National Native Title Tribunal

Registration test decision

Application name	Mantjintjarra Ngalia #2
Name of applicant	Phyllis Thomas, Dolly Walker, Kado Muir, Vanessa Thomas, Nancy Gordon and Kalman Murphy
State/territory/region	Goldfields Region of Western Australia
NNTT file no.	WC06/6
Federal Court of Australia file no.	WAD372/2006
Date application made	21 December 2006
Date application last amended	16 December 2008

Name of delegate Lisa Jowett

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

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

For the purposes of s. 190D, my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 31 March 2009

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Lisa Jowett

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

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

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept the claimant application WC06/6—Mantjintjarra Ngalia #2—WAD372/06 for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to the claims made in all claimant applications given to her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under subsections 190A(1A) and 190A(6A).

I note that the application in this particular instance was caught by the transitional provisions of the *Native Title Amendment Act 2007* (Cwlth) which commenced operation on 15 April 2007 (see item 89).

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth), as in force prior to 1 September 2007. Please refer to the Act for the exact wording of each condition.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

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

A summary of the result for each condition is provided at Attachment A.

Application overview

The making of native title determination applications by the Mantjintjarra Ngalia people has a long history, not all of the detail of which appears in this summary—only that which is relevant to my consideration of the Mantjintjarra Ngalia #2 application before me.

The first Mantjintjarra Ngalia application, Mantjintjarra Ngalia Peoples (WC96/20), was lodged with the Tribunal in 1996.

In later years it was included, to the extent (and because) of its overlap with the Wongatha application (WAD6005/98), in the proceedings in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*).

A second Mantjintjarra Ngalia claim was authorised in August 2006. The current Mantjintjarra Ngalia People #2 native title determination application (WC06/6) was filed in the Court on 21 December 2006.

On 5 February 2007 the decision of the Court in *Wongatha* dismissed the original Mantjintjarra Ngalia application (WC96/20) to the extent of its overlap with any of the land or waters of the Wongatha application. This Mantjintjarra Ngalia application was later amended on 6 February 2008, the area reduced and its eastern boundary being contiguous to the south-western boundary of the Mantjintjarra Ngalia #2 (WC06/6) application area.

The Mantjintjarra Ngalia #2 application was not accepted for registration when the test was first applied to it on 20 April 2007. The applicant sought judicial review of the Registrar's decision in the Court and on 3 December 2007, the Court ordered that the decision of the Registrar be quashed and set aside. In January 2008 the Tribunal wrote to the applicant to advise that the application would have the registration test re-applied and that in accordance with the transitional provisions to the *Native Title Amendment Act 2007*, further information to support the application could be provided. It was also pointed out that if major changes were to be made, the application must be amended.

During 2008, a number of informal and formal requests for extensions of time to the application of the registration test were made by the representative for the applicant, the Goldfields Land and Sea Council (GLSC). The requests were made on the basis that the GLSC wanted to consult with the applicant to obtain further instructions and documentation in relation to the application.

A final request for an extension of time was granted to 8 December 2008 to allow for the application to be amended and re-filed in the Court. The GLSC filed an amended application in the Court on 4 December 2008 and leave to amend was granted on 16 December 2008. This is the application I have before me to which I apply the conditions of the registration test under s.190A.

Additional information was provided direct to the Registrar by the GLSC on behalf of the applicant on two occasions—19 December 2008 and 27 January 2009. This information was provided to the State of Western Australia in accordance with procedural fairness considerations—refer to the section below on page 6.

Information considered when making the decision

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

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

However, the application has in this instance been caught by item 89 of the transitional provisions of the *Native Title Amendment Act 2007* which provides that I must also abide by item 89(4). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*.

Attachment C of these reasons lists all of the information and documents that I have considered in reaching my decision.

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

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

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

Western Australia v Native Title Registrar (1999) 95 FCR 93 (*Western Australia v Registrar*) is authority that during the course of making a registration test decision, the Registrar may be required to accord the State with procedural fairness. In this instance, the State of Western Australia is a person entitled to procedural fairness.

I note that the State of Western Australia has a copy of the application as originally filed 21 December 2006, including the amended application filed in the Court on 4 December 2008, as it is a party to the proceedings. On 19 December 2008 and 27 January 2009, the GLSC provided directly to the Registrar additional information to which the applicant wished me to have regard. This information is listed in detail at items 7 and 8 of Attachment B to these reasons.

In line with *Western Australia v Registrar*, on 16 February 2009 the State of Western Australia was forwarded the additional information provided to the Registrar by the applicant on 19 December 2008 and 27 January 2009 and offered an opportunity to comment before my decision. The State agreed to and signed on 17 February 2009 a confidentiality undertaking in relation to the additional material. Any comment from the State with regard to this information was required by 25 February 2009. I received no comment from the State.

There is one registered native title claim that partly overlaps the Mantjintjarra Ngalia #2 application area, that is WC99/10—Wutha—WAD6064/98. However, in line with *Hazelbane v Doepel* [2008] FCA 290 at [25]–[28], it is my view that I am not required to afford procedural fairness to the applicant for this claim.

Procedural and other conditions: s. 190C

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

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

Delegate's comment

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

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

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

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

Native title claim group: s. 61(1)

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

Result and reasons

The application **meets** the requirement under s. 61(1).

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact

a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I should not accept the claim for registration—*Doepel* at [36].

In forming a view on this, I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

The description of the persons in the native title claim group is set out in Schedule A of the application (set out in full below under s. 190B(3)) and, in summary, describes the Mantjintjarra Ngalia native title claim group as all the descendants of four singly named persons and from the union of nine couples. The description of the group also includes those persons who are adopted by any of the ancestors or by a member of the native claim group in accordance with traditional Mantjintjarra Ngalia law and custom.

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a sub group of the native title claim group.

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

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

Result and reasons

The application **meets** the requirement under s. 61(3).

The name and address for service of the applicant's representative is found on page 19 of the application.

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

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

Result and reasons

The application **meets** the requirement under s. 61(4).

The application at Schedule A does not name the persons in the native title claim group but contains a description of the persons in the group.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and

(ii) the applicant believes that none of the area covered by the application is also covered by an 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).

Result and reasons

The application **meets** the requirement under s. 62(1)(a).

The application is accompanied by affidavits from each of the six persons who comprise the applicant. The affidavits are signed by each deponent, appear to be competently witnessed and make the statements required by this section.

Though not a requirement of applications made before the *NTA Technical Amendments Act* 2007, each of the affidavits comply with subsection 62(1)(a)(v) of that Amendments Act which requires that details be set out of the decision–making process complied with in authorising the applicant. Paragraphs 5 to 7 of each affidavit contain details of the traditional decision-making process of the Mantjintjarra Ngalia people that must be used by members of the claim group to authorise the applicant.

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

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

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below.

Result

The application **meets** the requirement under s. 62(1)(b).

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(a).

Schedule B of the application refers to Attachments B1 and B2.

Attachment B1 describes the external boundaries of the application area by the use of coordinates within a geographical description. Information about the areas within the external boundary which are not covered by the application area is provided at Attachment B2 at paragraphs 1 through to 5.

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(b).

Schedule C of the application refers to an Attachment C which is a map that shows the external boundaries of the application area.

Searches: s. 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.

Result and reasons

The application **meets** the requirement under s. 62(2)(c).

Schedule D states that a search to determine any non-native title rights and interests has been conducted by the National Native Title Tribunal on behalf of the applicants and refers to the results as set out at Attachment D. Attachment D is a search of non-freehold land tenure conducted by the Tribunal's Geospatial Services and includes the pastoral leases, general leases, reserves and unallocated crown land that fall within the external boundary of the application area.

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(d).

Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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

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

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

Result and reasons

The application **meets** the requirements under s. 62(2)(e).

Schedule F contains information going to the factual basis on which it is asserted that the native title rights and interests claimed exist, and also for the particular assertions in the section. Further information in relation to the factual basis is contained in Attachments F.1, F.2, F.3 and F.4 and also in Schedule G.

Activities: s. 62(2)(f)

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

Result and reasons

The application **meets** the requirement under s. 62(2)(f).

Schedule G contains details of activities carried out by the native title claim group in the application area. Further details of activities are provided in the attachments to Schedule F.

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(g).

Schedule H contains the details of one other application seeking determination of native title made in relation to some or all of the Mantjintjarra Ngalia #2 application area: WC99/10—Wutha—(WAD6064/98).

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(h).

