphasis added)*

The requirements in subparagraph 61(4) are closely aligned with the preceding subparagraph 61(1), as to who is entitled to make a native title determination application, namely:

> (1) a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and

> interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Section 253 defines 'native title claim group' in relation to a native title determination application to mean the native title claim group mentioned in s. 61(1), namely, 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.' In my view the term 'native title claim group' is a term that is to be attributed a uniform meaning throughout the Act and where it appears in s. 190B(3), it is to be given the meaning attributed to it in s. 61(1) of the Act. I refer again to this comment by Lindgren J in *Harrington-Smith*:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4). [1216]

In my view the clearly stated contraction in the application to the membership of the 'native title claim group' so as to remove any impediment to registration posed by s. 190C(3) is not permitted by s. 61(1) and s. 61(4). It follows in my view that this fatally affects the merits of the identification of the native title claim group for the purposes of s. 190B(3). I note that this contraction of the native title claim group is not something that I have had to search for outside of the terms of the application; it is on the face of the application that I am alerted to the potential difficulties for this application under s. 61(1) and s. 61(4). [11]

Without a description of a 'native title claim group' as that term is defined in s. 61(1), there is nothing in my view to assess for the purposes of s. 190B(3). As I have stated, the application before me is clearly distinguishable from that in *Doepel*. Mansfield J expressly contrasted the description of the native title claim group in *Doepel* with the difficulties raised on 'the face of the application' he had considered earlier that year in *Edward Landers*.[12] As I remarked in my reasons above at s. 190C(2) in relation to s. 61(1), the facts of *Edward Landers* are strikingly similar to the express exclusion in the Widi Mob application of persons who pose an impediment to the registration of the application due to non-compliance with s. 190C(3).

***Decision in Martin No 2***

The applicant submits that I should follow the Court's ruling in *Martin (Dec) v State of Western Australia (No 2)* [2009] FCA 635 (Barker J) (*Martin No 2*) at [76]–[80], [93]–[102] and [103]–[112] in assessing the application against this merit condition. As I explain in my reasons above at s. 190C(2) in relation to s. 61(1), it would be erroneous for me to simply adopt, or not disagree with, the findings made in *Martin No 2*. In my view, the statutory scheme outlined in s. 190A in relation to considering applications for registration against the conditions in ss. 190B and 190C imposes a clear duty for me decide for myself whether this application should be accepted for registration.

If it is argued that these kinds of issues can only ultimately be resolved at the trial and should not concern me at this early stage or in the exercise of the administration function laid out in s. 190A, I respond again that I am constrained in this particular case because the contraction of the real

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[11] Although I do have a submission from the representative body (Yamatji Marlpa Aboriginal Corporation) dated 2 November 2009 as to members in common with overlapping applications, I do not consider it here, but where I am allowed to, namely in relation to the conditions in ss. 190C(3) and (4).

[12] *Doepel* at [36].

'native title claim group' appears on the very face of the information in the application that I must consider for the purposes of s. 190B(3). Likewise, I do not feel that I can follow or find probative the findings in *Martin No 2*. It seems to me that the reasons for judgment by His Honour Justice Barker do not indicate that the issue raised by the proposed amendment was put on the basis of the findings in *Landers* and *Harrington-Smith*.

***Conclusion***

To conclude, it is not possible for me to be satisfied as required by s. 190B(3) because it is clear on the face of the description in schedule A that it fails to include 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'

## *Subparagraph 190B(4): Identification of claimed native title*

> 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.
>
> Section 62(2)(d) provides that 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 **saitsfies** the condition of s. 190B(4).

My view is that for a description to meet the requirements of s. 190B(4), it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] to [92], [95], [98] to [101], [123].

The amended application provides a new description of the claimed native title rights and interests in schedule E.

Whereas previously the identified native title rights and interests were the rights to possess, occupy, use and enjoy against the whole world over the entire application area, the new schedule E claims this only over areas where it has not been extinguished or where the non-extinguishment principle in s. 238 apply.

Over areas where exclusive possession can not be recognised, the applicant now claims a series of 16 particular rights and interests relating to their use and enjoyment of and access to the application area, as enumerated in paragraph 2(a) to (p) of schedule E. The 16 listed rights include things like access, camping, erecting shelters, living on, moving about, holding meetings, hunting, fishing, conducting ceremonies, participating in cultural activities and controlling access by other Aboriginal people under traditional law and custom.

