National Native Title Tribunal

Registration test decision

Application name	Martu #2
Name of applicant	Roderick Ford, Kenny Thomas, Darren Farmer, Roy Toby, Colin Peterson, Lindsay Hardcase, Joshua Booth
State/territory/region	Western Australia
NNTT file no.	WC10/8
Federal Court of Australia file no.	WAD141/2010
Date application made	1 June 2010
Name of delegate	Lisa Jowett

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

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

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

Date of decision: 21 September 2010

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision not to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) ('the Act'), as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Registration test

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Martu #2 application to the Native Title Registrar (the Registrar) on 1 June 2010 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

As the application has not been amended since it was made on 1 June 2010 I am not required to consider whether subsections 190A(1A) or 190A(6A) apply. Therefore, in accordance with subsection 190A(6) I must accept the claim for registration *if* it satisfies all of the conditions in sections 190B and 190C of the Act. This is commonly referred to as the registration test.

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

The result of my consideration, pursuant to ss. 190A(6) and (6B), is that the claim in the Martu #2 claimant application **must not** be accepted for registration because it **does not satisfy** all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Application overview

The application area is comprised of three distinct and separate areas of land which, other than for a small portion of one area, were included in an earlier Martu native title claim made in 1996 (WAD6110/98). That claim was part determined on 27 September 2002 recognising the existence of native title—*James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 (*James*). The determination area excludes the areas that are now the subject of this Martu #2 application with no determination being made in relation to them. The three portions (as they are referred to in the application) lie on the outer northern boundaries of determined Martu country. The balance of the original Martu claim that since remained on foot underlies approximately 81% of this Martu #2 application.

The native title claim group for the Martu #2 application is described in the same terms as set out in the determination in *James*. The application states at Schedule F that the native title claim group has 'a connection to the claim areas within the wider context' of the determined Martu area.

Given that the area of this application is largely surrounded by the area of the determination, it is my view that the consent determination and the reasons for judgment in *James* are relevant to my consideration of certain conditions of the registration test.

Information considered when making the decision

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

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

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 that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' : see s. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential: see also ss. 94K and 94L.

Procedural fairness steps

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

On 4 June 2010, the Tribunal:

1. provided a copy of the application and accompanying documents to the State of Western Australia inviting a submission in relation to the registration test of the Martu #2 application;
2. provided copies of the application and accompanying documents to the Principal Legal Officers of the Representative Aboriginal / Torres Strait Island Bodies that cover the area of the application—Central Desert Native Title Services, Kimberley Land Council and Yamatji Marlpa Aboriginal Corporation; and

3. wrote to the applicant confirming receipt of the application and accompanying documents, noting that it would now be considered for registration.

On 8 June 2010, the representative for the applicant, Central Desert Native Title Services (Central Desert) provided to the Tribunal an affidavit sworn by its Principal Legal Officer on 24 May 2010.

On 23 June 2010, the Tribunal informed the applicant that the registration test decision would be made by 30 August 2010, and confirmed as per previous correspondence between an officer of the Tribunal and the Principal Legal Officer of Central Desert, that the applicant would not be providing further material for the purposes of the registration test.

No submissions were made by the State of Western Australia.

Procedural and other conditions: s. 190C

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

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

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 below.

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

I turn now to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s. 61(1)

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

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

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

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

The description of the persons in the native title claim group is set out in Schedule A of the application:

> The native title claim group comprises those persons mentioned in the third schedule to the 'Native Title Determination — Martu' made by Justice French on 27 September 2002 in native title determination application *Jeffery James and Others v State of Western Australia and Others* WAG 6110 of 1998.

The Third Schedule in *James* contains information in three parts:

- a description of the Martu people
- a description of that part of the determination area described as the Shared Area, and
- a description of the Ngurrara people

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

The statement at Schedule A refers me to a document external to this application for a description of the group — *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208. The Federal Court decision in this matter is a public document and I am of the view that it would be fair and reasonable to accept the description of the group contained in the Third Schedule in *James* as being the description of the native title claim group for this application:

> In respect of the determination area, the common law holders are those people known as the Martu people. The Martu people are those Aboriginal people who hold in common the body of traditional law and culture governing the determination area and who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups:
>
> (a) Manyjilyjarra;
> (b) Kartujarra;
> (c) Kiyajarra;
> (d) Putijarra;
> (e) Nyiyaparli;
> (f) Warnman;
> (g) Ngulipartu;
> (h) Pitjikala;
> (i) Kurajarra;
> (j) Jiwaliny;
> (k) Mangala; and
> (l) Nangajarra.

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

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

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

The application **contains** all details and other information required by s. 61(3).

The name and address for service of the applicant's representative is found on page 18 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.

The application **contains** all details and other information required by s. 61(4).

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

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

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

The application **is accompanied** by the affidavits required by s. 62(1)(a).

The application is accompanied by affidavits from each of the seven persons who comprise the applicant. The affidavits are signed by each deponent and make all the statements required by this section.

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

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

The application **contains** all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a).

