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, Kalman Murphy
State/territory/region:	Western Australia
NNTT file no.:	WC06/6
Federal Court of Australia file no.:	WAD372/2006
Date application made:	21 December 2006
Date of decision:	20 April 2007
Name of delegate:	Liam Harding

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

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(1B), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

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Liam Harding

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

Reasons for decision

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Please be advised that on 3 December 1997, in the matter of *Thomas v Native title Registrar* (an appeal against the decision of the Registrar's Delegate in the application of the registration test to Mantjintjarra Ngalia No.2 (WAD372/2006, WC06/6)), the Court order that

1. The decision of the Delegate of the first respondence (Native Title Registrar) made on 20 April 2007 be quashed and set aside.

2. The Native Title Registrar deal with the claim in the applicant's application for determination of native title (WAD372 of 2006: NNTT number WC06/6) according to law including the application of the provisions set out in sub-item 89(4) of Part 2 of Schedule 2 of the *Native Title Amendment Act 2007.*

Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the **Act**) requires the Native Title Registrar (**Registrar**) to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court).

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Registrar. The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 28 November 2006. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for the details of a claimant application to be included in the Register of Native Title Claims, s. 190A(6) requires that the claim must be satisfy *all* the conditions set out in ss. 190B and 190C of the Act.

Section 190B sets out conditions that test particular merits of the claim to hold 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 requirements of s. 190C(2) first, in order to assess whether the application meets the conditions about procedural and other matters required by s. 190C, *before* turning to questions regarding the merits of the application for the purposes of s. 190B.

As, in this case, the application has not been accepted for registration, a summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Section 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 judgements in the courts) relevant to the application of the registration test. Amongst 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 other appropriate information.

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

I have *not* considered any information provided to the Tribunal in relation to its mediation functions because it is not, in my view, appropriate to do so: see ss. 136A, ss. 136E and 136F.

Application overview

The area claimed in this native title determination application is located in the Western Australian Goldfields region.

The Goldfields Land and Sea Council (**GLSC**), the applicant's legal representative, prepared a draft version of the application and provided it to the Registrar on 22 May 2006 and requested that a delegate of the Registrar provide a preliminary assessment.

A preliminary assessment of the draft application, dated 19 July 2006, was provided to the GLSC on 24 July 2006. This preliminary assessment amounted to assistance to the applicant by the Registrar pursuant to s. 78 of the Act.

The application was filed in the Federal Court on 21 December 2006 and allocated the Federal Court file number WAD 372/2006.

As at 5 January 2007, 213 s. 29 or equivalent notices that fell within the external boundary of this application has been given.

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. The steps that were taken in this case to ensure procedural fairness was afforded are outlined in Attachment C to these reasons.

Please note: All references to legislative sections refer to the Act unless otherwise specified. The description of each condition of the registration test that appears prior to the delegate's result and reasons is in many instances a paraphrasing of the provision of the Act. Please refer to the Act for the exact wording of each condition.

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 under ss. 61 and 62 in turn before coming to a conclusion about satisfaction of s. 190C(2) at page 14.

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

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

Reasons

The Registrar's task under s. 61(1) was clarified by his Honour Justice Mansfield in the case of *Northern Territory of Australia v Doepel* (2003) 203 ALR 385 (***Doepel***). This case is authority for the following propositions:

- Section 190(C)(2) is confined to ensuring that the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62—at [16]
- Bearing in mind that the Registrar's consideration of s.61(1) is defined by the procedural task set in s. 190C(2), I must be satisfied that the application sets out the native title claim group in the terms required by s. 61. That is one of the procedural requirements to be satisfied to secure registration: s. 190(A) (6) (b)—at [36]
- If the description of the native title claim group indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the relevant requirement of s. 190C(2) would not be met and the claim cannot be accepted for registration—at [36], and
- This consideration **does not involve me going beyond the application**, and, in particular, does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group—at [37] and [39].

The description of the claim group as it appears in Schedule A to the application is reproduced here:

> 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 Ingkngka,
>
> 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 (in both cases) are adopted in accordance with traditional law and custom (Itharra). A person is adopted under traditional 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.

In my view, having regard to this description and other information in the application, there is nothing on the face of the application which would cause me to conclude that the requirements of this section are not met, bearing in mind the limited task set in s. 190C2.

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

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

Reasons

Details are provided in Part B 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

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

Reasons

The application contains a description of the persons in the native title claim group at Schedule A.

Application in prescribed form: s. 61(5)

The application must:
(a) be in the prescribed form,
(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998 as required by s. 61(5)(a). It was filed in the Federal Court on 21 December 2006 as required pursuant to s. 61(5)(b).

I read s. 61(5)(c) as requiring that an application contain the information prescribed in the Act, including the information prescribed at ss. 61 & 62. I am of the view that the application does contain the prescribed information in s. 61 and therefore I am satisfied that this sub-section is met. Please refer to my comments above regarding s. 61 and then below regarding s. 62.

Section 61(5)(d) requires the application to be accompanied by any prescribed documents (which I read as being the applicant affidavits prescribed by s. 62(1)(a)) and any prescribed fee.

In relation to the prescribed documents I am satisfied that the requirements of s. 61(5)(d) have been met.

I note that s. 190C(2) only requires me to consider details, other information and documents required by ss. 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s. 61(5) have been met.

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 subparagraph (iv).

Result

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

Reasons

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in sub-paragraphs (i) through to (v).

To satisfy the requirements of s. 62(1)(a) the persons comprising the applicant may jointly swear/affirm an affidavit or alternatively each of those persons may swear/affirm an individual affidavit.

The application is accompanied by affidavits from [name withheld], [name withheld], [name withheld], [name withheld], [name withheld] and [name withheld], all of which are dated 29 August 2006 except the affidavit of [name withheld], which is dated 30 August 2006. Each of these affidavits are signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently address the matters required by s. 62(1)(a)(i)-(v).

Accordingly, the application meets the requirements of the s. 62(1)(a)(i)-(v).

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

Paragraph 62(1)(b)requires that the application must 'contain the details specified in' s. 62(2). As s. 62(2) contains 8 paragraphs (from (a) to (h)), I address each of paragraphs in turn before setting out my conclusion on ss. 62(1)(b) and (2) as a whole at page 15 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

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

Reasons

Information that enables the boundaries of the area covered by the application to be identified is found in Attachment B2 and in the map in Attachment B1 depicting the boundary of the application area.

Information that enables the boundaries of any areas within the external boundaries not covered by the application to be identified is found in Attachment B3 of the application.

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

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

Reasons

A map showing the external boundaries of the area covered by the application area is found in Attachment B1 of the application.