A number of qualifications are provided at the end of schedule E to show that the applicant does not claim rights and interests prohibited by law (e.g. ownership of Crown minerals, petroleum or gas, or exclusive possession over areas covered by previous non-exclusive possession acts, as defined in the Act).

In my view the description of the claimed rights and interests in the application is clear and understandable. I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

## *Subparagraph 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 **does not satisfy** the condition of s. 190B(5) for the reasons that follow.

***My approach to this condition***

I propose to firstly consider whether the factual basis provided in the application and in additional information separately to the Registrar supports the assertions set out in s. 190B(5) in relation to the Widi Mob native title claim group, unaffected by the exclusion of some of its members that appears on the face of the application. I believe that this is warranted in this matter because of my view that in *any event* the factual basis is not sufficient to support the assertions in s. 190B(5).

***What I may consider in relation to this condition***

In deciding whether the requirements of s. 190B(5) are met, I am not limited to a consideration of the information in the application. *Doepel* at [16]: 'Sections 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose may go beyond the information in the application.' This was also discussed in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (French, Moore and Lindgren JJ) (*Gudjala Full Court*) at [90]. The Full Court went on to say at [92] that a general description of the factual basis under s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality' could, when read with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar in relation to the corresponding merit condition in s. 190B(5).

***General description of the factual basis in the application***

Schedule F of the application (the place that calls for a general description of the factual basis required by s. 62(2)(e)) is in these terms:

> Association of the Widi Mob with the Application Area
> Members of the Claim Group have and do engage in one or more of the activities described in Schedule E Clause 2 (a) to (n) (the activities) with the result that the Widi Mob as a group engage in all the activities mentioned from time to time in the application area.

> The present members of the claim group have been told of their obligations and responsibilities in relation to the activities and their country (the application area) by persons recognized by Widi laws and customs as elders or as having special knowledge. This includes persons who are of the previous generation and the generation before that. These persons have themselves claimed to be instructed in these matters by previous generations.
>
> The presence of persons recognized as Widi Mob in the general area of the Application Area is recorded in records and accounts since early contact with white people.
>
> The Traditional Laws and Customs that give rise to the Claimed Native Title
> The Widi Mob is defined as a traditional group by the laws and customs by which a person is recognized as Widi. Those laws and customs have been passed down from previous generations extending to before white settlement.
>
> The recognition carries the expectation, by others in the group, that the person so recognised will observe Widi laws and customs. It also carries with it the entitlement to be treated by others as Widi. There is a mutual recognition of each other as Widi.
>
> The Application area is the area over which before white contact Widi Mob as a group asserted the right, in accordance with their laws and customs, to exclusive use of the land and its resources.
>
> Before white contact that use included everything used in traditional life. Some uses such as cutting and making spears and making stone tools have not survived. The following activities are traditional uses that have survived and have been passed from generation to generation.

What then follows in schedule F is a list of 16 activities, essentially mirroring the 16 non-exclusive rights identified in schedule E of the application. I note that schedules G and M to some extent simply repeat the schedule F assertions, including by listing the 16 activities and incidences of asserted traditional physical connection.

In my view the information in the application does not rise above 'assertions at a high level of generality', nor is it in 'sufficient detail to enable a genuine assessment of the application' against this condition of the registration test.

***Additional information in relation to the factual basis***

The former applicant has previously provided additional information to the Registrar in the form of affidavits, a genealogical chart, statements and some information as to the basis for the Widi Mob being the right people for the area, when this application underwent the registration test in 1999 and 2000 and also in 2004 when it sought a preliminary assessment of a proposed amendment of the application. Most recently I have been provided with an affidavit by Irwin Tasman Lewis dated 7 December 2009. I have considered all of this information, as discussed in s. 190A(3)(a). (I have provided a list of these documents at the commencement of this statement of reasons). I have also considered an affidavit by the former applicant provided to the Tribunal in 1998 in relation to future act proceedings. For the reasons that follow, I am of the view that the information available does not assist in providing a sufficient factual basis for the assertion that the claimed native title rights and interests exist, nor for the particular assertions in subparagraphs 190B(5)(a) to (c).

***General discussion of the task at 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 approved in *Gudjala Full Court* at [83]–[85].