Schedule B describes the application area as consisting of three portions. Portion 1 and 2 are described by lot on plan and list their former tenure. Portion 3 is a metes and bounds description making reference to a reserve and coordinate points.

The area of the application includes the entirety of the areas of the three portions.

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

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

The application **contains** all details and other information required by s. 62(2)(b).

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

Searches: s. 62(2)(c)

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

The application **contains** all details and other information required by s. 62(2)(c).

Schedule D provides results of an historical tenure search conducted by Landagate Native Title Spatial Services on 12 April 2010 over the area of the application as described at Schedule B.

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

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

The application **contains** all details and other information required by s. 62(2)(d).

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

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

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

The application **contains** all details and other information required by s. 62(2)(e).

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

Activities: s. 62(2)(f)

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

The application **contains** all details and other information required by s. 62(2)(f).

Schedule G contains details of activities carried out by the native title claim group in the application area.

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

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

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H contains the details of one other application seeking determination of native title made in relation to the whole or part of the Martu #2 application area—*Jeffrey James and Ors on behalf of the Martu People* (WAG 6110 of 1998).

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

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

The application **contains** all details and other information required by s. 62(2)(ga).

Schedule H [sic] states that the applicant is not aware of any notifications under section 24MD.

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

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

The application **contains** all details and other information required by s. 62(2)(h).

Schedule I provides details of three s. 29 notices that fell within the area of the application as at 17 May 2010. All have notification dates prior to 2003.

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

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

The application **does not satisfy** the condition of s. 190C(3).

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that has been entered onto the Register of Native Title Claim (Register) or not removed from the Register as a result of consideration under s.190A.

Subparagraph 190C(3)(a)—Are there any applications overlapping the area of the current application?

On 11 June 2010, the Tribunal's Geospatial Services provided a geospatial overlap analysis of the application area (GeoTrack 2010/1010). That analysis and my searches of the area against the Tribunal's mapping database and the Register confirms that the current application covers approximately 4% (677.35 sq km) of an underlying Martu application (WAD6110/1998—WC96/78). Approximately 80% of the current application overlaps the area covered by the Martu application.

Therefore the Martu application is an application that satisfies the criterion in s. 190C(3)(a), as it is overlapped by the current application.

Subparagraph 190C(3)(b)—was the Martu application entered on the Register when the current application was made?

The current application was made when it was filed in the Court on 1 June 2010. The claim made in the Martu application was entered onto the Register on 26 June 1996. It has not been removed from the Register since that time and was on the Register when the current application was made on 1 June 2010. The Martu application thus satisfies the criterion in subparagraph (b).

Subparagraph 190C(3)(c)—was the entry for the Martu application on the Register made, or not removed, as a result of a consideration under s. 190A?

An entry relating to the claim made in the Martu application was not removed from the Register as a result of its consideration for registration under s. 190A by a delegate of the Registrar and thus satisfies the criterion in subparagraph (c).

For these reasons I find that the Martu application is a previous application satisfying the requirements of paragraphs 190C(3)(a) to (c). I therefore need to be satisfied that there are no common claim group members between the previous Martu application and the current Martu #2 application.

Consideration

In order to ascertain whether or not the two native title claim groups include some or all of the same people, I have compared what each of the applications say about the identity of the claim group as well as the applicant.

The description at Schedule A of the current application refers to the definition in *James* which describes the Martu people by membership of one, some or all of twelve language groups. The previous Martu application names the persons in the native title claim group and there are 21 persons named as comprising the applicant. Comparison between the two descriptions of the native title claim groups does not allow me to identify whether there are any persons common to the two groups.

The identity of the applicant in the current application is more useful to my consideration. Each of the persons comprising the applicant have deposed in affidavits attached to the application to being a member of the native title claim group. The names of four of these persons appear in the list of persons identified as the native title claim group in the previous Martu application – Darren Farmer, Colin Peterson, Lindsay Hardcase and Joshua Booth. The first three persons are also persons who comprise the applicant for the previous Martu application. I am of the view that these persons are members of the native title claim group for the previous application and are included in the native title claim group for the current application.

Additionally, and definitively, the current application at Schedule O states that all members of the native title claim group are also members of the previous application (WAD110/1998) made in relation to the whole of the area covered by this application.

I am therefore not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any relevant previous application. The requirements of this section are not met.

Subsection 190C(4) Authorisation/certification

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

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

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

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

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

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

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

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

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

The application is not certified pursuant to s. 190C(4)(a) so it is therefore necessary for me to consider if the application meets the condition at s. 190C(4)(b)—that is, whether I am satisfied that the applicant is a member of the native title claim group and authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

Section 251B defines the term authorise and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways. That this section is relevant to the inquiry is confirmed by the note following s. 190C(4)(b), which refers to the definition of the term authorise in s. 251B. In summary, an applicant can only be authorised by one of two processes:

(a) by a process of decision-making that is mandated by the traditional laws and customs of the native title claim group in relation to authorising things of that kind (in accordance with s. 251B(a)); or

(b) where there is no traditionally mandated process, by a decision-making process agreed to and adopted by the native title claim group (in accordance with s. 251B(b)).