Searches: s. 62(2)(c)

> The application must contains 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

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

Reasons

Schedule D of the application states:

> Searches as to any non-native title rights and interests in relation to the land or waters in the area of the application have been carried out by the State of WA under copyright to the State and served upon the Applicant in the form of a CD Rom for the purposes of the proceedings. They are available for inspection at the offices of the applicants' representative Goldfields Land & Sea Council at 1st Floor, 63 Adelaide Terrace, Perth, WA. The applicants point out that they have not themselves carried out the searches described in section 62(2)(c) of the Native Title Act and the only available details and results of all searches referred to in that paragraph of which the applicants are aware are contained in the above mentioned CD- Rom produced by the State of Western Australia for the purpose of the proceeding.

As a matter of construction I understand the section as meaning 'carried out by or on behalf of the applicant'. I accept the applicant's position above. The section could not have been intended to burden the applicant with a requirement to provide details of searches done by others.

Additionally, I have no reason to believe that the recorded searches have been considered by the applicant such that it is in a position to provided details and results in Schedule D.

In these circumstances I am satisfied that the application satisfies the requirements of s. 62(2)(c).

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

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

Reasons

A description of the claimed native title rights and interests is found in Schedule E of the application. It does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law. Therefore I am satisfied that this procedural requirement is met.

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

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

Reasons

The application must contain a general description in the terms required by s. 62(2)(e). In the present instance, I am satisfied that Schedule F of the application provide a 'general' description in the terms contemplated by s. 62(2)(e)(i)–(iii).

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

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

Reasons

This is a procedural condition to be applied with reference to the material contained on the face of the application. I accept that the application, at Schedule G, contains details of activities currently being carried out by the native title claim group.

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

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

Reasons

This is a procedural condition to be applied with reference to the material contained on the face of the application.

The information in Schedule H indicates there are three applications in relation to the claim area of which the Applicant is aware. They are:

- Wutha WAD 6064/98,
- Mantjintjarra Ngalia WAD 6069/98, and
- Ngalia Kutjungkatja WAD 6001/02.

Therefore, I accept that the application contains details required for the purposes of this section.

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

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

Reasons

Schedule I of the application refers to Attachment I, which is a four page list of 209 s. 29 or equivalent notices falling within the external boundary of this application as at 9 October 2006. Attachment I indicates that the list was prepared by the National Native Title Tribunal on 9 October 2006.

Therefore, I am satisfied that application meets the requirements of this section.

Combined result for s. 62(2)

The application meets the requirements of s. 62(2), because it satisfied each of the requirements found in paragraphs 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

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

Reasons

Each of the three requirements in s. 190C(3)(a), (b) and (c) must be met. In considering whether they have been met, I may refer to information otherwise available than in the application: see s. 190A(3)(b) and the comments by Mansfield J in *Doepel* at [16].

The Geospatial overlap analysis of the application area dated 5 January 2007 indicates that there is one overlapping application that is on the Register of Native Title Claims at the time that the current application was made (this is the date it was filed in the federal Court on 21 December 2006). This is:

- Wutha (WC99/10) (WAD6064/98), entered on the Native Title Register on 15 June 1999 (the 'Wutha application').

Therefore, I must be satisfied that no person included in the native title claim group for the Mantjintjarra Ngalia application who a member of the native title claim group for the Wutha application.

The Wutha application describes the members of the native title claim group by reference to descent from two apical ancestors rather than naming all members individually.

The application being considered here similarly chooses to describe the claim group rather than name all members individually.

I have compared the descriptions from both applications and I am satisfied that on the face of the applications they do not appear to share the same apical ancestors.

Additionally, Schedule O of the application provides the following information which assists me in my task at s. 190C(3). It provides:

> Details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.
>
> Mantjintjarra Ngalia WAD 6069/98
>
> Ngalia Kutjungkatja WAD 6001/02

By omitting the Wutha application in Schedule O, the Applicant has indicated that between the Wutha application (WAD6064/98) and the Mantjintjarra Ngalia application (WAD372/2006) there are no members in common.

Accordingly, I am satisfied that the requirements of this section are met.

Section 190C(4) Authorisation/certification

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

(a) the application has been certified under s. 203BE, or under the former s. 202(4)(d), 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. 203BE(4), certification of a claimant application by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met (regarding the representative body being of the opinion that the applicant is authorised and that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group), and
(b) briefly set out the body's reasons for being of that opinion, and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)(regarding overlapping applications).

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

I must be satisfied that the circumstances described by either ss. 190C(4)(a) or (b) are the case, in order for the condition of s. 190C(4) to be satisfied.

For the reasons set out below, I am satisfied that the circumstances described by s. 190C(4)(b) are the case in this application, including that the condition of s. 190C(5) is met.

Reasons

The application is not certified pursuant to s. 190C(4)(a). Therefore I must be satisfied that the application meets the requirements of s. 190C(4)(b).

There are two limbs to s. 190C(4)(b) compliance. Firstly, the Registrar must be satisfied that the applicant is a member of the native title claim group. Under the second limb the Registrar must be satisfied that the applicant is authorised by all the other persons in the native title claim group to make the application and deal with matters arising in relation to it. In accordance with s. 190C(5) the Registrar cannot be satisfied of compliance with s. 190C(4)(b) 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.

Authorisation is defined in s. 251B and provides, in summary, that where there is a process of decision making under traditional law and custom for authorising things of this kind then that process must be complied with (s. 251B(a)). Where there is no such process, the native title claim group may authorise the applicant in accordance with a process of decision making agreed to and adopted by the group (s. 251B(b)).

It is clear, as a matter of law, that the requirement that the applicant be authorised by all the persons in the native title claim group does not necessarily mean that each and every member of the claim group must authorise the applicant for the purposes of s. 251B(b). It simply requires all those persons who need to authorise an applicant according to traditional law and custom do so. There may well be individual members of the claim group who for one reason or another are incapable of authorising an applicant— for example because they are of unsound mind, ill, or unable to be located- or are disinclined to do so for whatever reason.

1st limb – the applicant is a member of the native title claim group

Schedule A, Part 2 and Schedule R both contain statements to the effect that each of the persons who jointly comprise the applicant are members of the native title claim group.

In these circumstances I am satisfied that the first limb of the authorisation condition is met.

2nd limb – the applicant is authorised to make the application and to deal with matters arising in relation to it

Schedule R of the application provides the following information relevant to the issue of authorisation of the applicant by the native title claim group:

> Applicants are members of Native Title claim group

> The applicants are members of the native title claim group and are authorised to make the application, and deal with matters arsing in relation to it, by all the other persons in the Native Title claim group.
>
> The Goldfields Land & Sea Council has conducted extensive research in relation to the asserted connection of the Mantjintjarra Ngalia people to the claim area. That research includes the preparation of detailed genealogies and the filing of expert reports.
>
> The research indicates that the applicants are descendants of various of the named apical ancestors in the Mantjintjarra Ngalia claim group. This was confirmed by Mantjintjarra Ngalia claim group members who attended an authorisation meeting for the new Mantjintjarra Ngalia claim which was held at Leonora on the 29 August 2006 ("the meeting").
>
> Native Title Claim Group
>
> The anthropological research conducted by the Goldfields Land & Sea Council confirms that the Mantjintjarra Ngalia claim group hold the common or group rights and interests comprising the Mantjintjarra Ngalia native title claimed over the within claim area.
>
> Authorisation
>
> Written notice was given to all members of the Mantjintjarra Ngalia claim group for the authorisation meeting that was held at Leonora on 29 August 2006 ("the meeting"). Each person at the meeting identified themselves by reference to their family name and by reference to their place as descendants of apical ancestors that together comprised the basis of the claim group description. Those present at the meeting stated that they were able to make decisions on behalf of their family. The group, which included elders, confirmed that they and their family members all belong to the Mantjintjarra Ngalia claim group and that in their traditional way those present at the meeting could speak for their family and could speak for any other family members who were unable to be at the meeting.
>
> Those present at the meeting then decided that the applicants were authorised to make this application, and deal with matters arising in relation to it. This was accepted by the meeting as a decision by all the persons in the native tile claim group under a decision making process in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.