As noted above there are comments at [92] in *Gudjala Full Court* 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'. 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] 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 Full Court*, 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 additional information 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).

In *Gudjala Full Court* at [68] to [72] and [77], the Full Court considered the analysis in *Gudjala first instance* of the elements a sufficient factual basis must address in order to answer the criteria found in s. 190B(5). There is nothing in the reasons to indicate that the Full Court considered the primary judge to have erred. It is therefore my view that in assessing whether the asserted facts are sufficient to support the assertions in s. 190B(5)(a) to (c), I must consider how those propositions interact with the definition in s. 223 of the expression 'native title rights and interests' and the related case law.

I note *Doepel* states at [132] that the Registrar in that case did not err by focussing primarily on the particular assertions in subparagraphs s. 190B(5)(a) to (c); if the factual basis does not support any of the particular assertions, then the general requirement would not be met. It is appropriate therefore that I consider the factual basis provided by the applicant against each of the particular assertions in subparagraphs 190B(5)(a) to (c) as I now discuss:

***s. 190B(5)(a): That the native title claim group have, and the predecessors of those persons had, an association with the area***

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

The information in schedule F in relation to this particular assertion is generic and vague. I do have other material to consider, including that provided by the former applicant and the applicant's affidavit dated 24 August 1998 and a recent affidavit by one of the new applicant persons (Irwin Tasman Lewis). This material does contain information describing the association of individuals who claim a Widi Mob identity in relation to some parts of the application area. The affidavit by [name deleted] at [5] to [11] goes some way to addressing the deficiencies identified in the previous registration test decisions, also discussed in *Martin v Native Title Registrar* [2001] FCA 16 (French J) at [23] in relation to this particular assertion, that the applicant's factual basis materials did not reveal an association with members of the claim group and 'all of the area under claim.'

However it is my view that overall, the applicant does not sufficiently describe the association of the group's predecessors with the application area as a whole. It remains the case that the only information provided by the applicant about their predecessors discusses their mother being born on the banks of the Irwin River near Gutha[13] and their grandparents, [names and birth dates deleted] [14] having an association with some limited parts of the application area, but not the application area as a whole.

I understand from comments by Dowsett J in *Gudjala* that a sufficient factual basis for this assertion 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 to refer to the assertion that there is a cohesive community of people who observe 'traditional'[15] law and custom and who are associated with the application area over the period since sovereignty.

Ultimately, the factual basis materials do not address these issues and speak only to the associations of some past and present individuals with some parts of the application area.

***s. 190B(5)(b): That there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests***

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

The language of the assertion in subparagraph s. 190B(5)(b) nearly mirrors that found in s. 223(1)(a). In my view, the factual basis must be sufficient to support an assertion that the claimed

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[13] paragraph 1, affidavit by former applicant, 24 August 1998

[14] this information is from the genealogical chart annexed at 'C' to the former applicant's affidavit dated 1 February 1999.

[15] 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*).

native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' highlights that its meaning in s. 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 first instance* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) 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 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'—*Gudjala Full Court* at [96].

The following is a brief synopsis of the case law which has developed around the requirement in s. 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.
- It is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs.
- 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. [16]

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 the requirement 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 in *Gudjala first instance* that the factual basis materials for this assertion must address:

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[16] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. 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*.

- 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—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—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—at [66] and [81].

This aspect of Dowsett J's decision was not criticised by the Full Court—see *Gudjala Full Court* [71]–[72] and [96]. In this latter passage the Full Court said that one question that must be addressed is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'

I have considered the schedule F description and the additional information provided by the applicant, including the affidavits by the former applicant and the more recent affidavit by Irwin Lewis. However it is my view that these materials ultimately fail to provide a sufficient factual basis for this particular assertion. Although there is some information in the affidavits by the former applicant and the current applicant describing their ancestral links with parts of the area under claim and their life-long attachment to and conduct of activities of a traditional nature in that area, I am of the view that none of this material ultimately describes how these things are asserted to be currently rooted in a society of people living according to a system of identifiable laws and customs, having a normative content, being a society that operated in relation to the application area at the time of European settlement.

***s. 190B(5)(c): That the native title claim group have continued to hold the native title in accordance with those traditional laws and customs***

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

I take the view that the assertion in subparagraph s. 190B(5)(c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta* and Full Court cases since, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging 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 first instance* 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 appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area—*Gudjala Full Court* at [96].