The second of the two processes under s. 251B may only be employed where there is no traditional process mandated for authorising things of that kind—*Evans v Native Title Registrar* [2004] FCA 1070 at [7] and [52].

The importance of the proper authorisation of an application has been considered by the Courts on many occasions. For instance, in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*), Justice French said:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…—at [43].

The information before me

The application states at Part A, that:

> The applicants are entitled to make this application as persons authorised by all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed ("the native title claim group").

and

> The applicants are members of the native title claim group.

The following information is provided at Schedule R:

> On the 2nd – 3rd October 2008, a meeting of the Martu People was held at Jigalong to *inter alia* authorise the bringing of the Martu #2 native title determination application. Over 100 Martu People were in attendance including a number of senior law men and women with authority to undertake an appropriate traditional decision making process for the authorisation of the applicants in the Martu #2 application.
>
> The meeting decided by consensus, in accordance with traditional decision making processes, to authorise Colin Peterson, Roderick Ford, Roy Toby, Lindsay Hardcase, Kenny Thomas, Joshua Booth and Darren Farmer to bring the Martu #2 claim and to deal with matters in relation to it. The Applicants are all members of the native title claim group—at [57] and [58].

On 8 June 2010, Central Desert provided to the Tribunal an affidavit sworn by its Principal Legal Officer (the PLO) on 24 May 2010. Paragraphs 5 and 6 of the affidavit outline in similar terms the information contained in Schedule R and also includes, in summary, a basis for the authority of the statements made by the PLO:

- Central Desert and its predecessor the Ngaanyatjarra Council Native Title Unit has provided legal and other services to the Martu People since 2000; and
- The PLO has attended numerous meetings of Martu people and has observed their decision-making in accordance with their traditional laws and customs.

The PLO states that he attended the meeting of 2nd – 3rd October 2008 and witnessed, as he has done on numerous previous occasions, the group's traditional decision-making process.

Does the application contain the information required by s. 190C(5)?

The information in Part A and Schedule R make the statements required by subsection 190C(5)(a)—that is, the persons comprising the applicant are members of the native title claim group and are authorised to make and deal with the application.

Subsection 190C(5)(b) requires that the application briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met. I am of the view that the following statement in Schedule R sets out such grounds:

> Over 100 Martu People were in attendance including a number of senior law men and women with authority to undertake an appropriate traditional decision making process for the authorisation of the applicants in the Martu #2 application.

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

The interaction of s. 190C(4)(b) and s 190C(5) is considered in *Doepel* in that:

> [It] may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

It is therefore still necessary for me to consider whether I am satisfied that the applicant is authorised pursuant to s. 190C(4)(b), noting that I am not limited to what is in the application on the issue.

Decision-making process and authorisation

The information I have before me about the decision-making process of the Martu People and the group's authorisation of the Martu #2 application is as follows:

- there was a meeting of the Martu People on the 2nd – 3rd October 2008 to authorise the bringing of the Martu #2 application—*at Schedule R*;
- over 100 Martu People attended the meeting, including senior law men and women with authority to undertake an appropriate traditional decision-making process for the authorisation of the applicants in the Martu #2 application—*at Schedule R*;
- at that meeting the decision to authorise the applicant was made by consensus in accordance with traditional decision-making process— *at Schedule R;* and
- Central Desert confirms, by virtue of its long standing assistance to Martu People, the use of decision-making processes in accordance with the group's traditional laws and customs—*affidavit of PLO for Central Desert*.

Paragraph 8 of the affidavits of each of the persons who comprise the applicant provides a brief statement as to the basis for their authorisation to make and deal with the Martu #2 application:

> The process of decision making undertaken in authorising me as the applicant follows the way people in the native title claim group have traditionally made decisions. This involves those people who are members of the native title claim group meeting to discuss who should be the applicant and then those people agreeing by consensus to appoint the applicant.

In *Strickland v Native Title Registrar* (1999) 168 ALR 242 at pp 259-60; [1999] FCA 1530 (*Strickland*) French J found that whilst authorisation is a fundamental requirement that is not to be met by formulaic statements, a detailed explanation of the authorisation process may not be required.

> The affidavit attached to the application meets the requirements of s 190C(5)(a) which requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the Registrar should consider that it has been met. The insertion of the word "briefly" at the beginning of par

> 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained. The sufficiency of the grounds upon which the Registrar should consider that the requirement has been met is primarily a matter for the Registrar—at [57].

The 'specified grounds in this case [the Martu #2 application] constitute an assertion that' (*Strickland* at [57]) the applicants have been authorised by the rest of the native title claim group using a traditional decision-making process involving discussion and agreement by consensus. Further, I infer from the affidavit of Central Desert's PLO, that in undertaking the appropriate traditional decision-making process, a number of senior law men and women with the requisite authority were also involved in the authorisation of the applicant—at 5.