Schedule I refers to Attachment I which provides geospatial data held by the Tribunal and lists notices given under s. 29 between 1995 and 2008 which fall within the external boundary of the application as at 17 November 2008.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the subrequirements of ss. 62(2)(a) to (h) as set out above.

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

Result and reasons

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' on the Register.

For the purposes of subsection (b), the current application, being Mantjintjarra Ngalia #2, was 'made' when it was filed in the Court on 21 December 2006—see *Strickland FC*—at [44] to [45]. Therefore, any overlapping application would need to have been on the Register on this date for it to become necessary to consider whether there are any common members.

A search of the current application area against the Register reveals an overlapping application was on the Register when this current amended application was made—that is WC99/10—Wutha—WAD6064/98. The Tribunal's geospatial report confirms that this previous application falls within the external boundary of the current Mantjintjarra Ngalia #2 application.

The Wutha application (the previous application) was accepted for registration as a result of consideration under s. 190A on 15 June 1999.

For the purposes of subsection 190C(3)(c), it is the case that for this previous application, its entry onto the Register was made, or not removed, as a result of consideration under s. 190A. Consequently, the Wutha application meets all of the conditions of subsections (a), (b) and (c). I

therefore need to be satisfied that there are no common claim group members between this previous application and the current application, the Mantjintjarra Ngalia #2 application, in order for the current application to meet this condition.

The description at Schedule A of the Mantjintjarra Ngalia #2 application contains (amongst other things) a definition of the claim group as those descendents of four apical ancestors and the descendants of nine unions. None of these names appear in the description of the persons claiming to hold native title in the Wutha application.

Additionally, in my consideration of all the material pertaining to the Mantjintjarra Ngalia #2 application, I have not found reference to any of the ancestors named in the Wutha application. I am therefore satisfied that there are no common members between the Wutha and Mantjintjarra Ngalia #2 native title claim groups.

Section 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied either that:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s. 190C(5), if the application has not been certified, the application must:
> (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
> (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result and reasons

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am **satisfied** that the circumstances set out in s. 190C(4)(b) are met, including that the condition s. 190C(5) is met.

As the application is not certified pursuant to s. 190C(4)(a), it is necessary to consider if the application meets the condition in s. 190C(4)(b) – that is, that the applicant is a member of the native title claim group and authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

Additionally, in my consideration of the authorisation condition at s. 190C(4)(b) I must also consider the requirements as set out in s. 190C(5):

> If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:
> a) includes a statement to the effect that the requirement set out in paragraph 4(b) has been met; and

b) briefly sets out the grounds on which the Registrar should consider that it has been met.

In *Doepel*, Mansfield J discusses the interaction between s. 190C(4)(b) and s. 190C(5) and how the Registrar is to be satisfied as to these conditions of the registration test:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). 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—at [78].

Finally, a note to s. 190C(4) directs the Registrar to s. 251B of the Act, for the meaning of the word authorise:

> **251B Authorising the making of applications**
> For the purposes of this Act, all the persons in a native title claim group or compensation claim group authorise a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
>
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind--the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
>
> (b) where there is no such process--the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Information considered

In my consideration of the authorisation of the applicant to make this application and to deal with matters arising in relation to it I have had regard to the following material:

The Mantjintjarra Ngalia #2 application including—

- Schedule R
- Affidavit of [Name deleted], sworn 3 November 2008
- Affidavit of [Name deleted], sworn 12 November 2008
- Affidavit of [Name deleted], sworn 31 October 2008
- Affidavit of [Name deleted], sworn 13 November 2008
- Affidavit of [Name deleted], sworn 21 November 2008
- Affidavit of [Name deleted], sworn 30 October 2008
- Information provided direct to the Registrar on 19 December 2008
- Copy of Affidavit of [Name deleted], sworn 1 December 2006

- Annexure SC1—map of the area of the application
- Annexure SC2—Curriculum Vitae of [Name deleted]
- Annexure SC3—notice inviting persons to a meeting for the authorisation of the application (the notice)
- Annexure SC4—copy of the notice of the meeting as advertised in the Kalgoorlie Miner on 16 August 2006
- Copy of Affidavit of [Name deleted], sworn 1 December 2006
- Annexure PMR1—copy of the notice for the meeting as posted out to claimants on the updated mailing list
- Annexure PMR2—record of outcomes of the authorisation meeting held at Leonora on 29 August 2006 and attendance list for the meeting
- Copy of Affidavit of [Name deleted], sworn 1 December 2006
- Annexure LT1—copy of the notice for the meeting as posted at various notice boards
- Copy of Affidavit of [Name deleted], sworn 18 September 2006
- Annexure WWG1—facsimile information about the meeting sent to WIN TV
- Annexure WWG2—facsimile information about the meeting sent to GWN TV
- Annexure WWG3—facsimile information about the meeting sent to ABC Radio
- Annexure WWG4—facsimile information about the meeting sent to Radio West
- Annexure WWG5—copy of the notice of the meeting as advertised in the Kalgoorlie Miner on 16 August 2006

The requirements of s. 190C(5)

The application contains at Schedule R the statements relevant to satisfy the requirements of s. 190C(5). At paragraph (a) it is stated that the persons comprising the applicant are descendents of the apical ancestors listed in the description of the claim group at Schedule A and are as such all members of the native title claim group. At paragraph (b) it is stated that the persons comprising the applicant are all 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.

Also paragraph (b) of Schedule R briefly sets out the grounds on which the Registrar should consider that the requirement of s. 190C(4)(b) has been met. A summary is provided about the authorisation process and the conduct of the authorisation meeting and includes the date of the meeting, the efforts of the GLSC to advertise and give notice of the meeting to the Mantjintjarra Ngalia people, the nature of the representation of persons at the meeting, the conduct of the meeting and its outcomes – namely the authorisation of the applicant to make and deal with the application. A statement is also made that a decision making process was followed in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.

The affidavits accompanying the application by each of the persons comprising the applicant also attest to the same information.

I am satisfied that the application meets the requirements of s. 190C(5).

How was the authorisation process conducted?

The affidavits of [Name deleted], [Name deleted], [Name deleted] and [Name deleted] provide detail on the process by which the meeting of 29 August 2006 was notified, advertised, prepared, convened and conducted.

[Name deleted] has been employed by the GLSC since 2004 as its Co-ordinating Anthropologist—at [5]. As a result of her work in this capacity she has acquired specialist knowledge of the genealogies of the Mantjintjarra Ngalia people and the families who are members of the existing claim group—at [10]. She and a solicitor employed by the GLSC appear to have co-ordinated the authorisation process.

The following is a summary of the process taken from the information provided by the four above mentioned persons:

- From April to August 2006 a working group was established made up of senior and knowledgeable representatives of Mantjintjarra Ngalia people nominated at a full claim group meeting.

- With these working group members, [Name deleted] reviewed the claim group description and genealogies, updated existing information relevant to the description with information provided by senior Mantjintjarra Ngalia people and refined and developed a new claim group description.

- As result of this work, a list was compiled of adults aged 18 years and over who identified as being Mantjintjarra Ngalia. The list was used to update an existing mailing list.

- [Name deleted] and a GLSC solicitor prepared and finalised a notice inviting persons to a meeting scheduled for 29 August 2006 for the authorisation of the Mantjintjarra Ngalia #2 application. [Name deleted] was asked to post the notice to all the persons on the updated mailing list.

- [Name deleted] directed [Name deleted] (GLSC Project Officer) to contact by telephone and in person as many of the persons on the updated mailing list as possible to advise them of the date and reason for the meeting. [Name deleted] made personal visits to claimants throughout Kalgoorlie, Boulder, Leonora, Laverton and Cosmo Newberry informing people of the meeting, the business that was to be discussed at the meeting and their need to attend. In every case [Name deleted] asked family members to speak with other family members. He repeated his visits to Leonora and Laverton to speak with people he was unable to speak to on the first occasion.

- [Name deleted] placed the notice on various notice boards in Kalgoorlie, Leonora, Laverton and Cosmo Newberry (places in which Mantjintjarra Ngalia people either reside, visit, or pass through regularly). [Name deleted] attests to having made contact in some way with every claimant on the updated mailing list.

- An identical notice was used variously to advise the Mantjintjarra Ngalia people. It contained all the details of the venue, date and time of the meeting, a description of the Mantjintjarra Ngalia claim group and an agenda. A statement in bold black capital letters states that important decisions will be made at the meeting affecting the claim and that 'your presence is required'.

- [Name deleted] co-ordinated the advertising of the 29 August 2006 meeting. She organised for announcements about the meeting to be made on two local television stations and two local radio stations and was informed that these announcements were made at least once.