In my view, the applicant's factual basis materials are ultimately lacking for this particular assertion for the reasons outlined in relation to the assertion in subparagraph 190B(5)(b). I am also of the view in relation to this particular assertion that there is not enough material that identifies how the ancestral links and traditional activities described in the affidavits of the former applicant and the current applicant are derived from a society of people living according to a system of identifiable laws and customs, having a normative content, being a society that operated in relation to the application area at the time of European settlement.

***Effect of the exclusion clause on the factual basis***

It is my view that an additional problem is created by the exclusion clause in schedule A of the amended application for all of the assertions in s. 190B(5). To explain, I note the following comments by Dowsett J in *Gudjala first instance*:

> Subsection 190B(5) of the Act refers to the factual basis upon which it is asserted that the claimed Native Title rights and interests exist. This is clearly a reference to the existence of rights vested in *the claim group*. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, *it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)*—at [39] (*emphasis added).*
>
> The Delegate experienced difficulty in addressing this question, given his lack of satisfaction as to the adequacy of the description of the claim group. My view of the identity of the claim group relieves me of part of that difficulty. However the absence of any description of the basis upon which the apical ancestors were selected re-emerges in considering this aspect of the case. *There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land*—at [40] (*emphasis added).*
>
> In some cases it will be convenient to describe the claim group by referring to particular people, either by name or, as in this case, by reference to apical ancestors. In other cases, it may be done by describing the relevant requirements of law and custom which must be satisfied in order that a particular person share in the claimed rights and interests. Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. *The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship.* The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim group for the purposes of subs 190B(3), but *that step had to be undertaken for the purposes of subs 190B(5)*—at [41] (*emphasis added).*

This analysis of what the factual basis materials must support was not criticised by in *Gudjala Full Court*—see [68] and also at [90]–[96].

Following the two *Gudjala* decisions, I am of the view that the applicant's factual basis must identify the relationship between its asserted native title claim group, the area covered by the application and the claimed native title rights and interests.

As I have noted in my reasons above, the native title claim group is described in schedule A as 25 named persons and their biological descendants and excludes any such person who 'is within the description contained in section 190C(3)'. The significance of such an 'exclusion clause', which the applicant clearly explains in schedule O seeks to regulate membership of the native title claim group so as to ensure compliance with the registration test condition in s. 190C(3), is that it behoves the applicant to explain how such an exclusion clause operates under the traditional laws and customs of an Indigenous society which existed in the application area at sovereignty and with a continuous vitality since that time (or at least since European settlement of the application area, cf. *Gudjala Full Court* at [96]).

The exclusion clause in schedule A is one of a number of amendments to the application allowed by Barker J in *Martin No 2*. The applicant does not explain how such an exclusion clause operates under the traditional laws and customs of an Indigenous society with a continuous vitality since sovereignty, or at least since European settlement of the region in which the application area is located.

That such an explanation is necessary to support to the applicant's assertion that the Widi Mob native title claim group, as described in schedule A of the application, are the rightful holders of the claimed native title, is illustrated by what happened to a number of claims ultimately dismissed by Lindgren J in *Harrington–Smith*. A significant factor that led to the dismissal of these claims was the Court's view that the various claim groups were designed so as not to offend the registration test condition in s. 190C(3) and to facilitate registration, and were not referable to the operation of the traditional laws and customs of a relevant pre-sovereignty Indigenous society.

At [280] to [281], Lindgren J is critical of applicants who 'redefined' their claim group by amending it to 'exclude problematical ... members', including people who were otherwise members of the claim group but were excluded simply to pass s. 190C. He returned to this throughout his decision. I refer to the following passages to illustrate the problems that the exclusion clause, on its face, poses for the asserted factual basis in this application:

> [2475] Again, the artificiality of the distinction between the Claim groups is indicated. Subsection 190C(3) of the NTA and the very fact of propounding different group claims make it desirable to avoid membership of multiple groups, yet the creation of the Claim groups by the process of aggregation, coupled with the existence of overlaps, makes multiple memberships virtually inevitable, unless there is a power not to admit to membership exercisable by reference to NTA considerations.
>
> [1220] I have reached the conclusion that the exclusion poses for the Wongatha Claim (and the Cosmo Claim) the problem or problems that confronted the Dieri Mitha and Edward Landers applications.
>
> [1221] There are really two problems or two aspects of the one problem: first, as a result of the exclusion, the application is no longer being made on behalf of, supposedly, all the holders of the particular native title claimed; second, the amended application on behalf of the reduced group that is now being pursued was not authorised by either the original group or the reduced group.