Further information relevant to the issue of authorisation is found in the following affidavits which were not filed in the Federal Court but provided to the Registrar by the GLSC under cover of letter dated 21 December 2006:

- Affidavit of [name withheld] (Anthropologist) sworn 1 December 2006;
- Affidavit of [name withheld] (GLSC Clerk) sworn 1 December 2006;
- Affidavit of [name withheld] (GLSC Project Officer) sworn 11 December 2006; and
- Affidavit of [name withheld] (GLSC Lawyer) sworn 18 September 2006.

The s. 62(1)(a) affidavits of the applicant each include a statement that the deponent is ' … authorized by all the persons in the native title claim group to make and deal with the matters arising in relation to the application.'

I am therefore satisfied that the application includes a statement to the effect that the second limb of the authorisation condition is met, as required by s. 190C(5)(a).

I am also satisfied that the application briefly sets out the grounds on which the Registrar should consider that the second limb of the authorisation condition has been met, as required by s.

190C(5)(b). I am of the view that this requirement is satisfied by information provided in Schedule R and the affidavits of [name withheld], [name withheld], [name withheld] and [name withheld], as referred to above.

I will now proceed to consider whether I am satisfied that the second limb of the authorisation condition has been met. In doing so, I note that I am not confined to the information provided in the application and accompanying affidavits: *Strickland & Ors* (2000) 99 FCR 33 (***Strickland FC***), at [28] and [78].

The native title claim group assert that there is a process of decision making under traditional law and custom for authorising things of this kind and that this process has been complied with. The final paragraph of Schedule R asserts that:

> Those present at the meeting then decided that the applicants were authorised to make this application, and deal with matters arising in relation to it. This was accepted by the meeting as a decision by all the persons in the native tile claim group under a decision making process in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.

In her affidavit dated 1 December 2006, [name withheld] deposes that:

> In my opinion the Mantjintjarra Ngalia people used a process of decision making that under the traditional laws and customs of the Mantjintjarra Ngalia people must be complied with in relation to making decisions of this kind—at [42]

This opinion is said to be based on her specialist knowledge based on study, training and experience [42].

The process of decision making is explained in paragraph 40 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.

The application provides evidence from an anthropologist to show that quite recent and substantial work has been undertaken to identify group members and to authorise the applicant. In her affidavit, [name withheld] deposes to having:

- Undertaken research, interviewed people and compiled genealogies [8]
- Compiled a mailing list of adult who had been identified through research as being Mantjintjarra Ngalia people [22]
- prepared a notice inviting people to attend a meeting on 29 August 2006 to authorise the applicant which was mailed to all persons that had been identified as being Mantjintjarra Ngalia people[25],[29], advertised in the 'Kalgoorlie Miner' on 16 August 2006 [31] and copies placed on public notice boards in communities and towns where members of the Mantjintjarra Ngalia people are known to reside, visit or pass through [33], and
- directed [name withheld] to contact people referred to on the mailing list by telephone and in person to advise them of the date and reason for the meeting [32].

[Name withheld] deposes in her affidavit, dated 1 December 2006, to having posted a notice to all persons on the mailing list of Mantjintjarra Ngalia claimants [3].

[Name withheld] deposes in his affidavit, dated 11December 2006, to having:

- placed a copy of the notice of the authorisation meeting on the display board at the Bega Garnbirringu Health Service in Kalgoorlie on 18 August 2006 [6]
- placed a copy of the notice of the authorisation meeting on the display board at the Ted Coomanoo centre, Leonora supermarket and the Leonora Elders store in Leonora on 23 August 2006 [10], and
- travelled to Kalgoorlie, Boulder, Leonora, Laverton and Cosmo Newberry to speak to persons whose names appeared on the mailing list to advise them of the authorisation meeting and to ask them to attend [9],[11]-[15].

[Name withheld] deposes in his affidavit, dated 18 September 2006, to having:

- Placed an advertisement to be published in the 'Kalgoorlie Miner' on 16 August 2006 giving notice of the authorisation meeting [12]
- Organised an announcement of the authorisation meeting to be made on ABC Radio and having been advised by ABC Radio on 25 August 2006 that this had occurred [8][10], and
- Organised an announcement of the authorisation meeting to be made on Radio West and having been advised by Radio West on 28 August 2006 that this had would have occurred [8][11].

The information in [name withheld] affidavit indicates that the meeting in Leonora on 29 August 2006 was attended by members of the claim group, all of whom were able to the identify themselves as descendants of the ancestors referred to in the notice [these names being those given in the claim group description in schedule A] [34]. It also appears from the affidavit material that the meeting was attended by both the senior men and senior women of the native title claim group [39]. Having attended the meeting herself, [name withheld] says of the capacity of those who attended to make decisions:

> In my opinion those persons present at the Mantjintjarra Ngalia meeting were able to make decisions on behalf of the Mantjintjarra Ngalia people regarding matters relating to their claim— at[36]

I am satisfied that where the applicant asserts that a process of decision making under traditional law and custom exists for authorising things of this kind, this decision making process has been complied with. I accept that this decision making process involved the native title claim group taking advice from the elders of the group, and after consultation with them, reaching a decision to authorise the applicant to make the application, and deal with matters arising in relation to it. Given the extensive endeavours of the GLSC on behalf of the applicant to ensure all members of the claim group were given notice of the authorisation meeting and on the basis of the sworn evidence from the GLSC's anthropologist concerning the capacity of those persons who attended to make decisions, I am satisfied that such authorisation was by all the persons in the native title claim group.

In conclusion I am satisfied that the requirements of s. 190C(4)(b) are met.

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

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

Reasons

External boundary description

Schedule B of the application refers to Attachment B2, which describes the boundaries of the application area by means of a metes and bounds description including references to the following:

- cadastral parcels
- a series of coordinate points, and
- existing native title determination application boundaries.

The boundaries of the area are shown on a map in Attachment B which is a copy of a map produced by the Tribunal's Geospatial Services Unit dated 9 October 2006 and includes the following information:

- the application area clearly depicted by a bold outline
- the boundaries of labelled adjoining native title determination and determination applications
- cadastral boundary background, coded by tenure
- scale bar, north point, coordinate grid, legend and locality diagram, and

- notes relating to the source, currency and datum or data used to prepare the map.