I do not have any information before me that raises any contentious issues as to the proper authorisation of the persons comprising the Martu #2 applicant. Therefore, I am satisfied that the traditional decision making process asserted by the applicant complies with the requirements of s. 251B(a) and I am satisfied that the applicant has been authorised by the native title claim group to make the application and deal with matters arising in relation to it.

Merit conditions: s. 190B

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

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

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

Schedule B describes the area covered by the application as comprising of three separate areas located within the external boundary of the Martu application (WAD 6110 of 1998). These areas are described in terms of portions whereby portion 1 and 2 are described by lot on plan and list their former tenure. Portion 3 is a metes and bounds description making reference to a reserve and coordinate points. I note that a small proportion of Portion 3 (being Reserve 5279) is not overlapped by the Martu application (WAD 6110 of 1998).

Schedule C refers to Attachment C. Attachment C is an A4 monochrome copy of an A3 colour map entitled Martu #2 prepared by Native Title Spatial Services 30/06/2009 and includes:

- the application area depicted by a light blue hachured area;
- land tenure and parcel IDs; and
- scalebar, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map.

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. For the Registrar to be satisfied that this can be said, the written description and the map are required to be sufficiently consistent with each other.

Having regard to the description of each of the portions by reference to Lots, Plans, Reserves, as well as coordinate points and the map in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

The Tribunal's Geospatial Services has also provided an assessment of the map and written description (GeoTrack 2010/1010). The assessment was that the description and map are consistent and identify the application area with reasonable certainty.

Schedule B also states that all the areas within the external geographical boundaries of each of the portions are covered by the application.

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

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

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

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

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

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

> The native title claim group comprises those persons mentioned in the third schedule to the 'Native Title Determination – Martu' made by Justice French on 27 September 2002 in native title determination application *Jeffrey James and Others v State of Western Australia and Others* WAG 6110 of 1998.

Mansfield J stated in *Doepel* at [16] that the requirements of s. 190B(3) 'do not appear to go beyond consideration of the terms of the application'. He also said that although subsection (b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subsection (3)(a), it is intended to do so—at [16] and[51]. In my view the application does contain a description of the group, albeit by reference to another document. As noted in my reasons at s. 61(1), I am of the view that it is fair and reasonable to accept the description as being contained in the application, and that in doing so it does not contravene the authority in *Doepel*.

As to whether I am satisfied that the description is sufficiently clear, I have therefore considered the description in *James*:

> In respect of the determination area, the common law holders are those people known as the Martu people. The Martu people are those Aboriginal people who hold in common the body of traditional law and culture governing the determination area and who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups:
> (a) Manyjilyjarra;
> (b) Kartujarra;
> (c) Kiyajarra;
> (d) Putijarra;
> (e) Nyiyaparli;
> (f) Warnman;
> (g) Ngulipartu;
> (h) Pitjikala;
> (i) Kurajarra;
> (j) Jiwaliny;
> (k) Mangala; and
> (l) Nangajarra.

This is a description of Martu people that, based on the statement at Schedule A, also applies to the native title claim group in the application I have before me. I interpret this description to mean that a person is a member of the native title claim group if they:

(i) are Aboriginal people who hold in common the body of traditional law and culture governing the determination area; and

(ii) identify as Martu; and

(iii) in accordance with their traditional laws and customs, identify themself as members of one or more 12 specified language groups.

I acknowledge that the area of this application is surrounded by the area of the determination and (as the application states at Schedule F) that the native title claim group has 'a connection to the claim areas within the wider context of Martu'. In my consideration I am also aware that there is clear case law about the administrative nature of the registration test (*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [43], [44], [55] and [60]; *Doepel* at [11] to [19], [27] to [31], *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 at [82] to [85]) (*Gudjala FC*), and I note French J's comments in *Strickland*:

> The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court—at [55].

In my application of the requirements of the test, I am mindful that my task is to be satisfied that the description of the group in the application before me makes it possible to ascertain whether any particular person is in the group. In this particular case, the description of the native title claim group, in my view, relies on self identification (both as Martu and as members of one or more of the specified language groups) and does not contain any external reference points or objective rules by which it can be ascertained whether any particular person is in the native title claim group.

I am also guided by *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 in relation to the clarity by which members of the native title claim group should be identified:

> First, the delegate's decision was not based on the proposition that it was necessary to identify each and every member of the claim group. The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles.
>
> Secondly, as the delegate also recognised, the statutory preconditions for registration were not conditions which had to be satisfied in *Mabo*, *Ward* or *Delgamuukw*. As the delegate noted in her reasons:
>
> "The scheme of the current Act allows applications to go forward for mediation and determination even if not registered. This allows scope for a broader and more general description of the native title claim group for the purposes of recognition of native title than for the purposes of registration."

> In my view, it was clearly open to the delegate to find that she was not satisfied that the persons in the claim group were described sufficiently clearly within the requirements of s 190B(3)(b). The matter is largely one of degree with a substantial factual element. The problems which the delegate identified, some of which I have referred to above, including the impossibility of deciding whether ten of the deponents who denied the applicants' authority, demonstrate that such a conclusion was open to her. There was no reviewable error on the delegate's part—at [25] to [27].