- [Name deleted] also finalised the notice advertising the meeting and placed it in the Kalgoorlie Miner on 16 August 2006.

Having regard to the above information, I am satisfied that the 29 August 2006 meeting was properly notified to allow every opportunity for members of the Mantjintjarra Ngalia #2 native title claim group to attend and participate in decisions about their application and to authorise an applicant to make and deal with the application.

How the meeting was attended

Details about the conduct of the 29 August 2006 claim group meeting are provided in the affidavit of [Name deleted] and in the report '*Outcomes of the Mantjintjarra Ngalia Meeting held on Tuesday 29 August 2006 at the Ambulance Hall, Leonora*' (*Outcomes*) annexed to the affidavit of [Name deleted]. Both [Name deleted] and [Name deleted] attended the meeting.

From the details provided about the meeting in [Name deleted] affidavit and in the document recording the *Outcomes*, I understand the following:

- The agenda for the meeting included topics relating to the existing Mantjintjarra Ngalia claim (WC96/20—WAD6069/98) and topics relating to a new Mantjintjarra Ngalia #2 claim
- An attendance list was distributed and signed – 34 persons attended the meeting
- People were asked to identify themselves as the descendents of the ancestors referred to in the notice (now referred to in the description at Schedule A of the application)
- People confirmed that they were able to speak on behalf of any other family representatives who were not present at the meeting.

All persons present at the meeting confirmed that they were able to make decisions in relation to the preparation of the new Mantjintjarra Ngalia #2 application. [Name deleted] opinion is that those persons present at the meeting were able to make decisions on behalf of the Mantjintjarra Ngalia people regarding matters relating to their claim. She attests that in reaching this opinion she has relied on her specialised knowledge based on her study, training and experience.

Consideration was given to the making of a new Mantjintjarra Ngalia #2 claim, about the appointment of applicants and the claim group description. The GLSC solicitor provided information about the responsibilities of persons who comprise the applicant the group discussed the application of certain conditions to such appointments.

Resolutions were reached about these matters and detailed at items 6, 7 and 8 in the *Outcomes*.

Having regard to the above information, I am satisfied that those attending the 29 August meeting were sufficiently representative of the Mantjintjarra Ngalia #2 claim group and were sufficiently informed about the requirements of authorisation.

Decision making process

Each person comprising the applicant attests in their affidavit to the existence of a 'traditional decision making process that must be used by Mantjintjarra Ngalia people under [their] traditional laws and customs for things of this kind' (at para [5]). Each person states that this decision making process was used by members of the claim group for authorising the applicants (at para [5]). The process is described in each affidavit:

> The decision making process involves all Mantjintjarra Ngalia people discussing the matter and then the Mantjintjarra Ngalia native title claim group making a decision by consensus—at para 6.

[Name deleted] in her affidavit also attests to the existence and use by the Mantjintjarra Ngalia people of a traditional decision making process:

> 38. ...These senior elders have explained to me how they traditionally make decisions and I am satisfied that this process is accepted and acknowledged by members of the Mantjintjarra Ngalia people
>
> and
>
> 42. In my opinion the Mantjintjarra Ngalia people used a process of decision making that under the traditional laws and customs of Mantjintjarra Ngalia people must be complied with in relation to making decisions of this kind.
> 43. I have specialised knowledge based on my study training and experience to give an opinion in relation to the decision making process for the Mantjintjarra Ngalia people. I have relied upon that specialised knowledge information and experience I have gained referred to herein in reaching my opinion referred to in paragraph 42.

[Name deleted] uses the statements of a senior man to describe the decision making process:

> 40. ...the process of decision making is in accordance with tradition and involves taking guidance from elders, discussion by the group at which everyone has the opportunity to have a say and a decision is then made by the group taking into account the elders advice and based on traditional decision making practices..
> 41. There then followed a discussion by those present at the meeting of the above description of the traditional decision making process and everyone agrees that it was an accurate description of the decision making process.

Similar statements are recorded in the *Outcomes*, and conclude with the following sentence:

> Group agreed to take guidance from elders and that everyone present are the right people to make the decision on behalf of the group and their families and any family members who are not able to be present—item 3.

The three resolutions reached in relation to the new Mantjintjarra Ngalia #2 claim each conclude with the statements that the decision is made in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people and that the resolution was passed unanimously.

I am satisfied that the Mantjintjarra Ngalia #2 native title claim group had a traditionally mandated decision making process that must be complied in relation to authorising things of this kind. I am

satisfied that this process was used to authorise the applicant to make and deal with the new Mantjintjarra Ngalia #2 claim (the application currently before me).

Consideration

The Mantjintjarra Ngalia #2 application was authorised on 29 August 2006. This amended application before me relies on the authorisation material contained in the application filed on 21 December 2006 and considered for the purposes of the previous registration test. I have nothing before me that contradicts a conclusion that the applicant for this current Mantjintjarra Ngalia #2 application continues to be authorised by virtue of the process followed in August 2006.

I have no material before me that documents any consultation occurring between the applicant and the wider claim group about the filing of an amended application. However, I do not consider this to be an issue for the proper authorisation of this amended application. Though it was not a requirement to do so, each person comprising the applicant has provided a fresh s. 62(1)(a) affidavit and each states that the affidavit is 'in support of [the] amended application'.

Sufficient and cogent information is contained in the application and accompanying affidavits and in the affidavits of those employees of the GLSC who were involved in the authorisation process. I am satisfied that the traditional decision making process asserted by the applicant complies with the requirements of s. 251B(a) and I am satisfied that the applicant has been authorised by the native title claim group to make the application and deal with matters arising in relation to it.

Merit conditions: s. 190B

Section 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.

Information regarding external and internal boundaries: s. 62(2)(a)

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

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

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

Result and reasons

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

Schedule B refers to Attachment B1 and B2.

Attachment B1 is a description prepared by the Tribunal's Geospatial Services on 17 November 2008. It describes the external boundary of the application area in two parts – External Boundary Area 1 and 2. Both are described by metes and bounds referencing cadastral boundaries, native title determination application boundaries, native title determination boundaries, pastoral leases and coordinate points. It also provides sources and reference data.

A written description of the areas within the external boundary that are not covered by the application is found at Attachment B2, at paragraphs 1 through to 5. This is a description listing a number of qualifications to which the application is subject. That is, the application area excludes areas of land and water affected by a previous exclusive possession act as defined by the NTA and a category A intermediate period act and category A past act. The description states that any land or waters falling within certain provisions of s. 23B or ss. 47, 47A or 47B are included in the application and that the application area excludes any land or waters where native title has been otherwise wholly extinguished.

Schedule C refers to Attachment C which is a monochromatic copy of a colour map titled 'Native Title Determination Application WAD372/06 Mantjintjarra Ngalia 2 (WC06/006), prepared by Geospatial Services dated 17 November 2008 and includes:

- two separate application areas depicted by a bold outline, the southern area labelled '(Area 2)' and the northern areas labelled '(Area1)';

- abutting native title determination applications and native title determinations shown and labelled;
- land parcels shown and labelled;
- scale bar, north point, coordinate grid, locality map and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the areas covered by the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied that this can be said, the written description and the map are required to be sufficiently consistent with each other.

Having regard to the comprehensive identification of the external boundary in Attachment B1 and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

Geospatial Services has also provided an assessment of the map and written description (the geospatial report). The assessment is that the description and map are consistent and identify the application area with reasonable certainty. I agree with that assessment.

Whilst the written description at Attachment B2 contains only general exclusions and not a list of tenures, they are sufficient to offer an objective mechanism to identify which areas fall within the categories described.

In conclusion, I am satisfied that the information and the maps required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of the land or waters.

The application satisfies the condition of s. 190B(2) as a whole.

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

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

Result and reasons

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description.

Schedule A of the application contains this description of the group:

> The Mantjintjarra Ngalia native title claim group comprises those Aboriginal people who are:-

(a) all the descendants of
Nukuwara ,
Thayangka,
Nyirrpi,
Tjujaru,

and

(b) all the descendants who result from the union of
Walayangga and Jiku Jiku ,
Kungki and Imantura ,
Kapui and Ingangka,
Munggi Munggi and Nura Tarikarral,
Nguldan and Gurula,
Winmura and Imitjara,
Waltila and Nanuma,
Ngiyo and Kungi,
Manadi and Nurrutjukurr

The word descendants where it appears in this application means [in (a)] those persons who are the biological descendants of the named single ancestors or who [in (b)] result from the union of the named ancestors grouped together as a couple or who (in both cases) are adopted in accordance with traditional Mantjintjarra Ngalia law and custom (*Itharra*). A person is adopted under traditional Mantjintjarra Ngalia law and custom when that child is 'grown up' by any of the ancestors referred to above or by a member of the native title claim group. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b)—at [51].