The Tribunal's Geospatial Services Unit assessed the map and written description and concluded in its assessment dated 5 January 2007 that the description and map are consistent and locate the application area with reasonable certainty, notwithstanding two typographical errors found in the text of Attachment B2.

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

(a) information, whether by physical description or otherwise, that enables the boundaries of:
    i the area covered by the application[1]; and
    ii any areas within those boundaries that are not covered by the application[2] to be identified
(b) a map showing the external boundary of the application area

The application contains a written description of the boundaries in Attachment B2 and Attachment B3 respectively. A map showing the external boundary is found in Attachment B1 of the application.

Attachment B2 uses geographic coordinates and references to the boundaries of other native title applications to describe the northern, southern, eastern and western boundaries of the application area. The map in Attachment B1 depicts the external boundary in a bold. The map contains a scale bar, north point, coordinate grid, locality diagram, underlying cadastral boundaries and source and datum notes. The map and written description were prepared by the Tribunal's Geospatial and Mapping analysts (Geospatial) on 9 October 2006.

Considering the comprehensive identification of the external boundary in Attachment B2 and the clarity of the mapping of this external boundary on the map in Attachment B1, I am satisfied that the external boundaries of the application area have been described comprehensively, so that the location of it on the earth's surface can be identified with reasonable certainty. It is my view that the typographical errors found in the text of the written description are very minor and do not ultimately detract from the information or preclude the application from meeting the requirements of this section.

Internal boundary description

At Attachment B3, the applicant has provided information identifying areas within the external boundaries of the area covered by the application that are not covered by the application. This is done by way of a number of general exclusions which are shown below:

1. Subject to paragraphs 3 and 4 the area covered by the application excludes any land or waters that are or have been affected by:

    a) a category A intermediate period act and category A past act (subject to the operation of the Native Title Act 1993); and

[1] Referred to here as the external boundary of the application area
[2] Referred to here as the internal boundaries of the application area

b) a previous exclusion possession act as defined by the Native Title Act l993 and regulations and the Western Australian State analogue, Titles (Validation) and Native Title (Effect of Past Acts) Act 1995.

2. Subject to paragraphs 3 and 4, exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or state of Western Australia.

3. Where an act specified in paragraphs 1 or 2 falls within the provisions of:

   1) s.23B(9) - Exclusion of acts benefiting Aboriginal Peoples or Torres Strait

   Islanders;

   2) s.23B(9A) - Establishment of a national park or state park;

   3) s.23B(9B) - Acts where legislation provides for non-extinguishment;

   4) s.23B(9C) - Exclusion of Crown to Crown grants; and

   5) s.23B(10) - Exclusion by regulation

   the area covered by the act is included in the application.

4. Where an act specified in paragraphs I or 2 affects or affected land or waters referred to in:

   1) s47 - Pastoral leases etc covered by claimant application

   2) s47A - Reserves etc covered by claimant application

   3) s47B - Vacant Crown land covered by claimant application

   the area covered by the act is included in the application.

5. The area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise wholly extinguished.

I am of the view that the stated exclusions enable areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Western Australia may be required; nevertheless, it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

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

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

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

Reasons

In *Doepel*, Mansfield J states at [16] that s. 190B(3) has 'requirements which do not appear to go beyond consideration of the terms of the application.' In accordance with these comments I have confined my consideration to the information contained in the application itself.

Schedule A does not name the persons in the native title claim group for the purposes of s. 190B(3)(a). I must therefore be satisfied that the requirement found in s. 190B(3)(b) is met.

At [51] in *Doepel*, Mansfield J stated that:

> The focus of s.190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so.

Further, at [37], Mansfield J states that the focus of s. 190B(3)(b) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained.' Accordingly, for the purpose of satisfying myself that the requirements of this section have been met I must consider the issue of the adequacy of the description alone.

The description of the persons in the native title claim group is found in Schedule A and is set out on page 8 of my reasons.

Identification of members of the native title claim group by reference to named apical ancestors is capable of satisfying the requirements of s. 190B(3)(b) even though the descendants are not individually named and some process of inquiry would need to be undertaken in order to determine if any one person is a member of the claim group: *State of Western Australia v Native Title Register & Bellotti* (1999) 95 FCR 93.

I am of the view s. 190B(3)(b) requires an objective method of determining who is in the claim group be described in the application. I am also of the view that the description in Schedule A satisfies this requirement. The fact that some factual inquiry may be required to determine who is in the group does not in itself render the description inadequate.

For these reasons, I am satisfied that the description of the persons in the native title claim group meets the requirements of s. 190B(3)(b).

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. 61(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Result

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

Reasons

Section 190B(4) requires me to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition only the description contained in the application can be considered: *Doepel* at [16].

The description referred to in s. 190B(4) must be:

> …a description of the native title rights and interests claimed in relation to particular land or 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: s. 62(2)(d).

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. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act. For my consideration of the claim against s. 190B(4), I am focussing only on whether the rights and interests as claimed are 'readily identifiable'.

I take the view that s. 190B(4) is only intended to identify those rights and interests, it any, that are not 'readily identifiable' in the sense of being unintelligible or not able to be understood.

Schedule E sets out the claimed native title rights and interests as follows:

> 1) Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the Mantjintjarra Ngalia People 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 Mantjintjarra Ngalia People claim the following rights and interests:
>
> (a) the right to access the application area
>
> (b) the right to camp on the application area
>
> (c) the right to erect shelters on the application area
>
> (d) the right to remain and erect habitats on the application area
>
> (e) the right to hunt on the application area

(f) the right to have access to, manage and use the natural water resources of the application area

(g) the right to gather and use the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin according to traditional laws and customs

(h) the right to conduct ceremonies on the application area

(i) the right to participate in cultural activities on the application area

(j) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area

(k) the right to conduct burials on the application area

(l) the right to speak for and make decisions about the application area

(m) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs

(n) the right to control access to and use of the application area by other Aboriginal People who seek access to or use of the lands in accordance with traditional laws and customs

(o) the right to determine and regulate membership of and recruitment to the native title claim group

(p) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites

3) The native title rights are subject to:

a) The valid laws of the State of Western Australia and Commonwealth of Australia

b) The rights (past or present) conferred upon persons pursuant to the valid laws of the State of Western Australia and the Commonwealth of Australia.

I have considered the description of native title rights and interests and I am satisfied that the claimed rights and interests are readily identifiable for the purposes of s. 190B(4).

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 follow 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.

Result

The application **does not satisfy** the condition of s. 190B(5).

Reasons

The task required at s. 190B(5)

The nature of the Registrar's task under s. 190B(5) was discussed by his Honour Justice Mansfield in *Doepel*:

> 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]

And:

> S. 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist— at [127] to [128]

In this regard, I also refer to *State of Queensland v Hutchinson* (2001) 108 FCR 575 (***Hutchison***), where Kiefel J said:

> [S]ection 190B(5) may require more than [s. 62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.