In my view, I have a description of a group that is sufficient for the purposes of the recognition of native title but does not satisfy the requirements of the registration test. Carr J found in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 that it may be necessary on occasion to engage in a factual inquiry—at [67]. However, self-identification as Martu and as being a member of one, some or all of the language groups does not rely on an objective rule or principle to identify who is or is not a member of the native title claim group. People identify themselves, *as a matter of perspective*, with Martu and a particular language group. The description does not include any set of *rules* that could be applied in order to ascertain whether a person is as a *matter of fact* a member of one or more language groups or that being a Martu person includes membership of one or more language groups. The process of self-identification does not allow for sufficient clarity or a mechanism that would resolve any question about who is in or out of the group.

I am not satisfied that identification of any particular person in the native title claim group would be possible and I am therefore not satisfied that the requirements of this condition are met.

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

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

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

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

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

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

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

15) Subject to paragraph 18, the nature and extent of the native title rights and interests held by the native title claim group in relation to the Land claimed are mentioned in paragraphs 16 and 17.
16) The right to possess, occupy, use and enjoy the land and waters of the application to the exclusion of all others, including the right:
    a) to speak for the area covered by the application;
    b) to be asked permission to use the land and waters of the area covered by the application;
    c) to live on the area covered by the application;
    d) to make decisions about the use, enjoyment and management of the land and waters of the area covered by the application;
    e) to hunt and gather and to take water and other resources (including ochre) on the area covered by the application;
    f) to control the access to and activities conducted by others on the lands and waters of the area covered by the application;
    g) to use and enjoy resources of the area covered by the application;
    h) to maintain and protect areas of cultural significance to the native title claim group on the area covered by the application;
    i) as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the area covered by the application;
    j) to trade in resources of the area covered by the application; and
    k) to participate, engage in and conduct ceremonial activities and other cultural activities on the area covered by the application.
17) The native title rights and interests are exercisable in accordance with the traditional laws and customs of the native title claim group.
18) Native title rights and interests are not claimed to the:
    a) extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia; and
    b) exclusion of any other rights or interests validly created by or pursuant to the Common law, a law of the State or a law of the Commonwealth.

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

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

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

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

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

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

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

Consideration of the condition at s. 190B(5) necessitates taking into account the concept and meaning of the word 'traditional'. The decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

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

Essentially, the application needs to provide some factual basis to identify the society that is asserted to have existed at least at the time of European settlement—*Gudjala FC*. Therefore, when considered as a whole, the information that is before me in relation to the Martu #2 application must identify the society that existed at the time of British sovereignty and not simply assert in a general statement that one existed. The factual basis is also required to show the connection between the native title claim group and its pre-sovereignty society and in so doing address how it is that the claimed rights and interests as currently expressed by the claim group are 'rooted in pre-sovereignty laws and customs'.

Information considered

The application contains at Schedule F an extensive description of the native title claim group's connection to the area covered by the application, elements of the group's traditional laws and customs, and the continuity of the society which acknowledges and observes those laws and customs. I understand the information at Schedule F to encompass Martu country beyond the boundaries of the Martu #2 application area and the group's society as a whole within the framework of Western Desert traditional law and custom. I note, however, that the statements are largely formulaic and do not particularise information about the claim group or the area.

The wider country surrounding the areas covered by this application was the subject of a consent determination recognising native title (*James*) and I am of the view that this is relevant to my consideration of whether the factual basis in the Martu #2 application sufficiently supports the assertion that the native title rights and interests claimed exist. This is for the following reasons:

(i) the descriptions of the native title claim group for both the determination in *James* and the Martu #2 application are the same;

(ii) the three portions of land comprising the Martu #2 application are in the majority overlapped by the area of the earlier Martu application and abut the area of the determination; and

(iii) the application states in Schedule F that 'the native title claim group, by the traditional laws acknowledged and customs observed by them, and their ancestors, have a connection to the claim areas within the wider context of Martu (Determined 27/09/2002; WAD 6110 of 1998)'—para 20.

For the purposes of my consideration of the factual basis for the claim, I have *not* taken into account that I was not satisfied about the clarity of the identification of the native title claim group. It is clear to me that the intent of the application is that a claim is made by the same group for whom native title has been determined in an area adjacent to the area of this application.

In my approach to testing the Martu #2 application at the condition of s .190B(5), I also acknowledge the case of *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126, in which Finkelstein J found:

> …The evidence to which an administrative tribunal may have regard can include evidence that has been given in another proceeding, including a court proceeding, provided the evidence is relevant to an issue before the tribunal: In *re A Solicitor* [1993] QB 69 at 77. A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue…I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may…be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627—at [18] to [19].