Mansfield J also said that the focus of s. 190B(3) is:

> ...not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained—at [37].

The description of the Mantjintjarra Ngalia #2 native title claim group is complicated by what may be simply clumsy grammar so I have found it necessary to break the phrases up in order to list the criteria by which the claim group is defined. I interpret this description as follows:

The Mantjintjarra Ngalia #2 native title claim group comprises those Aboriginal people who are:-

all the descendants of four singly named people,

and

all the descendants who result from the union of 9 couples.

In the application, the word 'descendants' means:

those persons who are the biological descendants of the singly named ancestors [in (a)]

or

those persons who result from the union of the named ancestors grouped together as a couple [in (b)]

or

those persons who have been adopted by any of the ancestors named (singly or as couples) or by a member of the native claim group in accordance with traditional Mantjintjarra Ngalia law and custom (*Itharra*).

A person is adopted under traditional Mantjintjarra Ngalia law and custom when that child is 'grown up' by any of the ancestors referred to above or by a member of the native claim group. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system.

As the application does not name the persons in the native title claim group, I must consider if, pursuant to s. 190B(3)(b), this description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

Carr J in *Western Australia v Native Title Registrar* found, in the way native title claim groups were described, that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

I understand the authorities of *Doepel* and *Western Australia v Native Title Registrar* to mean that the description at Schedule A needs to contain some objective means of identifying or ascertaining the members of the group. Describing the claim group as the 'biological descendants' of certain named persons provides a sufficiently reliable means by which to ascertain a person's membership of the group. A member of the Mantjintjarra Ngalia #2 native title claim group will have one or more of the named persons as an ancestor. In respect of those persons adopted into the claim group, the description allows for a clear understanding of the terms by which people are adopted into the Mantjintjarra Ngalia #2 native title claim group—either by the ancestors or their descendants.

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala*) confirms that s. 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification.

I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group – whether they descend directly from the named ancestors or are adopted into the claim group under traditional law and custom. It may be that some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

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

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

Result and reasons

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

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in Ward. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner.

Native title rights and interests are defined in the Act at s. 223(1), which states:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

With this definition in mind it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 cannot be 'readily identified' for the purposes of s. 190B(4).

On another view, s. 190B(4) is only intended to cover those rights and interests that are not readily identified in the sense of being unintelligible or not understandable. On this view, any rights that fall outside the scope of s. 223 should be considered under s. 190B(6) as not able to be prima facie established. I have adopted this latter view and do not consider those rights that fall outside the scope of s. 223 under this condition at s. 190B(4).

The description of the native title rights and interests claimed in relation to particular land or waters is found at Schedule E:

> 1. Over areas where a claim to exclusive possession can be recognised, the applicants claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the applicants claim the following rights and interests:
> a) The right to live on the application area;
> b) the right to camp and light fires on the application area;
> c) the right to access and move about the application area;
> d) the right to hunt and gather on the application area;

e) the right to have access to and use the natural water resources of the application area;
f) the right to gather and use the natural products of the application area (including for example flora, fauna, timber, stone, ochre, wax and resins) according to traditional laws and customs;
g) The right to participate in cultural, ceremonial, ritual and religious activities, including the transmission and maintenance of cultural heritage and knowledge of the application area;
h) The right to carry out activities associated with birth and death including burials in the application area and to maintain and protect sites associated with birth and death;
i) the right to share or exchange (for non-commercial purposes) resources of the area in accordance with traditional laws and customs; and
j) the right to maintain and protect places of importance under traditional laws and customs in the area;

The description further provides that, in summary, the rights and interests are subject to those rights and interests of the Commonwealth and the State of Western Australia.

I am satisfied that the description of all eleven native title rights and interests claimed is sufficient to allow for them to be readily identified in the sense that they are described in a clear and easily understood manner.

Section 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.

Delegate's comments

For the application to meet this merit condition, the delegate must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particular assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not 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—at [17].

In considering this condition, I will also take account the concept and meaning of the word 'traditional'. The decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist—at [46]—[47].

I understand *Yorta Yorta* to be authority that:

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs;
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

The application needs to provide some factual basis to identify the society that is asserted to have existed at least at the time of European settlement. This requirement is supported, in my view, by the decision in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC)*. The Full Court was satisfied that there was material in the application which 'contained several statements which, together, would have provided material upon which a decision-maker could be satisfied that there was, in 1850–1860, an Indigenous society in the claim area observing identifiable laws and customs'—[96].

The information that is before me in the Mantjintjarra Ngalia #2 application must address how it is that the claimed rights and interests as currently expressed by the claim group are 'rooted in pre-sovereignty laws and customs'. That is, what does the factual basis say about the content of the law and custom and is there a factual basis identifying the rules of a normative society that existed

before the assertion of sovereignty? 'Normative' in this sense can be understood to be those normal or everyday customs, rules, systems and practices that go to make up a group's social organisation. Also, does the factual basis support the assertion that the society with its normative rules has continued to exist substantially uninterrupted since that time?[2]

Information considered

The application contains a general description of the factual basis as required by s. 62(2)(e) in Schedule F of the application. Information is also contained in Schedules G and M.

Some of the information I have considered for the purposes of this condition is in the application itself, but the applicant also provided further information direct to the Registrar (the details of which can be found at Attachment B of these reasons). Below I have listed all the information I have considered into three categories, without reference to whether or not it forms part of the application. That I may consider material outside the confines of the application is plainly stated in *Doepel* which states that sections 190B(5), (6) and (7) 'clearly calls for consideration of material which may go beyond the terms of the application'—at [16].

I have considered affidavits by persons in the claim group providing evidence about traditional laws and customs and rights and interests held by the Mantjintjarra Ngalia people:

- [Name deleted], sworn 18 December 2006,
- [Name deleted], sworn 23 August 2007,
- [Name deleted], sworn 30 October 2008,
- [Name deleted], sworn 16 December 2008,
- [Name deleted], sworn 8 January 2009.

I have considered an anthropological and an ethnographic report providing specialist information about traditional laws and customs and rights and interests held by the Mantjintjarra Ngalia people:

- Preliminary Anthropological Report for Goldfields Land and Sea Council, November 2008, [Name deleted], Anthropologist of de Gand Pty Ltd;
- Ethnographic Report in support of the Mantjintjarra Ngalia #2 – native title claim (south-western and north-eastern parts) registration application, November 2008, [Name deleted], Anthropologist of [Name deleted];
- Affidavit of [Name deleted] sworn 4 September 2007.

I have been assisted by maps of the claim area locating areas of significance to the Mantjintjarra Ngalia people and places referred to in the affidavit material:

- A copy of "Map 2: Berndt's location of the *Mantjintjarra Ngalia – Map of 1959*" which appears at p.18 of Schedule F.3 to the Amended Form 1 (paginated as p86 of the Amended Form 1);
- Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 18 December 2006 (at Attachment F.1 to the Amended Form 1);

[2] *Yorta Yorta*—at [87].

- Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 30 October 2008 (at Attachment F.2 to the Amended Form 1).
- Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 16 December 2008 (submitted with material provided direct to the Registrar on 19 December 2008).

In relation to my consideration of all of the above listed information, I refer to the Full Court decision in *Gudjala FC*. The general contention in this decision is that s. 190B(5) does not require the applicant 'to provide evidence that proves directly or by inference the facts necessary to establish the claim'—[at 92].

The anthropologist annexes to his affidavit a list of various research material upon which he relies. He also states that he has conducted primary and secondary research in relation to the application area and has spoken with members of the Mantjintjarra Ngalia #2 claim group. I note that all persons comprising the applicant state on oath in their affidavits (as required by s. 62(1)(a)(iii)) that they believe that all the statements made in this application are true. I am also inclined to infer that the information in the material which was later provided direct to the Registrar is also true in the same sense as is sworn by the applicant in the s. 62(1)(iii) affidavits of the truth of the information contained in the application itself.