I have considered the Explanatory Memorandum to the Native Title Bill 1997-98 which says, when discussing an overview of the proposed amendments which would see the creation of a test for registration in s 190A:

> 29.1 . . . The registration test is not intended to provide a screening mechanism for access to the Federal Court. A claim which fails the registration test may still proceed through the Federal Court to a determination unless it is struck out, settled or withdrawn.
>
> 29.2 Instead, the purpose of the registration test is to ensure that only claims which have merit are registered on the Register of Native Title Claims.

I have also considered the Second Reading Speech of the Attorney-General [Hansard, House of Representatives, 9 March 1998 at p 784] when he explained the purpose of the introduction of the proposed amendments to Part 7 of the Act is to introduce a more stringent test (the registration test) to be applied by the Registrar when considering applications for registration and entry onto the Register of Native Title Claims, thereby allowing the registered native title claimant to participate in the right to negotiate process:

> . . . it is essential to the continuing acceptance of the right to negotiate process that only those people with a credible native title claim should participate. Application of an improved test will go a long way to removing the ambit and unprepared claims which are now clogging the National Native Title Tribunal.

I note that one effect, however, of the most recent amendments to the Act, in April 2007, will that where a claim fails the merit condition of the registration test (such as the condition at s. 190B(5)),

and after all avenues of review have been exhausted, the Court, either on its own initiative or on the application of a party may dismiss the application in which the claim was made if:

- The Court is satisfied that the application has not been amended since the registration test was applied, and is not likely to be amended in a way that would lead to it being accepted for the registration, and
- in the opinion of the Court there is no other reason why the application should not be dismissed (see s. 190D(7) of the Act).

I am mindful also that the registration test is of an administrative nature and that it is therefore not appropriate to apply standards of proof that would be required at a trial or hearing of the application.

What the delegate can consider

In performing my task under s. 190B(5), I am not limited to consideration of information contained in the application but may have regard to other information provided by the applicant. I may also have regard to information from other sources relevant to my consideration, as indicated by the concluding words of s. 190A(3) that the Registrar 'may have regard to such other information as he or she considers appropriate', subject to providing procedural fairness: *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107 at [4], per Kiefel J; *Doepel* at [16]; *Quall v Native Title Registrar* (2003) 126 FCR 512; at [36], per Mansfield J; *Hutchison* at [25], per Kiefel J; *Wulgurukaba People (No 1) v State of Queensland* [2002] FCA 1555, at [20], per Drummond J*; Martin v Native Title* Registrar [2001] FCA 16, at [23], per French J (***Martin***); *Strickland FC* at [78] and [79], per Beaumont, Wilcox and Lee JJ; *Strickland & Nudding on behalf of the Maduwongga People v Native Title Registrar* (1999) 106 LGERA 8 at [24], per French J.

I note however that the provision of material demonstrating a sufficient factual basis to support the assertion that the claimed native title rights and interests exist is ultimately the responsibility of the applicant and there is no requirement that I undertake an independent search for this material: see *Martin* at [23].

In the interests of procedural fairness, the Registrar wrote to both the State of Western Australia and the applicant on 23 February 2007, referring to the Federal Court decision of *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9) [2007] FCA 31 (*Wongatha*) which was handed down while I was considering the application for registration. The Registrar invited the parties 'to provide submissions addressing what, if any, significance those findings have on the delegate's consideration of the application against the conditions contained in s.190B and s.190C of the Act.'

It seemed to me that this step was necessary because the group that makes this application appears to be, if not made by the same group, then one made by a group that is comprised of substantially the same persons who make the Mantjintjarra Ngalia application (WAD6069/98) which overlaps the area of the Wongatha application and was dismissed to the extent of the overlap by the Court in *Wongatha*.

On 11 April 2007, the legal representatives for the State of Western Australia responded in writing to the Registrar's letter and advised that they did not intend to provide submissions.

The applicant's representative, the GLSC, responded by letter dated 27 February 2007 and requested clarification as to:

(a) Whether the delegate intends to have regard to the Wongatha decision by way of 'other information' within s. 190A(3) of the Native Title Act 1993 in considering the Mantjintjarra Ngalia #2 claim under s. 190A of the Act; and

(b) If so, what element or elements of the decision does the delegate consider may constitute adverse material against the Mantjintjarra Ngalia applicants such that they may have an opportunity to contradict or comment on that element or elements.

On 15 March 2007 the Registrar wrote to the GLSC and noted, among other things, that:

> In registration testing the application, the delegate must give effect to the wording of the *Native Title Act 1993* (Cwlth) (the Act) and, in doing so, must consider the facts and apply settled law. The delegate is not under a duty as an administrative decision-maker to foreshadow which judicial decisions he may consider or will apply to the facts in reaching his decision. Nor is there an onus on the delegate to make the applicant's case for them. For example, the provision of material disclosing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. It is not a requirement that the Registrar or his delegate undertake a search for such material: *Martin v Native Title Registrar* [2001] FCA 16 at [23].
>
> However, as previously indicated to you in my letter of 23 February 2007, the applicant is welcome to make submissions to the delegate addressing what, if any, significance the decision in Wongatha may have on the matters considered for the purposes of the registration test. Procedural fairness requires that the applicants be afforded an opportunity to know the case which they must answer, but that the extent to which the details of that case must be provided is a matter of degree according to the circumstances. Requiring full details could 'encumber the decision making process with undue delay' (*Kioa v Minister for Immigration* (1984) 55 ALR 669 at 682.)
>
> I note that this matter is s 29 affected.
>
> That said, however, you may care to address the implications in the following:
>
> - at [923] of the decision in Wongatha, his Honour Justice Lindgren makes a number of findings on the evidence given in support of the Mantjintjarra Ngalia (WG6069/98) claim. The evidence was given, in part, by members of the claim group whose application the delegate is presently considering. Particularly, evidence given by [name withheld] (who provides the sole affidavit from a member of the claim group in support of the Mantjintjarra Ngalia (WAD 372/2006) claim) is considered by Lindgren J.
> - at [310] to [319], his Honour refers to the capacity of various claim groups to claim group rights and interests. In this discussion, the court refers to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). In the present case, similar issues arise when ss. 190B(5) and 190B(6) of the Act are considered. On this issue see also [879] to [902].
> - On some matters that may be relevant to the delegate's decision see also [301] to [303], [1011], [1937], [1966] to [1991], [1993] to [1997].
> - Whether the delegate might give any and if so, what weight to the findings of fact in that decision.
>
> The list of examples referred to above is not intended to serve as an exhaustive list of passages from the Wongatha judgment that are or may be relevant. With respect, the present application has been

> filed by members of the claim group in that matter and the issues must be clear to them or their advisers.

The GLSC again wrote to the Registrar on 10 April 2007 and made submissions to the effect that the Mantjintjarra Ngalia #2 application (WAD376/06) is a differently constituted claim, both in the description of the claim group and the application area, to that considered by the Court in Wongatha. Consequently, in the opinion of the applicant's representatives, it would be an error of law for the delegate applying the test in s. 190A to extrapolate findings in relation to one constituted case in one area to a differently constituted case in another area.