> [1222] As to the first point, the foreshadowed Wongatha native title claim group, that is, the foreshadowed actual holders of the particular native title claimed, are the Wongatha People. For example, the GLSC submissions state:
>
> > put simply, the Wongatha people as described in the application are those persons of the WDCB (being the society from which the laws and customs are derived) who pursuant to those laws and customs, have rights and interests in the land and waters covered by the application.'
>
> The Wongatha applicants similarly refer to the holders of the group rights and interests as 'the Wongatha people'. The persons excluded on 1 November 1999 were not excluded because it was appreciated that they were not a part of the Wongatha People after all, and had previously been included as part of the Wongatha People by mistake.
>
> [1223] I do not see any basis on which the Court could make a determination in favour of a group that did not include those members of the Wongatha People who were excluded in the Wongatha Form 1 filed on 1 November 1999. As Mansfield J held in both Dieri People and Edward Landers, s 61 permits a native title determination application to propose only a determination in favour of all the members of the native title claim group. By reason of the exclusion, the Wongatha Claim does not meet the requirements of ss 61(1) and (4).
>
> [2406] It may be that the Koara claimants could show that the aggregation of their claimed connections and areas represents a closer connection to Wongatha/Koara overlap than does an aggregation of the claimed connections and areas of the claimants constituting other Claim groups before the Court. That is to say, it is possible that if one were given the task of forming claim groups and claim areas, there may be reason to create one looking something like the Koara Claim group for the purposes of making a claim in respect of an area looking something like the Koara Claim area, and the Wongatha/Koara overlap in particular. (A similar observation applies, mutatis mutandis, to the Wutha Claim.)
>
> [2407] This, however, is not a process permitted by the NTA. The traditional rights and interests, in the present case traditional group rights and interests, for the recognition of which the NTA provides, must exist prior to and independently of the NTA and processes associated with it, and, indeed, must be pre-sovereignty ones.

I have considered the view expressed by Barker J in *Martin No 2* at [99] that the references in the proposed amended application to the 'Widi Mob' are to be read as 'merely a reference to the claim group and not to any wider group.' His Honour went on to say, 'the expression "Widi Mob" is therefore simply a convenient way in which the claim group refers to itself and itself alone'—at [99]. In His Honour's view, by amending the application in the way proposed, the applicants 'do not purport to be a subgroup of some larger group, and the material before the Court does not suggest they are'—at [99].

I think that the task I have under s. 190B(5) is different to that before His Honour and it would be erroneous for me to adopt these comments as satisfying me that the particular requirements imposed on the applicant by this registration test condition are thereby met. It is to be noted that His Honour's decision was not concerned with whether the application contained a sufficient factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions in either of s. 62(2)(e)(i) to (iii) or s. 190B(5)(a) to (c). Further it does not

appear from His Honour's reasons that the issue was put to him on the basis of the findings in *Harrington-Smith*.

I also have before me information from the YMAC dated 2 November 2009 that was not apparently before Barker J in *Martin No 2*. The YMAC information is to the effect that anthropological research undertaken by or under instruction from YMAC reveals that current members of the Widi Mob native title claim group also have genealogical connections or ancestral links with the overlapping the Amangu and Badamia native title claim groups, such that I can not be satisfied that there are no common members under s. 190C(3). Of these two overlapping applications only the Badamia application satisfies all three criteria in s. 190C(3)(a) to (c),[17] such that the exclusion clause in schedule A thereby operates to exclude any person identified in schedule A of the Widi Mob application, who was a member of the previous Badamia aplication.

On the submission of the YMAC identifying that the former applicant was married to a Badamia man, whose children are in the Badamia native title claim group, it would appear that this may result in the exclusion of a key element of the current native title claim group, namely the children and other biological descendants of the former applicant, including two of the new applicant persons.

The information from the YMAC, in my view, simply reinforces that not enough has been done by the applicant to show how this exclusion clause operates under the traditional laws and customs of a pre-sovereignty Indigenous society with a continuous vitality since that time in relation to the area covered by the application.