Sovereignty

In the case of the area covered by this application, the British Crown's acquisition of sovereignty occurred in 1829 by virtue of its proclamation of Western Australia as of that date. However, based on the information relating to this application, I understand that first contact by Europeans in the region around what is now known as the 'Western Desert' (in which the Mantjintjarra Ngalia #2 claim falls) occurred sometime in the 1890s. It is reasonable to infer that the structures of any indigenous societies present in the area at the time of European contact were the same as those in existence in 1829. Therefore, I am of the view that the 'position' of the Indigenous society at 1829 in the area of this application need only be demonstrated by evidence that reflects the position of that society at the time of first European settlement of the area—in this case from 1890 onwards.[3]

The Wongatha decision

An earlier Mantjintjarra Ngalia native title determination application (Mantjintjarra Ngalia Peoples—WAD6069/98) was the subject of proceedings in *Wongatha.* As a result of those proceedings, the Mantjintjarra Ngalia Peoples application was dismissed by the Court in so far as the area it covered overlapped with the area covered by the Wongatha claim. The Mantjintjarra Ngalia #2 claim that I consider in these reasons, filed on 21 December 2006, covers an area to the north east of the Wongatha claim boundary. The Mantjintjarra Ngalia #2 claim does not cover the same area as dealt with in the *Wongatha* proceedings.

Section 190A(3) provides that, in considering a claimant application under s. 190A, the Registrar must have regard to certain things, but may also have regard 'to such other information as he or she considers appropriate'. The fact that a claimant application made by the Mantjintjarra Ngalia people in the past has been the subject of previous Court proceedings alerts me to the existence of information that may be relevant to my consideration under s. 190A of this 'new' application made

[3] *Gudjala FC* at [64], [66] and [82]

by Mantjintjarra Ngalia people. The *Wongatha* decision does consider the traditional laws and customs acknowledged and observed by Aboriginal societies past and present who affiliate with the same and surrounding country as do the Mantjintjarra Ngalia people—this being the composition of the Western Desert Cultural Block (WDCB).

Some of the material I have before me in relation to the Mantjintjarra Ngalia #2 application may be the same or say similar things to that provided in the *Wongatha* proceedings. In his anthropological report of November 2008, [Name deleted] describes the region in which the Mantjintjarra Ngalia #2 claim lies as within 'a culturally and socially distinct constellation of Aboriginal groups which are collectively referred to as the Western Desert Cultural Block'. In his explanation of the 'cultural block' of the Aboriginal groups in the Western Desert region, he writes that 'recent primary and secondary research has confirmed the cultural and linguistic affiliation of the Mantjintjarra group (amongst others) with WDCB traditional laws and customs. Groups 'belong' to the WDCB by virtue of 'similarities in [their] organisational, linguistic and socio-cultural aspects' (at p.7).

With this preliminary assessment of the similarities in mind, I need to determine the weight of consideration I attach to the *Wongatha* decision in my application of the test in of s. 190B(5). Some guidance on this issue is found in the case of *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126, in which Finkelstein J found:

> …The evidence to which an administrative tribunal may have regard can include evidence that has been given in another proceeding, including a court proceeding, provided the evidence is relevant to an issue before the tribunal: In *re A Solicitor* [1993] QB 69 at 77. 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…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.
>
> …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—at [18] to [19].

Though aspects of Lindgren J's findings and his decision may well be relevant to the issues about which I must be satisfied if the application is to meet the condition found in s. 190B(5), I do not take the view that I must accept the view of Lindgren J in *Wongatha* and I do not intend to 'merely adopt' any of his findings. On the contrary, my view is that I have an entirely different context in which all of this information plays out:

- The application I consider under s. 190A is an entirely new and separate application and covers a different area to that dealt with in the *Wongatha* proceedings,

- The anthropological and ethnographic reports I am considering and four of the five affidavits provided for the purposes of the registration test were prepared and sworn post Lindgren J's decision;
- The material before me appears to be responding to some of the questions raised in Lindgren J's findings and this information could be considered to be 'new' and therefore not considered by him.

Additionally, my task in the making of this decision is not to 'test' whether the asserted factual basis can be proved (*Doepel* at [17]). The test in s. 190A involves an administrative decision not a judicial enquiry and in saying that, I am conscious of what was said by the Full Court in *Gudjala FC*:

> [T]he applicant is not required 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. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92].

Whether or not it can be proved that the Mantjintjarra Ngalia #2 claim group hold native title pursuant to the traditional laws and customs of the WDCB is not for me to decide—I must simply be satisfied that the material before me provides a sufficient factual basis to support the three assertions found in s. 190B(5). None of the affidavits before me, sworn by members of the claim group, make any reference to the WDCB in the context of Mantjintjarra Ngalia traditional laws and customs. Whatever 'expert' label is attached to the traditional laws and customs of the Mantjintjarra Ngalia people, and whether or not it has been discredited by the decision in *Wongatha*, is not something I need to determine here in my decision. It is not my role as the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country and their traditional laws and traditional customs.

My approach to the new material provided in support of the new Mantjintjarra Ngalia #2 claim has been to read that material in a particular and limited context—that is, to consider the material's ability to sufficiently support the assertions found in s. 190B(5).

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to a combined result for s. 190B(5) below.

Result and reasons re s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the Mantjintjarra Ngalia people have and their predecessors had an association with the application area.

The word *Ngurra* is used by people to refer to country and certain parts of country are referred to repetitiously throughout the affidavit and 'expert' material. These places are referred to consistently throughout the affidavits as places of importance, of history, of cultural significance and of close past and present association.

The affidavit material establishes a comprehensive annunciation of Mantjintjarra Ngalia past and present association with the claim area. [Name deleted] (Deleted for privacy reasons), [Name deleted] and [Name deleted] (Deleted for privacy reasons]) are able to trace their ancestry to named apical ancestors. [Name deleted] (Deleted for privacy reasons) names her grandparents, placing her maternal grandparents alive in the mid 1800s. Each of these people has offspring to whom they actively pass on Mantjintjarra Ngalia knowledge, law and custom.

[Name deleted] lists places in the claim area to which he and his family and their predecessors have association. He describes his mother's *ngurra*, and describes his knowledge of the camps on Mantjintjarra Ngalia country.

[Name deleted]'s affidavit describes her country and her *ngurra*. A map showing the locations of the places referred to in [Name deleted]'s affidavit is provided with the additional material forwarded to the Registrar. Most of the places are located within the boundary of the claim area and those that fall outside do so only by small distances.

[Name deleted] also states her and her family's association with some of the same places, and names other places as significant areas for [Name deleted].

[Name deleted] lists numerous places 'where Mantjintjarra Ngalia people belong under their law'.

[Name deleted] material provides extensive expert research, data, factual and historical references regarding Mantjintjarra people and their past and present association with the claim area. This information provides a wider context in which to consider the more personal experience and histories contained in the affidavit evidence. His overview of the anthropology and the historical record specific to Mantjintjarra supports the affidavit material.

- People moved west along *yiwarra* (runs) during times of 'environmental, historical and cultural' necessity. These areas were 'already part of the cultural geography' of the Mantjintjarra. The report quotes evidence about the geographical origin of certain families, the movement of people into and out of the desert and that people travelled for 'business, men's business, marriage business'. Movement into and out of the 'spinifex' (the desert) was influenced by environmental, historical and cultural factors such as climate, European contact, supplies of food and social and cultural connections and obligations;
- Ethnographic evidence recorded from Mantjintjarra informants of regular movement between east and west; and
- Claimants ongoing association with country was maintained through camping and hunting on stations –allowing traditional systems to endure.

I am of the view that I am able to find references within all of this material to familial relationships, localities, and the predecessors of the group to a sufficiently wide and varied extent. The material I have before me supports the assertion that the Mantjintjarra Ngalia people currently have an association with the whole of the area. Lines of descent are sufficiently demonstrated such that I believe that there is support for the fact that the predecessors of the claim group had an association with the whole of the claim area.

Result and reasons re s. 190B(5)(b)

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

Schedules F and G of the application provide information about the traditional laws acknowledged and customs observed and the activities conducted in accordance with those laws and customs. They outline information that is not, in my view, 'something more than assertions at a high level of generality'[4]. However, the additional material in the application and that provided directly to the Registrar does expand upon the points outlined in the Schedules with sufficient detail and illustration.

[Name deleted] in his Preliminary Anthropological Report (November 2008) provides a brief overview of the anthropological theories or views relating to those Aboriginal groups that inhabited the Western Desert region – explaining the concepts of estate, range, reciprocal rights, mobility and the 'practicalities of ensuring subsistence' in a harsh desert environment. His references essentially 'umbrella' the claimant evidence provided in their affidavits.