Nevertheless, the applicant's representatives then proceeded to address aspects of the judgment in *Wongatha* and sought to either distinguish the circumstances of the present application from those considered by the Court or to find support in some of the Court's findings.

I do not accept the premise behind this argument of the GLSC. The claim group is described differently but it is apparent that at least some of the members are common to each of the applications and that the type of recognition sought for this group is the same. Schedule R of the current application refers to the extensive research conducted by the GLSC including the 'filing of expert reports', which presumably is a reference to the filing of expert reports in respect of the Mantjintjarra Ngalia Peoples claim (WAD6069/98). The Court in *Wongatha* heard evidence from members of the Mantjintjarra Ngalia #2 claim group and I am aware that the evidence given by those parties significantly reflects material before me in the form of affidavits from those same members. Further, whilst the application area is different, it's an adjacent area to that of the claim considered in part in *Wongatha*.

Nevertheless, my role as an administrative decision maker in this context is to give effect to the wording of the registration conditions contained in the Act and apply the settled law about these conditions to the facts. Whilst I am undoubtedly bound by the principals of law enunciated in *Wongatha*, in undertaking the task required at s. 190B(5), I am not bound to consider, and have not considered, the findings of fact made by the Court in that case.

My role as an administrative decision maker is different to that of the Court and it is clearly not appropriate to apply standards of proof that would be required at a trial or hearing of the application. Indeed, when undertaking the task required of me at s. 190B(5), the passage from *Doepel* (to which I referred to earlier) directs me '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.' However, I am required 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'.

I note also that s. 190B(6) may require some consideration of controverting evidence and this issue will be addressed in my reasons when that section of the test is applied – see *Doepel* at [127]:

> It [s. 190B(5)] does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence.

Accordingly, in the present case I have directed my consideration of the application in support of the requirements of s. 190B(5) to the information in the application and accompanying material only.

What I have considered

In considering the application against the condition in s. 190B(5), I have had regard to the application as a whole.

Material which addresses the requirements of s. 190B(5) is contained in Schedules F, G and R and in the affidavit material as detailed below.

The particular assertions of the section

As the section reads, I 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 their predecessors had, an association with the area;

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

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

According to *Doepel* at [131] to [132], s. 190B(5):

> [R]equires the factual basis for the claimed native title rights and interests to be asserted ... [It] identifies the particular assertions which must be supported by the factual basis set out. It follows … that the general requirement [found in the chapeau to s. 190B(5)] beyond the particular [found in paras (a) to (c)] is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately …
>
> Consequently, in my view, the Registrar did not err in focussing primarily upon the particular requirements of s 190B(5). That is the way in which the NT Act directs his attention. If any of the particular requirements were not met, then the general requirement would not be met.

The word 'association', as it is used in s. 190B(5)(a) is not defined in the Act. In my view, the association required must be referrable to the native title rights and interests claimed in respect to the particular land and water the subject of the application.

Section 190B(5)(b) requires me to be satisfied that the factual basis provided supports the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. The High Court decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) provided an interpretation of the meaning of the word 'traditional' which I have considered when applying the requirements of s. 190B(5)(b) and (c) to the present application.

In that case at [46] to [47], [56], [79] and [87], Gleeson CJ, Gummow and Hayne JJ said (McHugh and Callinan JJ agreeing) that:

> 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. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

[I]t would be wrong to confine an inquiry about native title to an examination of the laws and customs now observed in an indigenous society, or to divorce that inquiry from an inquiry into the society in which the laws and customs in question operate…Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs…

For the reasons given earlier, "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs…

[A]cknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.

Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would necessarily be fatal to a native title claim; rather that an assessment would need to be made to decide the significance (if any) of change to, or adaptation of, traditional law or custom: *Yorta Yorta* at [44] and [82] to [83].

Section 190B(5)(c) requires that I must be satisfied that a sufficient factual basis provided supports the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In relation to the assertion relevant to s. 190B(5)(a) the information in Schedule F provides:

> The native title claim group and their ancestors have, before and since the assertion of British sovereignty possessed occupied used and enjoyed the claim area or alternatively, exercised their native title rights and interests

Schedule G provides:

> Members of the native title claim group to the greatest extent possible carry out traditional law business and customary activities on the land and waters within the claim area. In particular they possess occupy use and enjoy the land including by way of living, camping, hunting and gathering. They protect sites of traditional significance and maintain water holes and pass on traditional knowledge of the area.

In relation to the assertions relevant to ss. 190B(5)(a), (b) and (c), Schedule F states:

> (A) The native title claim group and their ancestors have, before and since the assertion of British sovereignty possessed occupied used and enjoyed the claim area or alternatively, exercised their native title rights and interests; and
>
> (B) Such possession occupation use and enjoyment and exercise of their native title rights and interests has been pursuant to and possessed under the laws and customs of the claim group including traditional laws and customs that vest rights and interests in land and waters in members of the native title claim group on the basis of one or more of the following and considered determinative by the native title 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 (including through adoption)
>
> (C) The rights and interests held by the native title claim group in relation to the claim area and identified at Schedule E are possessed under the traditional laws and customs of the members of the native title claim group which are in turn shared with other members of the Western Desert cultural bloc.
>
> (D) Such traditional laws and customs have been passed on by traditional teaching through the generations preceding the present generations to the present generations of persons comprising the native title claim group.
>
> (E) The native title claim group continues to acknowledge and observe those traditional laws and customs.
>
> (F) The native title claim group by those laws and customs has a connection with the land in respect of which the claim is made.
>
> (G) the rights and interests are capable of being recognised by the common law of Australia.

Schedule F contains both assertions of fact, and conclusions that the applicant asks be drawn from asserted facts. For example, Schedule F asserts as fact the proposition that the native title claim group has, and their ancestors have, possessed the claim area since before British sovereignty. The applicant also asserts as fact the proposition that laws and customs have been passed on to successive generations by a method of teaching. By way of example, a conclusion that the applicant asks to be drawn is the conclusion that rights and interests which are said to be held by the native title claim group are possessed under traditional laws and customs.

It is not my task to test whether the asserted facts will or may be proved (see *Doepel* —at [17]). However, in satisfying myself that the material discloses the requisite factual basis, nor am I am

obliged to accept the general assertions contained in the Schedule F. I find support for this in the decision in *Martin*, where French J had this to say about the requirements of the section:

> The critical finding of the delegate was that there was little information about the relationship of the claim group and its predecessors to the Widi people. This consideration was involved in his analysis of whether he could be satisfied that there was a factual basis supporting the primary assertion referred to in s 190B(5)(b). He was entitled to take the view that he did that the factual basis laid out did not support the conclusion that was necessary. He was not obliged to accept the very general assertion in Schedule F as disclosing a factual basis for the matters of which he had to be satisfied. In my opinion the delegate did not err in coming to the conclusion that he did in relation to this condition—at [28]

The statements in *Yorta Yorta* ,to which I have referred earlier, define how the terms 'traditional laws acknowledged and traditional customs observed' and 'native title rights and interests', as found in s. 190B(5) must be interpreted. Therefore, I do not consider that that the reference in Schedule F to laws and customs as being 'traditional' obviates the need for me to determine whether there is a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interests. The mere use of the words 'traditional laws and customs' is not of itself enough. The application and/or supporting material must contain a sufficient factual basis to support the particular assertions found s. 190B(5)(a) to (c).