In his reasons for judgement on the consent determination in *James*, French J refers to the Court's obligations under s. 87 (as it was under the Act amended in 1998):

> The Court has the power, under s 87 of the Act, to make orders to give effect to agreements about native title determinations if it appears to the Court to be appropriate to do so. In making a consent determination the Court must be satisfied that it has the power to do what it is asked to do and it must be satisfied that what it is asked to do is appropriate. If for example the parties had reached an agreement where it appeared to the Court that there was nothing to support the claimed connection of the applicants to their country or if the determination appeared in some way to be obviously unfair or unjust the Court might conclude that such a determination was not appropriate. In this case the parties have had the benefit of legal advice. Extensive anthropological research has been carried out to establish the connection of the People to their country, the extent of that country and the existence and content of their traditional laws and customs. The anthropologists have also reported upon the way in which they have kept their connection with their country since colonisation. That evidence has been considered by the State to support their claim. The parties generally have been involved in the process of mediation. The Court is entitled to and does give weight to the fact that agreement has been reached in the circumstances—at [4].

French J also quotes from a report commissioned on behalf of the applicants and prepared by anthropological experts and academics at the University of Western Australia:

> "The claimants are among a number of Western Desert peoples who maintain a very strong cultural base in their traditional laws and customs, and have retained close connections to their lands despite many decades of change stemming from the advent of Whites and the powerful impacts of governmental policies and practices. Because the frontier of contact between Whites and Aborigines continued in their lands until as recently as the 1960s, these groups are able to describe and demonstrate in great detail their laws and customs. Their religiously based traditions are embedded in a wealth of cultural elements: mythology, story, song, ritual, the features of the landscape, and secret-sacred paraphernalia – all of which contribute to a vibrant religious life that connects them to their creators and their homelands"— at [5].

I do not have the same information before me that was before French J when he made the determination in *James*, or the information considered by the parties when they agreed to support the claim and consent to the determination. I note that the determination area in *James* was different from the one I am considering in this application. However I am of the view that French J's comments are relevant to my consideration, because the majority of the area of the Martu#2 application is surrounded by the area of that determination. The reasons for judgement provide a detail lacking in the more generalised statements contained in Schedule F of the application (of which the most relevant paragraphs follow):

> The anthropological report shows there was a gradual migration of Western Desert People from the desert heartland to the fringes as a consequence of the spread of European settlement. But this resulted in only a brief period of physical absence of the claimants from their traditional territories. Through the cultural mechanism of dream-spirit journeys, they kept contact with and responsibility for their countries while physically elsewhere. That is what they had always done in the desert where such absences were sometimes forced by lack of water and/or food resources in their core territories. Their hunter gathering activities continued and they went back into the desert from time to time so they did not lose contact. There was no serious cultural break with their traditional roots. The return of people to live on the country has supported the maintenance of law and custom among them. They remain one of the most strongly "tradition-oriented" groups of Aboriginal people in Australia today partly because of the protection that their physical environment gave them against non-

> Aboriginal intruders. It is not a welcoming environment for those who do not know how to locate and use its resources for survival. Of great importance is the continuing strength of their belief in the Dreaming.
>
> The term "Martu" is one of many dialect words used in the Western Desert by speakers of different dialects to refer to Aborigines, men or people. This word has become the way in which different dialect speakers in the area identify themselves. It is not tied to a particular place in the claim area. It is used to express their shared kinship and culture across different dialects or languages. The existence of two languages and many dialects does not detract from the unity of the group. There is evidence also that neighbours of the claimant group recognise its members' interests and legitimacy to speak about the claim area.
>
> Although the Court has to set boundaries in order to define the area of a native title determination, it is a fact that in the extremely arid region of the Western Desert boundaries between Aboriginal groups are rarely clear cut. They are very open to human movement across them. Desert people define their connection to the land much more in terms of groups of sites, thinking of them as points in space not as areas with borders. As the anthropological report says:
>
> > "Prior to the arrival of Europeans, the huge Western Desert region, in which this claim lies, would have had the lowest population densities and the highest levels of Aboriginal mobility in the continent. These adaptations were necessary to live in this extremely marginal area, described by Gould as 'the harshest physical environment on earth ever inhabited by man before the Industrial Revolution'. There is also one key climatic factor – the patchiness and unreliability of rainfall – which makes it absolutely essential for human survival that, if the inhabitants recognise some form of territorial boundaries, these must allow people to cross them freely."
>
> Various conventions and practices have arisen to guarantee freedom of movement by Aborigines into the territories of their neighbours in areas of extreme variability of rainfall. Despite this there is much evidence for the existence of ideas of territoriality. People suffer home sickness when away from their heartlands for long periods and a sense of unease when entering or camping in or travelling through someone else's country particularly for the first time—at [8] to [10].

While I do not 'merely adopt' the reasons for judgement, they are relevant to my consideration because they substantiate and express the weight the Court gives to the agreement of all the parties on the Martu people's connection to country and the existence and content of the group's traditional laws and customs. In pronouncing the determination, the Court was been satisfied, based on the information before it, that 'it is appropriate that there should be a determination of native title in the form proposed'—at [13]. I am therefore considering the Martu #2 application in the wider context of the determination of *James*.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

Reasons for s. 190B(5)(a)

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

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group has, and its predecessors had, an

association with the area of the application. Whilst it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (Gudjala)* at [51] and [52].