In particular, the reports explain the traditional concepts of *ngurra* (country) *tjukurpa* (the Dreaming) and *yiwarra* (Dreaming Tracks). These are concepts by which Mantjintjarra are said to define their traditional law and custom under which their rights and interests are possessed.

There is much in the affidavit evidence about Mantjintjarra Ngalia acknowledgement and observance of traditional law and custom. [Name deleted] [Deleted for privacy reasons] in her 2006 affidavit uses language to name food, family relationships, geographical locations and sites, traditional customs to do with *wiltjas* (humpies), weather, country, seasons, animals and law. [Name deleted] describes many *tjukurr* (Dreamtime stories). She refers to the Law and describes rules that define family relationships and responsibilities for land. [Name deleted] [Deleted for privacy reasons] states that he went through the Law to become a 'wati' (man) so that the Law would be passed onto the next generation and that as a 'man' you must look after your country. He speaks for his country and his Dreaming tracks and sacred sites, and describes rules and customs about family relations, marriage and burial. He has rights and responsibilities under the Law for his country – to hunt and get bush tucker, to maintain sacred sites and ceremonial grounds, to protect it from people who have not been through the Law, to teach the younger generations about looking after country, about language and about places and connection.

[Name deleted] is also a 'wati' (initiated man)—which means he can visit, look after and speak for sacred places that the uninitiated can't. Mantjintjarra law and custom has been passed down to him through his elders. He lists the places to which Mantjintjarra Ngalia people belong under their Law. He and his brothers were 'taught traditional bush skills, including tracking, finding waters and how to identify all the bush foods', were told the stories of the land and the dreamtime, of history and country and culture. [Name deleted] provides extensive detail in his affidavit about the places of importance in his country and the stories associated with some of those places.

[Name deleted] [Deleted for privacy reasons] is Mantjintjarra through her father's parents and she speaks the language taught to her by her parents and the old people. She states that Mantjintjarra Ngalia elders have the right to speak for country because they are most knowledgeable. [Name deleted] has the right to live and move about Mantjintjarra Ngalia country but in doing so she knows that there are places (men's sites) where she is not allowed to go.

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[4] *Gudjala FC*—at [92]

What does the material say about the traditional laws and customs of the Mantjintjarra Ngalia people – what factual basis does it give to illustrate that Mantjintjarra Ngalia people acknowledge and observe laws and customs which impose obligations or confer rights upon them? What I find in the reports and the affidavits is information about the normative rules of Mantjintjarra Ngalia society:

- Rules about access to certain sites and areas within Mantjintjarra Ngalia country (largely the boundaries of the claim area);
- only 'wati'(initiated men) have knowledge and may access certain sites ;
- women have obligations to avoid certain areas because they are not 'wati';
- there exist gender restrictions on knowledge about certain sites;
- Mantjintjarra Ngalia people have the right to walk on their own country without seeking permission;
- Permission needs to be sought by people who are not Mantjintjarra to access Mantjintjarra Ngalia country;
- Rules about obligations to country—
    - To do with protection, paying respect and maintenance;
    - To do with knowing your country.
- Rules about kinship systems—
    - skin groupings and allocations which govern marriage rules and inter-family relationships;
    - which structure connections of descent and kinship and are the focal point of social organisation;
    - which govern your behaviour towards your kin; and
    - oblige you to pass on your knowledge of Mantjintjarra law and custom.

The information I have considered needs to provide, in its totality, a factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the Mantjintjarra Ngalia people that give rise to their claimed native title rights and interests—and this despite the act of sovereignty and ensuing European settlement. The material [Name deleted] provides in his reports and the statements made in the affidavits point to acknowledgement and observance of traditional Mantjintjarra law and custom, exercise of Mantjintjarra rights and interests and the continuation of a vital Mantjintjarra society.

In my view, the material before me does provide information about the asserted existence of a society 'united in and by its acknowledgement and observance of a body of law and custom' — *Yorta Yorta* at [49].

It is clear to me that all of the material I have considered describes the Mantjintjarra Ngalia people's adherence to traditional laws and customs and not simply the group's knowledge of law and custom. The finding in *Yorta Yorta* is clear—the relevant laws and customs under which the rights and interests are possessed must be rules having normative content. Without that quality

there may be observable patterns of behaviour but not rights or interests in relation to land or waters (at [42]).

The material provides a sufficient factual basis for this assertion that there exist traditional laws acknowledged and customs observed by the Mantjintjarra Ngalia people and that these give rise to the native title rights and interests they claim.

Result and reasons re s. 190B(5)(c)

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

The anthropological and ethnographic reports contain a factual basis for the assertion that the society in existence at sovereignty has largely continued despite the interruption of European contact. Such factual basis includes:

- that 'at the turn of the twentieth century Mantjintjarra had had no contact with Europeans … that it was likely that Mantjintjarra were unaware even of the existence of Europeans on the continent;
- that long established patterns of connection, of territorial and social affiliations in the region of the claim area have been maintained; and
- despite the movement of people out of the 'spinifex' (desert) into the west of the claim area throughout the first half of the twentieth century, Mantjintjarra maintained connection with their ancestral areas and continued to live a virtually traditional lifestyle to well in the 1950s.

The affidavit evidence of members of the native title claim group include examples of factual information supporting that the Mantjintjarra Ngalia people have continued to hold their native title in accordance with their traditional laws and customs. This material has been summarised above in relation to the condition at s. 190B(5)(b), but further to this:

- [Name deleted] has learnt the Mantjintjarra ways from his parents, uncles, brothers, the [Name deleted] family, [Name deleted], the [Name deleted] and [Name deleted];
- [Name deleted] uncles have told him the stories of his *ngurra*, he has travelled his country and learnt traditional bush skills including tracking, finding water and how to identify all the bush foods and he is ensuring that he passes his knowledge of Mantjintjarra Ngalia country and culture onto his children; he is a *wati* (initiated man);
- [Name deleted], born in [Deleted for privacy reasons], relays the stories of the 'old people', recognises Mantjintjarra rules of access and restriction to her own and other people's *ngurra*;
- [Name deleted] father was a senior Law man, who learnt 'the ways of doing things' from his old people; and
- all depose to maintenance and protection of culturally significant sites and the transmission of traditional Mantjintjarra law and custom and cultural heritage to the younger generations.

Additionally, Schedule F provides for the following in relation to continuing acknowledgement and observance:

> The claim group has continued to acknowledge and observe traditional Mantjintjarra Ngalia laws and customs which have been passed down to Mantjintjarra Ngalia people from generation to generation by their forbears. Mantjintjarra Ngalia traditional laws and customs include complex kinship rules and a body of personal, spiritual, ritual, ceremonial and religious teachings, which reinforce and dictate relationships to country. These rules and teachings direct how members of the claim group must maintain, protect and care for each other and the land and waters of the application area ('country'), control access to country, pass on information and decisions about, and use country. Since the acquisition of British sovereignty, each generation of the claim group has maintained and observed these rules and teachings and correspondingly they have continued to hold and exercise their native title rights and interests in accordance with those rules and teachings which comprise Mantjintjarra Ngalia traditional laws and customs—at p.5.

I am of the view that the activities illustrated in the affidavit evidence and schedules (summarised throughout my reasons at s. 190B(5)), the descriptions of past and current Mantjintjarra Ngalia society in [Name deleted] reports are largely probative of normative rules of the group's society and the continued existence of a pre-sovereignty culture (for example, in people's acknowledgement and observance of rights and obligations pertaining to their *tjukurrpa*). Some activities may only be observable behaviour (like residence, camping and travelling, hunting, collection of bush tucker) or may not be about rules pertaining to land and waters or may not necessarily be probative of law and custom. However, all of the material considered together point to a continuing acknowledgement and observance of a body of traditional laws and customs.

In my view, the material provided fully and comprehensively furnishes the information requirements to support the assertion that the Mantjintjarra Ngalia people continue to hold native title in accordance with their traditional laws and customs.

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Section 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.

Result and reasons

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Under s. 190B(6) I must be satisfied that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that registration requires a minimum of only one right or interest to be established. In *Doepel*, Mansfield J noted at [16] the following:

> Section 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 the information sources specified in s. 190A(3) may be relevant. Even so, it is noteworthy that s. 190B(6) requires the Registrar to consider whether `prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle.

The consideration by the High Court in *North Ganalanja Aboriginal Corporation v QLD* (1996) 185 CLR 595 (*North Ganalanja*) of the term 'prima facie' as it appeared in the registration sections of the Act, prior to the 1998 amendments, are still relevant. In that case, the majority of the High Court said:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase 'Prima Facie' is: 'At first sight; on the face of it; as it appears at first sight without investigation' [citing the Oxford English Dictionary (2nd ed) 1989].