Whilst in the present case, Schedule F goes some way to providing the requisite factual basis to support the assertions of ss. 190B(5)(a), (b) and (c), I must consider whether the application and other material before me discloses a 'proper factual basis' (see *Doepel* at [128]) on which it is asserted that the claimed native title rights and interests exist.

With regard to s. 190B (5)(a), I note Schedule F provides that:

> The native title claim group and their ancestors have, before and since the assertion of British sovereignty possessed occupied used and enjoyed the claim area or alternatively, exercised their native title rights and interests

In [name withheld] affidavit dated 18 December 2006, she asserts such an association. She states that at various stages throughout her life she has lived at Mulga Queen, which I have identified as being situated within the application area. She describes having lived in a *wiltja* [traditional bough shelters] at Mulga Queen with her parents [22], hunting [85] and gathering bush foods all around Mulga Queen [90]. She describes having been told that the *yiwarra* [run] for her maternal grandparents is Mulga Queen to Mangkkili, Alexandra Spring and Empress Spring.

When read in conjunction with the information in Schedule F, I am satisfied that there is a proper factual basis for the assertion required of s. 190B(5)(a) that the native title claim group have, and their predecessors had, an association with the area.

I turn now to consider the factual basis for the assertions referred to in ss. 190B(5)(b) and (c).

Given that the laws and customs from which the native title rights and interests derive their existence must necessarily be those of a society or group, I have endeavoured to determine from the present application the nature of the particular society or group that has been described. The information, both in the application and in additional material provided by the applicant is set out below.

Schedule F makes reference to 'the Western Desert cultural bloc', where it states:

> The rights and interests held by the native title claim group in relation to the claim area and identified at Schedule E are possessed under the traditional laws and customs of the members of the native title claim group which are in turn shared with other members of the Western Desert cultural bloc.

In the Registrar's letter to the GLSC dated 15 March 2007, clarification was sought as to the meaning of this particular paragraph from Schedule F.

In their letter dated 10 April 2007, the GLSC advised that the intended meaning was that traditional laws and customs of the claim group are shared with other members of the Western Desert cultural bloc and that it is these shared laws and customs which give rise to the rights and interests claimed to be held by members of the claim group.

I note, however, that none of the affidavit material refers to the 'Western Desert cultural bloc' as being either the 'society' to which the claim relates or the source from which the claimed native title rights are derived. Nor in fact does the Form 1 refer to the 'Western Desert cultural bloc' other than in the paragraph from Schedule F extracted above.

Schedule R refers to the authorisation of the applicant having been made under 'a decision making process in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.'

In the affidavit dated 1 December 2006, deposed to by [name withheld], an anthropologist employed by the GLSC to conduct research in relation to the Mantjintjarra Ngalia people, there are references to, '…the traditional laws acknowledged and the traditional customs observed by the Mantjintjarra Ngalia people [12] and '…the traditional laws and customs of the Mantjintjarra Ngalia people'.

An available inference is that the society or group is the Mantjintjarra Ngalia People, rather than the broader Western desert cultural bloc.

Yet elsewhere before me are references to the 'Wongatha people', 'Wangkayi way' or 'Wangkayi People'. A possible inference being that the traditional laws and customs come from a society or group called the 'Wongatha', the 'Wangkayi' or a society or group that follows the 'Wangkayi way'.

In her affidavit of 18 December 2006 [name withheld] states:

- When my mother died, [name withheld] and [name withheld] became my mothers. Wangkayi way, I call them my ngunytju (mother)—at [5]
- Some of my relatives are [name withheld], [name withheld], and her brothers, [name withheld], [name withheld] and [name withheld]. Wangkayi way, I call them my brothers (kurta) and sisters (turtu)—at [9]
- I say to other Wangkayi that they should ring me up if they are coming to Mulga Queen so that I can cook a fat kangaroo and damper for them—at[83]
- Sometimes Wangkayi people call in to see me and ask me if I'm alright for water—at[84]
- When we go hunting we share the kuka (meat) we get with others. It's Wangkayi way—at [92]

- Wangkayi way, we have to clean out the rockholes, and get rid of the dead animals. We do this before the rains come—at [93], and
- Young Wangkayi people on parole or with community work orders come to Mulga Queen from Leonora and Laverton. Sometimes they come from Kalgoorlie. One of the ways people at Mulga Queen help these young people is by taking them out bush camping and hunting—at[97].

In paragraph 4 of her affidavit, [name withheld] states that she both understands and speaks 'Wongatha'. There are further references to the term 'Wongatha' made in her affidavit where in describing a dreaming site she says 'That honey ant place is the main one for all the Wongatha people' [69]. And in describing a law she says:

- Wongatha people say that if someone in your household dies, you have to move away. We have to leave that place. [Name withheld] has been away from his in Mulga Queen for one year now because his wife passed away. Now he can come back and I live there—at [75]; and
- We had to move our winter camps near Lawut because some family passed away. We have to follow our custom. We moved about half a kilometre from that place—at[76]

There are also references made to another group called 'Ngaanyatjarra'. For instance, [name withheld] refers to her father as a 'Ngaanyatjarra man' where in paragraph 14 of her affidavit she states:

> My father, [name withheld], was from Tjirrkarli - he was a Ngaanyatjarra man. He told me that his people travelled to Lake Wells, Empress Spring and Alexander Spring. This was his country. He travelled together with the [name withheld] family. All the families stuck together.

In summary, the material variously refers to:

- The Mantjintjarra Ngalia people
- The Western Desert cultural bloc
- The Wangkayi people or people following the Wangkayi way
- The Wongatha people, and
- The Ngaanyatjarra

The information provided is contradictory and the inconsistencies generally within this material and that contained in the Form 1 application prevents me from reaching any conclusion about what is being described.

The fact that there is some current practice or observation of laws and customs does not, of itself, provide a sufficient factual basis to support the assertion that those laws and customs are 'traditional' in the sense set out in *Yorta Yorta*. From the material, I cannot determine a proper factual basis for the assertions in (b) and (c) of s. 190B(5). This is because the information is inconsistent and does not identify with any clarity the society or group from which the laws are derived nor does it provide any factual basis for the assertion that the traditional laws and customs claimed are traditional in the sense that they are derived from a society or group in existence at sovereignty. Without this, it follows that I am not satisfied that a sufficient factual basis is provided for the two assertions in subparagraphs (b) and (c), namely:

- 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
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

To conclude:

- I am satisfied that there is a proper factual basis for the assertion required of s. 190B(5)(a) i.e. that the native title claim group have, and their predecessors had, an association with the area
- I am not satisfied that a sufficient factual basis is provided for the assertions in subsections (b) and (c) of s. 190B(5)
- I am therefore, not satisfied that a sufficient factual basis is provided for the assertion that the claimed native title rights and interests exist.