Schedule F of the Martu #2 application addresses the 3 assertions of s. 190B(5). Past and present association of the area is stated to be comprised of spiritual, physical, historical, (indigenous) legal, economic and social elements of connection.

This, in addition to the reasons for judgement provided by French J in *James* and keeping in mind that the area covered by this Martu #2 application falls within the wider context of Martu country, is sufficient for me to be satisfied that the native title claim group has and its predecessors had an association with the area.

Reasons for s. 190B(5)(b)

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

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Justice Dowsett recently considered the requirements of s. 190B(5) and addressed the adequacy of the factual basis underlying an applicant's claim in *Gudjala People #2 v Native Title Registrar* [2009] FCA 157 (*Gudjala 09*). He makes the following statements about the assessment of the adequacy of a general description of the factual basis of the claim at [29]:

- assertions should not merely restate the claim
- there must be at least an outline of the facts of the case

Schedule F states that the traditional laws acknowledged and customs observed that give rise to the rights and interests claimed are given 'normative force' by the group's widespread commitment to *Tjukurrpa*. I understand *Tjukurrpa* to be a body of religious, moral and social imperatives given by the group's creative ancestors during the 'creative epoch' when they formed the natural environment and imbued its features with spiritual essence. There is information in Schedule F about the content of the law and custom of the native title claim group:

- there exists rules for recognition of those holding rights and interests in relation to an area,
- identification of the group is with varieties or dialects of the one language,
- the group practices a particular kinship system,
- laws and customs exist in relation to generational moieties, access conditions, imposition of sanctions, respect and care for spiritual features of the landscape, kinship relationships and social organisation, religious knowledge and practice, ceremonies, food and other resources, and respect for the authority of senior people.

Though the statements are general in nature, when read in addition to the reasons for judgement provided by French J in *James* and keeping in mind that the area covered by this Martu #2

application falls within the wider context of Martu country, is sufficient for me to be satisfied that there exist traditional laws acknowledged and customs observed by the native title claim group that give rise to the claim to native title rights and interests.

Reasons for s. 190B(5)(c)

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

This subsection requires that I be satisfied that that there is sufficient factual basis to support the assertion that the native title claim group continue to hold native title in accordance with their traditional laws and customs.

Schedule F makes statements specific to the native title claim group's continuing connection and association with Martu country:

- members of the group are the recognised descendents of the people of the Western Desert who existed at sovereignty;
- the people of the Western Desert, today and at sovereignty, are a body persons united in and by their acknowledgement and observance of laws and customs;
- acknowledgment and observance of those laws and customs have been subject to adaptive change;
- adaptation in the laws and customs has led to a greater emphasis being placed on parental and grandparental connections to country, and on long association with an area; and
- by those laws and customs, the native title claim group has continued to possess rights and interests and have a connection with the area covered by the application.

The statements, summarised above, are also general in nature and largely formulaic, but are assisted by the reasons for judgement provided by French J in *James* and keeping in mind that the area covered by this Martu #2 application falls within the wider context of Martu country, my view is that there is a factual basis to support the assertion that a Martu society with its normative rules has continued to exist substantially uninterrupted since sovereignty[1].

I am therefore satisfied that the factual basis supports the assertion that the native title claim group has continued to hold the native title in accordance with its traditional laws and customs.

Subsection 190B(6)
Prima facie case

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

The application **satisfies** the condition of s. 190B(6).

Under s. 190B(6) I must be satisfied that, prima facie, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that

[1] *Yorta Yorta*—at [87]

registration requires a minimum of only one right or interest to be established. In *Doepel*, Mansfield J noted at [16] the following:

> Section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant. Even so, it is noteworthy that s. 190B(6) requires the Registrar to consider whether `prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle.

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

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

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

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

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

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

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

Consideration

I understand this application to be claiming the right to possess occupy, use and enjoy the land and waters of the area covered by the application to the exclusion of all others and that there are subsidiary rights (listed (a) to (k) at para 16 of Schedule E) included in that right. I have therefore considered only the overarching claim made in the application and whether, prima facie, it can be established. I note that all of the rights excepting (j), the right 'to trade in resources of the area covered by the application', are implicit in a claim to the right to possess occupy, use and enjoy the land and waters of the area covered by the application to the exclusion of all others. In relation to the right at (j), the Courts have found that a right to trade in the resources of the area may be able to be recognised over areas of exclusive possession. However, the information at Schedule F does not provide any probative factual material evidencing the existence of a right to trade. *James* also does not recognise a right to trade or any similarly expressed right. I am therefore not satisfied that a right to trade can be established prima facie.

The decision of the *High Court in Western Australia v Ward* (2002) 191 ALR 1 (*Ward*) is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation,

use and enjoyment of lands and waters can prima facie be established. The two rights which make up exclusive possession are (1) a right to control access and (2) a right to make binding decisions about the use of the country—*Ward* at [52].