In fact, the affidavits, including that provided most recently by Irwin Tasman Lewis dated 7 December 2009, is to the effect that the Widi Mob are <u>all</u> of the grandchildren of [name deleted] and [name deleted], and ther descendants.

***Effect of non-compliance with s. 190C(2) in relation to s. 61(1) and s. 61(4)***

I turn finally to the issues discussed in my reasons under s. 190C(2) in relation to s. 61(1) and s. 61(4). In my view the applicant's factual basis for the assertions in s. 190B(5) must ultimately fail in any event because the description in the application does not comply with either s. 61(1) or s. 61(4) due to the express exclusion of persons who are otherwise part of the real native title claim group, as that term is defined in s. 61(1). The assertions in s. 190B(5) require a factual basis that the 'native title claim group' observe traditional laws and customs that give rise to the claimed native title and that the 'native title claim group' have continued to hold the native title in accordance with those traditional laws and customs. As I have discussed, the term 'native title claim group' is to be given a consistent interpretation wherever it is used in the Act.

It follows in my view that the application must fail the factual basis condition in any event, because it is clear on the face of the description in schedule A that it fails to include 'all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'

[17] This is explained in my reasons at s. 190C(3).

## *Subparagraph 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 **does not satisfy** the condition of s. 190B(6).

***Nature of the task at 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].

I therefore reject the submission by the applicant's legal representative dated 2 December 2009 that a prima facie case restricts me to taking the asserted case at face value and to ignore competing evidence. In any event, as I have explained, the problems with the application appear on the face of the application.

***My consideration of this condition***

In the absence of a sufficient factual basis being provided by the applicant to support the assertion that there exist traditional laws and custom observed by the native title claim group giving rise to the claimed native title rights and interests, I think it must follow that I cannot be satisfied that the claimed native title rights and interests can be prima facie established. That an application which does not satisfy the merit condition at s. 190B(5) must then fail the condition at s. 190B(6) is supported by the decision in *Gudjala first instance* at [87], an aspect of the decision which was not overturned on appeal by the Full Court.

In my view there is an additional problem revealed in the material before me in relation to some of the claimed native title rights and interests. The description of the claimed native title rights and interests from schedule E paragraph 1 reveals a claim to the exclusive native title to possess, occupy, use and enjoy the application area as against the whole world over those areas where it has not been extinguished. (I shall refer to this as the 'exclusive right'.) Over other areas, schedule E paragraph 2(a) to (p) lists a bundle of rights and interests related to access and use and enjoyment of the application area and its resources, including the final right in 2(p) to control access to and use of the application area by indigenous persons who seek access or use in accordance with traditional laws and customs. (I shall refer to this the "controlling right').

It seems to me, for the reasons I have provided in relation to s. 190B(5), that these rights and interests are particularly vulnerable under this section. This is because none of the material in schedule F or elsewhere in the application or in the other additional information before me,

explains how such an exclusive or controlling right is derived in the traditional laws and customs of a pre-sovereignty Indigenous society in relation to the application area.

In this regard, I refer to the Full Court decision in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) which 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*. . . — at [71]. (*emphasis added*)

The Full Court in *Griffiths* indicates at [127] that what is required to prove the exclusive right and the controlling right 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 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*)

For the reasons set out in s. 190B(5), I am of the view that a particular weakness in the applicant's prima facie case at s. 190B(6), is the failure to adequately describe how the claimed exclusive right and the controlling right are possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group, being those laws and customs derived from a pre–sovereignty society and with a continued vitality since then. It may be that the remaining rights at 2(a) to (o) are similarly vulnerable.

## *Subparagraph 190B(7): 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 **does not satisfy** the condition of s. 190B(7).

***What is required for this condition?***

Dowsett J indicated in *Gudjala first instance* that to satisfy this condition there must be material to satisfy the decision maker that:

> the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in *Yorta Yorta*—at [89].

Dowsett J indicated that an application which fails to satisfy the requirements for a sufficient factual basis case will likewise fail this condition due to the requirement for material showing a '*traditional* physical connection.' I therefore consider that 'traditional physical connection' means a physical connection in accordance with the particular traditional laws and customs relevant to the native title claim group, with 'traditional' having the meaning discussed in *Yorta Yorta*.