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

The application **does not satisfy** the condition of s. 190B(6). I consider, prima facie, that none of the claimed native title rights and interests can be established.

Reasons

As I have found that a sufficient factual basis is not provided to support the assertion that the claimed native title rights and interests exist, it must follow that I do not consider, for the reasons outlined above under s. 190B(5), that at least some of the native title rights and interests can prima facie be established under s. 190B(6). In this regard, I note that in Doepel, Mansfield J said at [127] that it is at this section where some weighing of the factual assertion is required. I am unable to undertake this task in the absence of cogent or probative information that supports the assertions in the application about the claimed existence of the native title rights and interests.

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

The application **does not satisfy** the condition of s. 190B(7).

Reasons

'Native title rights and interests' are defined in s. 223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

- the rights and interests to be linked to traditional laws and customs
- those claiming the rights and interests to have a connection with the relevant land and waters, and
- those rights and interests to be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s. 190B(5). I will draw on the conclusions I made under that section in my consideration of s. 190B(6). My conclusion that the application does not establish a sufficient factual basis to support the assertions found in s. 190B(5)(a) and (b), it follows that I cannot be satisfied under s. 190B(7) that there are rights and interest linked to them.

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 at page 39.

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

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

Reasons

The Geospatial assessment and overlap analysis dated 5 January 2007 reveals that there are no approved determinations of native title over the application area as at that date.

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

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

Reasons

Attachment B3 to the application provides for the exclusion of any land or waters that are or have been affected by:

- a category A intermediate period act and category A past act (subject to the operation of the *Native Title Act 1993*), and
- a previous exclusion possession act as defined by the *Native Title Act l993* and regulations and the Western Australian analogue, the *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

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

Reasons

The application does not seek exclusive possession over areas that are the subject of previous non-exclusive possession acts.

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 sub-condition under s. 190B(9) in turn and I come to a combined result at page 40.

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

The application **satisfies** the sub-condition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

I refer to schedule Q, which clearly states that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

The application **satisfies** the sub-condition of s. 190B(9)(b).

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

I refer to Schedule P, which clearly states that no offshore areas are the subject of the application.

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

The application **satisfies** the sub-condition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

The application and accompanying documents do not disclose, and I am not otherwise aware, that the native title rights and interests claimed have otherwise been extinguished.

In addition, paragraph 5 of Attachment B3 excludes from the application area any area in relation to which native title rights have otherwise been wholly extinguished.

Combined result for s. 190B(9)

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

[End of reasons]

Attachment A

Summary of registration test result where application not accepted for registration

Application name:	Mantjintjarra Ngalia #2
NNTT file no.:	WC06/6
Federal Court of Australia file no.:	WAD372/2006
Date of registration test decision:	20 April 2007

Test condition (see ss.190B and C of the Native Title Act 1993)	Sub-condition/requirement	Result
s. 190C(2)		Combined result: Met
	re s. 61(1)	Met
	re s. 61(2)	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)	Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met

	re s. 62(2)(f)	Met
	re s. 62(2)(g)	Met
	re s. 62(2)(h)	Met
s. 190C(3)		Met
s. 190C(4)		Met
s. 190B(2)		Met
s. 190B(3)		Met
s. 190B(4)		Met
s. 190B(5)		Combined result: Not met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Not met
	re s. 190B(5)(c)	Not met
s. 190B(6)		Not met
s. 190B(7)		Not met
s. 190B(8)		Combined result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Combined 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 were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

In determining this application I have considered and reviewed the documents listed below:

- The application as filed in the Federal Court on 21 December 2006
- Prescribed affidavits of the Applicant pursuant to s.62(1)(a) that were filed with the application on 21 December 2006
- The results of searches by the Tribunal's Geospatial & Mapping Unit of the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases in relation to the application area including Geospatial assessment dated 5 January 2007 (Geotrack 2006/2464)
- A preliminary assessment from a delegate of the Native Title Registrar dated 19 July 2006
- Letter from Goldfields Land and Sea Council to NNTT dated 21 December 2006
- Affidavit of [name withheld] dated 17 March 1999
- Affidavit of [name withheld] dated 18 December 2006
- Affidavit of [name withheld] dated 1 December 2006
- Affidavit of [name withheld] dated 1 December 2006
- Affidavit of [name withheld] dated 11 December 2006
- Affidavit of [name withheld] 18 September 2006
- Registration Test file for Mantjintjarra Ngalia Peoples (WAD6069/98)
- Claimant application summary for Mantjintjarra Ngalia Peoples (WAD6069/98), and
- Claimant application summary for Ngalia Kutjungkatja 2 (WAD6001/02).

Attachment C
Procedural fairness steps

- On 22 December 2006, the Registrar received from the Federal Court a copy of the Mantjintjarra Ngalia 2 application filed on 21 December 2006
- On 22 December 2006, the Registrar sent to the State of Western Australia and the Ngaanyatjarra Council, in accordance with s. 66(2) of the Act, is a copy of the claimant application and accompanying documents which were referred to the Native Title Registrar pursuant to s. 63 of the Act
- On 22 January 2007, the Registrar sent to the applicant a letter regarding the registration test timeframes and advised that given that the application is s. 29 notice affected the delegate would use best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice
- On 1 February 2007, the Registrar sent to the State of Western Australia the following material and requested that the State provide any submissions in response to this material to the Registrar by 6 February 2007:
    - Affidavit of [name withheld], sworn on 18 December 2006
    - Affidavit of [name withheld], sworn on 1 December 2006
    - Affidavit of [name withheld], sworn on 1 December 2006
    - Affidavit of [name withheld], sworn on 11 December 2006
    - Affidavit of [name withheld], sworn on 18 September 2006
- On 23 February 2007, the Registrar wrote to the applicant and the State inviting them to provide submissions addressing what, if any, significance the findings from the 'Wongatha' decision may have on the delegate's consideration of the application when applying the condition of the registration test. Submissions were sought by 16 March 2007
- On 27 February 2007, the Registrar received a letter from the applicant asking what elements of the Wongatha decision the delegate would be considering
- On 15 March 2007, the Registrar wrote to the applicant and requested submissions by 30 March 2007
- On 16 March 2007, the Registrar received a letter from the applicant requesting an extension of time to provide submissions to the delegate
- On 19 March 2007, the Registrar advised the applicant that submissions could be provided by 10 April 2007
- On 10 April 2007, the Registrar received the applicant submissions for the delegate's consideration, and

- On 11 April 2007, the Registrar received a letter from the State of Western Australia advising the Registrar that no submissions would be made.

[End of document}