The test in *North Ganalanja* was considered and approved in *Doepel*—at [134]:

> Although [*North Ganalanja*] was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of "prima facie" there adopted is no longer appropriate…

Mansfield J in *Doepel* also approved of comments by McHugh J in *North Ganalanja* at—[638] to [641] as informing what prima facie means under s. 190B(6):

> …if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis—at [135].

That it is not for the Registrar to resolve disputed questions of law (such as those about extinguishment and the applicability or otherwise of s. 47B) in considering whether a claimed right or interest is prima facie established under s. 190B(6) is supported by *Doepel*

Having regard to the above authorities on what is meant by prima facie, it follows that the task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed. In performing this task, I should have regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223);
- whether or not the right has been extinguished; and
- whether or not the right is precisely expressed such that it sets out the nature and extent of the right.

If a described right and interest in this application has been found by the courts to fall outside the scope of s. 223(1) then it will not be prima facie established for the purposes of s. 190B(6).

Consideration

As mentioned above in relation to the requirements of s. 190B(5), the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are prima facie capable of being established.

In my consideration of the rights claimed in the application, I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or which require consideration of the same case law as to whether they can be established.

In the circumstances where I have found that a particular claimed right cannot be prima facie established, I refer the applicant to the provisions of s. 190(3A) of the Act. I note that the provisions of s. 190(3A) are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

1. Over areas where a claim to exclusive possession can be recognised, the applicants claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Established

The majority decision of the *High Court in Western Australia v Ward* (2002) 191 ALR 1 (*Ward*) is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can prima facie be established.

The two rights which make up exclusive possession are (1) a right to control access and (2) a right to make binding decisions about the use of the country—*Ward* at [52]. The traditional Mantjitjarra Ngalia law and custom that gives rise to their right to exlusive possession of their country is initially canvassed at Schedule F.

> (i) Certain rights, such as the right to speak for and make decisions about sites and other areas of significance in the application area, are attained on the basis of one or more of the following attributes which are considered determinative by the claim group:
>
> (a) birth in the area
> (b) totemic affiliation in the area
> (c) growing up in the area
> (d) traditional knowledge of the cultural geography of the area
> (e) traditional knowledge of the resources of the area
> (f) descent from ancestors connected to the area
> (g) adoption by descendants of such ancestors, in accordance with Aboriginal laws and customs

I have summarised and quoted extensively in my reasons at s.190B(5) from the material before me which refers to the normative rules of Mantjintjarra Ngalia society . I am satisfied that this material provides prima facie information that the group possesses under their traditional law and custom the right to control access to their country and the right to make binding decisions about that country. Additionally, Schedule G asserts that members of the claim group have in the past, and continue to, speak for and make decisions about the application area.

On the basis of my consideration of the whole of the application and further material provided by the applicant, I am able to find that a right of possession, occupation, use and enjoyment as against the whole world (where it can be recognised) can be established prima facie.

2. Over areas where a claim to exclusive possession cannot be recognised, the applicants claim the following rights and interests:

Rights/interests (a)—the right to live on the application area

Rights/interests b)—the right to camp and light fires on the application area

Rights/interests c)—the right to access and move about the application area

All established

In each of the affidavits, members of the claim group refer to camping with their elders and families throughout their childhood, of continuing that tradition with their own children and wider families, of being around campfires, listening to the stories of the 'old people' and about their country. I take 'to light fires' as meaning 'campfires' as it appears in the context of expressing a right to camp.

Mantjintjarra Ngalia people continue to live in the claim area and use the area for traditional purposes, to roam and to camp; young people are taken to and taught about Mantjintjarra Ngalia sites and the *tjukurrpa*. The affidavit material and the reports refer extensively to the *wiltja* (traditional bough shelters) in which people lived and which are now registered as cultural heritage sites. People have left the area and returned consistently to live in the places of their *ngurra*. [Name deleted] and her family extended this, choosing to formalise the community of Mulga Queen in the 1980s.

The reports and affidavit material contain information about cultural heritage management of Mantjintjarra Ngalia country which involves visiting and maintaining significant cultural sites; hunting, gathering and collecting natural resources. The affidavits identify *yiwarra* (dreaming tracks) traditionally significant to Mantjintjarra Ngalia people; mobility from ancestral areas in the east to *ngurra* in the west, confirming the practice of moving about the area since pre-contact times; travelling across the country in order to hunt, gather foods, visit sites, conduct ceremonies, attend meetings and visit neighbouring groups—for example the range of both past and present travel from Tjirrkarli and Cosmo Newberry to Mulga Queen.

Throughout the material before me, evidence is provided about the activities of the claim group on the application area which necessarily require access to, existing on and living in the application area. The material provides support to establish the rights prima facie to live on, to camp and light fires and to access and move about the application area.

Rights/interests d)—the right to hunt and gather on the application area

Established

All of the affidavit material provides stories, customs, rules and obligations in relation to hunting and gathering on the application area. All speak the names of food and animals in language; [Name deleted] and [Name deleted] speak of being taught by uncles and parents bush skills, hunting, tracking and finding water. The women speak of going hunting for emu, goanna, kangaroo, bush turkey and gathering bush foods, witchetty grub, emu eggs, seeds, flowers, plants with their families (grandparents and uncles and aunties); of *tjukurrpa* associated with certain foods (honey ant dreaming) and increase sites. A list of traditional foods upon which Mantjintjarra Ngalia people rely and which can be found in the claim area is provided with the anthropological report (at p.38).

The rights and obligations associated with hunting on Mantjintjarra country and to whom 'meat' is given and shared in the *Wangkayi* way is also referred to in both the affidavit material and reports.

The material in the application provides support to prima facie establish the right to hunt and gather on the application area.

Rights/interests e)—the right to have access to and use the natural water resources of the application area

Established

[Name deleted] refers to the areas in Mantjintjarra Ngalia country which are watercourse country – places where water does not stay, but runs into a creek (at [62]—2006 affidavit). It is Mantjintjarra Ngalia custom to clean out and maintain the rockholes before the rains come, t*jukurrpa* stories are related to certain sites of water resources, *yiwarra* (runs) are marked by 'water sites'. The Mantjintjarra Ngalia #2 application area covers an arid expanse of country. People's lives and the conditions under which they have lived and continue to live have necessitated access to water resources. Based on the material before me about the history relating to the group's (and that of other groups in the region) mobility and residence in the desert (the spinifex), I consider that access to, and use of, the water resources has been and continues to be an integral part of Mantjintjarra Ngalia society.

I therefore am able to find that this right can be prima facie established.

Rights/interests f)—the right to gather and use the natural products of the application area (including for example flora, fauna, timber, stone, ochre, wax and resins) according to traditional laws and customs

Established

[Name deleted] refers to the collection of *kirti* (resin) bushes and its use in the making of woomera and spears (at [91]—2006 affidavit). The affidavit material discusses the medicinal benefits of certain natural products, the use of natural material for the purposes of ceremony and in the construction of traditional tools. In most cases the traditional customs associated with the gathering and use of natural products is enunciated. There is extensive information about the gathering and use of flora and fauna in the application area and much of these activities are said to be carried out in accordance with traditional Mantjintjarra law and custom. I am inclined to consider that the items listed in parenthesis are a non-exhaustive list and are examples of 'natural products'.

The material provides extensive information about the interaction of Mantjintjarra Ngalia people on their country and, in my view, this necessarily involves the gathering and use of the natural products of the application area. I am therefore able to find that this right can be prima facie established.

Rights/interests g)—the right to participate in cultural, ceremonial, ritual and religious activities, including the transmission and maintenance of cultural heritage and knowledge of the application area

Rights/interests h)—the right to carry out activities associated with birth and death including burials in the application area and to maintain and protect sites associated with birth and death

Rights/interests j)—the right to maintain and protect places of importance under traditional laws and customs in the area

All Established

[Name deleted] deposes to Mantjintjarra Ngalia people holding firmly to 'their responsibilities to protect manage and maintain out land, including carrying out physical, spiritual, ritual, ceremonial and intellectual aspects of our culture' (at 27).