***My consideration***

Although the former applicant and one of the current applicant persons have provided affidavits describing their life-long attachment to and practice of traditional activities in parts of the application area, it seems that the application can not satisfy this merit condition in the absence of a sufficient factual basis for the assertions around the existence of ***traditional*** laws and customs giving rise the claim to hold native title in the application area. I am not satisfied that the material I have reviewed shows that any member of the group currently has or previously had a traditional physical connection.

***Non-compliance with s. 190C(2) in relation to s. 61(1) and s. 61(4)***

In any event, I cannot be satisfied that the application satisfies this condition in the absence of a 'native title claim group' as that term is defined in s. 61(1).

The consequences for the application not containing a description of the real native title claim group (as explained in my reasons above) must result in the application not satisfying this condition also, requiring as it does, that a member of the 'native title claim group' have the requisite connection. As I have discussed, this term is to be given a consistent interpretation throughout the Act, with reference to the definition in s. 61(1).

## *Subparagraph 190B(8): No failure to comply with s. 61A*

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If :
> (a) a previous exclusive possession act (see s. 23B) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

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

(3) If:

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

(b) either:

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

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

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

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

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

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

The application **satisfies** the condition of s. 190B(8) for the reasons that follow.

***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 application **does not** offend the provisions of s. 61A(1). A search of the application area against the National Native Title Register reveals that no part of it is covered by an approved determination of native title.

***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 application **does not** offend the provisions of s. 61A(2). Schedule B clearly excludes from the area covered by the application any areas covered by a previous exclusive possession act, except in the circumstances described in s. 61A(4) (i.e. where ss. 47, 47A or 47B may apply).

***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). The qualifications to the claimed native title rights and interests at the end of schedule E clearly identify that the application does not claim exclusive native title over areas covered by a previous non-exclusive possession act, except in the circumstances described in s. 61A(4) (i.e. where ss. 47, 47A or 47B may apply).

## *Subparagraph 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.

***190B(9)(a)***

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

The application does not claim ownership of crown minerals, petroleum or gas—see statements to this effect in schedules E and Q.

***190B(9)(b)***

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

The application does not extend below the high water mark where it abuts the coast and thus does not extend to offshore places.

***190B(9)(c)***

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

There is nothing in the application or other material I have considered to indicate that the native title rights and interests claimed have otherwise been extinguished.

# Attachment A
# Summary of registration test result

| | |
|---|---|
| **Application name** | **Widi Mob** |
| **NNTT file no.** | **WC97/72** |
| **Federal Court of Australia file no.** | **WAD6193/98** |
| **Date of registration test decision** | **16 December 2009** |

**Section 190C conditions**

| Test condition | Subcondition/requirement | Result |
|---|---|---|
| **s. 190C(2)** | | **Not met** |
| **s. 190C(3)** | | **met** |
| **s. 190C(4)** | | **Overall result:**<br>**Not met** |
| | **s. 190C(4)(a)** | **Not met** |
| | **s. 190C(4)(b)** | **Not met** |

**Section 190B conditions**

| Test condition | Subcondition/requirement | Result |
|---|---|---|
| **s. 190B(2)** | | **met** |
| **s. 190B(3)** | | **Overall result:**<br>**Not met** |
| | **s. 190B(3)(a)** | **N/A** |
| | **s. 190B(3)(b)** | **Not met** |
| **s. 190B(4)** | | **Met** |
| **s. 190B(5)** | | **Aggregate result:**<br>**Not met** |

| Test condition | Subcondition/requirement | Result |
|---|---|---|
| | **re s. 190B(5)(a)** | **Not met** |
| | **re s. 190B(5)(b)** | **Not met** |
| | **re s. 190B(5)(c)** | **Not met** |
| **s. 190B(6)** | | **Not met** |
| **s. 190B(7)(a) or (b)** | | **Not met** |
| **s. 190B(8)** | | **Aggregate result:**<br>**Met** |
| | **re s. 61A(1)** | **Met** |
| | **re ss. 61A(2) and (4)** | **Met** |
| | **re ss. 61A(3) and (4)** | **Met** |
| **s. 190B(9)** | | **Aggregate result:**<br>**Met** |
| | **re s. 190B(9)(a)** | **Met** |
| | **re s. 190B(9)(b)** | **Met** |
| | **re s. 190B(9)(c)** | **Met** |

[End of document}