Both the *wati* (initiated man), [Name deleted] and [Name deleted], refer to the access and gender restrictions associated with certain sacred sites and ceremonial grounds. They are both involved in cultural and ceremonial acitivites relating to these sites and their obligations to country. All of the affidavits speak of inter-generational transmission of Mantjintjarra Ngalia law and custom and all have participated in the continuity of their *tjukurrpa*. All are involved in the maintenance and transmission of cultural heritage and their knowledge of the application are. They actively pass on their knowledge of traditional Mantjintjarra Ngalia law and custom to their children and other younger people in the same way in which it was transmitted to them as young people.

All the affidavits speak of the importance of a person's birth site and the birth sites of their parents and grandparents in determining a person's *ngurra* and the sense to which they belong to and know about country. The maintenance and protection of such sites and areas are said to be integral Mantjintjarra Ngalia law and custom. [Name deleted] describes the traditional customs and restrictions associated with death.

Maintenance and protection of places of importance under traditional laws and customs in the area is referred to in all of the affidavits—cleaning out rockholes, managing heritage surveys in relation to mining and other related acitvities in area. In the ethnographic report, it is stated that 'knowledge' of *ngurra* (country) is fundamental to the custodianship of country'. [Name deleted], [Name deleted], [Name deleted] and [Name deleted] all speak of the protocols and obligations conferred upon them by their belonging to country – to protect and maintain and control access to their country. They have all been told by their predecessors to look after their country.

This material provides support to prima facie establish the rights claimed at **g)**, **h)** and **j)**.

Rights/interests i)—the right to share or exchange (for non-commercial purposes) resources of the area in accordance with traditional laws and customs

Not established

There is some material before me relating to the sharing of 'meat' after hunting in accordance with traditional law and custom. However, it is not extensive or consistent across the affidavits or referred to in the reports in any detail. Additionally, with the right expressed to include 'resources', it is not clear what defines such resources that would be shared or exchanged between people.

I am therefore unable to find that the right to share or exchange (for non-commercial purposes) resources of the area in accordance with traditional laws and customs can be established prima facie.

Section 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
    (i) the Crown in any capacity, or
    (ii) a statutory authority of the Crown in any capacity, or
    (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result and reasons

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

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. The condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application' (*Gudjala FC*—at [84].

Sufficient material is provided at Attachment F and at Schedules G and M. Extensive information in the affidavits and reports show that Mantjintjarra Ngalia people have traditional physical connection with the land and waters of the application area. The material has been quoted at length in my consideration for both s. 190B(5) and s. 190B(6).

I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

Section 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.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

No approved determination of native title: s. 61A(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.

Result and reasons

The application **meets** the requirement under s. 61A(1).

The geospatial report dated 15 January 2009 and a search undertaken by myself of the Tribunal's geospatial databases on 20 March 2009 reveals that there are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(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.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous 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.

Result and reasons

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Attachment B2 at paragraph 1(ii) excludes from the application area any land or waters that are or have been affected by 'a previous exclusive possession act as defined in the *Native Title Act 1993* and regulations and the Western Australian State analogue, *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*'.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the 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) 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.

Under s. 61A(4), s. 61A(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.

Result and reasons

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Attachment B2 at paragraph 2 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State of Western Australia.

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Section 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.

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

Result and reasons re s. 190B(9)(a)

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

The application at Schedule Q states that 'To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in right of the Commonwealth or the State of Western Australia, they are not claimed by the applicants'.

Result and reasons re s. 190B(9)(b)

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

The application at Schedule P states that 'No claim of exclusive possession of an offshore place is made by the applicants'.

Result and reasons re s. 190B(9)(c)

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

Attachment B2 states at paragraph (5) that 'the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished'.

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Mantjintjarra Ngalia People 2**
NNTT file no.	**WC06/6**
Federal Court of Australia file no.	**WAD372/2006**
Date of registration test decision	**31 March 2009**

Section 190C conditions

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

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

Section 190B conditions

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

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

Attachment B
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to this decision about whether or not to accept the application for registration.

1. The application as amended in the Federal Court on 16 December 2008, including attachments and affidavits.
2. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack 2008/2267, dated 15 January 2009 (the geospatial report), being an expert analysis of the external and internal boundary descriptions and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
3. Reports of searches made of the Register of Native Title Claims, Federal Court Schedule of Applications, National Native Title Register and other databases to determine the existence of interests in the application area, namely, overlapping native title determination applications, s. 29 future act notices and the intersection between Mantjintjarra Ngalia #2 application area and any gazetted representative body regions. These reports are against the Tribunal's databases and documented in the geospatial report.
4. Register Extract generated by the Tribunal's Case Management System for the following application:
   - WC99/10—Wutha—WAD6064/98
5. Transcript of Proceedings, *Phyllis Thomas & Others and Native Title Registrar and Another* (WAD119/2007), 3 December 2007
6. Federal Court Order dated 3 December 2007, that the decision of the Delegate of the Registrar be quashed and set aside and that the Registrar deal with the Mantjintjarra Ngalia #2 application according to law including the application of the provisions set out in sub-item 89(4) of Part of Schedule 2 of the Native Title Amendment Act 2007.

Additional information provided direct to the Registrar on 19 December 2008 comprising:

7. For the purposes of Schedule R – Authorisation and s. 190B(4) and (5)
   7.1. Copy of Affidavit of [Name deleted], sworn 1 December 2006
   7.2. Annexure SC1—map of the area of the application
   7.3. Annexure SC2—Curriculum Vitae of [Name deleted]
   7.4. Annexure SC3—notice inviting persons to a meeting for the authorisation of the application (the notice)
   7.5. Annexure SC4—copy of the notice of the meeting as advertised in the Kalgoorlie Miner on 16 August 2006
   7.6. Copy of Affidavit of [Name deleted], sworn 1 December 2006

7.7. Annexure PMR1—copy of the notice for the meeting as posted out to claimants on the updated mailing list

7.8. Annexure PMR2—record of outcomes of the authorisation meeting held at Leonora on 29 August 2006 and attendance list for the meeting

7.9. Copy of Affidavit of [Name deleted], sworn 1 December 2006

7.10. Annexure LT1—copy of the notice for the meeting as posted at various notice boards

7.11. Copy of Affidavit of [Name deleted], sworn 18 September 2006

7.12. Annexure WWG1—facsimile information about the meeting sent to WIN TV

7.13. Annexure WWG2—facsimile information about the meeting sent to GWN TV

7.14. Annexure WWG3—facsimile information about the meeting sent to ABC Radio

7.15. Annexure WWG4—facsimile information about the meeting sent to Radio West

7.16. Annexure WWG5—copy of the notice of the meeting as advertised in the Kalgoorlie Miner on 16 August 2006

8. For the purposes of Schedules E, F,G and M – General description of native title rights and interests and inter alia s. 190B(5), (6) and (7)

8.1. Copy of Affidavit of [Name deleted] sworn 23 August 2007 and filed in Federal Court proceeding number WAD119/07 (Phyllis Thomas and Ors v Native Title Registrar & Anor) (Copy of this document was served on the Native Title Registrar in August 2007)

8.2. Copy of Affidavit of [Name deleted] sworn 4 September 2007 and filed in Federal Court proceeding number WAD119/07 (Phyllis Thomas and Ors v Native Title Registrar & Anor) (Copy of this document was served on the Native Title Registrar in August 2007) (Copy of this document was served on the Native Title Registrar in September 2007)

8.3. Copy of Affidavit of [Name deleted] sworn 16 December 2008 (this document has not been filed. The GLSC retains the original which can be inspected if required)

9. For the assistance of the Registrar in assessing the material supplied for the purposes of Schedules E, F, G and M

9.1. For ease of reference a more legible copy of "Map 2: Berndt's location of the Mantjintjarra Ngalia – Map of 1959" which appears at p.18 of Schedule F.3 to the Amended Form 1 (paginated as p86 of the Amended Form 1) is provided

9.2. Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 18 December 2006 (at Attachment F.1 to the Amended Form 1)

9.3. Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 30 October 2008 (at Attachment F.2 to the Amended Form 1)

9.4. Map showing locations of places referred to in the Affidavit of [Name deleted] sworn 16 December 2008

10. Document compiled December 2008 by the GLSC – Material provided on a confidential basis in relation to the Mantjintjarra Ngalia #2 Amended Native Title Determination (Claimant)

Application for the purpose of satisfying the requirements of sections 190A, 190B and 190C of the Native Title Act 1993 (Cth) (not filed with the Amended Form 1 in the Federal Court)

Further additional material provided direct to the Registrar on 27 January 2009 comprising:

11. Copy of Affidavit of [Name deleted], 8 January 2009 (not filed in the Federal Court)

End of document