The determination in *James* is that the nature and extent of the native title rights and interests held by the common law holders in the determination area are the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others, and this includes, in summary, the rights to live on the area, to make decisions about the use and enjoyment of the area, to hunt and gather, and to take the waters, to control the access and activities of others, to maintain and protect sites and areas, the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners, to use specified traditionally accessed resources, and to take, use and enjoy the flowing and subterranean waters including the right to hunt on and gather and fish from the flowing and subterranean waters.

I note that no determination was made in *James* as regards these three portions that now comprise the area of the Martu #2 application. The application states at Schedule L that s. 47A and s. 47B apply to the three portions, and as such any extinguishment of native title rights is to be disregarded. The current tenure for Portion 1 and 2 is Unallocated Crown Land and Portion 3, being Reserve 5279, is vested for the 'Use and benefit of Aboriginal Inhabitants.' In my view it is clear that the Martu People now claim a right to possess, occupy, use and enjoy the land and waters of the three portions to the exclusion of all others, something that was not possible at the time of the determination based on the tenure of the portions at the time (refer to the historical tenure search provided at Schedule D of the application).

I have summarised in my reasons at s.190B(5) the factual basis for the assertion that the claimed native title rigths and interests exist, drawn from the material in the application as well as from the reasons for judgement in the determination of the earlier Martu claim. I am of the view that this material together prima facie supports the existence of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the native title claim group for the Martu #2 application (other than the right to trade).

The determination in *James* also recognises that in a part of the determination area called the Shared Area the native title holders are the Martu People and the Ngurrara People. That is to say there are concurrent native title rights and interests recognised. The reasons for judgement refers to observations made in the anthropological report:

> "The overlap between the Ngurrara and Martu Native Title Claims reflects both the shared interest in this region and the different historical and contemporary orientation of the claimants. The groups represented in the Martu and Ngurrara claims are related peoples who, as a result of post- contact historical processes, have come to self-identify in different ways."

The map attached to the First Schedule of the determination shows the area of the Martu #2 application referred to as Portion 3 (Reserve 5279) to be contiguous with the south-eastern boundary of the area identified as shared between the Martu and Ngurrara People. The south eastern boundary of the shared area appears to be an 'administrative' one defined by the north western boundary of Reserve 5279. The question may be asked whether or not coexistent rights between the Martu and the Ngurrara People extend into the area of Reserve 5279 which would

preclude a right of the Martu to possess, occupy, use and enjoy the land and waters of the Reserve area to the exclusion of all others.

As mentioned earlier in these reasons, the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not my role to draw definitive conclusions from the material before me about whether or not the right to exclusive possession exists, only whether it is prima facie capable of being established. I have nothing before me to suggest that Ngurrara People do not share rights and interests in all or part of the area of Reserve 5279. Equally I have nothing to suggest that they do.

Therefore, in summary, I consider that the asserted factual basis supports the claim to exclusive possession – that the right exists under traditional law and custom in relation to the land and waters of the area of the application and that it has not been extinguished over that area. The application and the fact of the wider Martu determination of native title, in my view, provides prima facie information that the group possesses under their traditional law and custom the right to control access to their country and the right to make binding decisions about that country.

On that basis, I am able to find that a right of possession, occupation, use and enjoyment as against the whole world can be established prima facie. By implication, it therefore follows that those subsidiary rights, other than the right 'to trade in resources of the area covered by the application', can also be established prima facie

Subsection 190B(7)
Traditional physical connection

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

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

Under s. 190B(7)(a) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

The word 'traditional' as it is used in s.190B(7) must be understood as it was defined in *Yorta Yorta*. That is, it is necessary to show that the traditional connection is in accordance with the laws and customs of a group or society that has its origins in the society that existed at sovereignty.

Doepel confirms that s. 190B(7) does not require being satisfied that the asserted traditional laws and customs in fact exist or that by those laws and customs the group have the requisite connection identified in s. 223(1)(b):

> *The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests.* The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18] (*emphasis added).*

As such, for an application to meet this condition there is a requirement that 'some evidentiary material be presented'.

Schedule L states that all three portions of land comprising the area are occupied by one or more members of the native title claim group. Schedule M also contains the following statements:

> Many members of the of the native title claim group have a traditional physical connection to the claim area in that they live permanently in communities located nearby. Many members of the native title claim group regularly hunt and travel through the area covered by the application.

Additionaly, the fact that a determination of native title exists in relation to land and waters that surround the area of this application, in my view, assists to satisfy me that there is currently and there has previously been traditional physical connection by members of the native title claim group with at least parts of the area covered by the application.

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If :
> (a) a previous exclusive possession act (see s. 23B) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (a) a previous non-exclusive possession act (see s. 23F) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;
> a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

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

The application **satisfies** the condition of s. 190B(8).

Reasons for s. 61A(1)

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

In my view the application **does not** offend the provisions of s. 61A(1).

Schedule H states that the application specifically excludes Native Title Determination Application WAD 6110 of 1998 (Martu) and Native Title Determination Application WAD 281 of 2008 (Ngurrara B).

The Tribunal's geospatial report dated 11 June 2010 and a search undertaken by myself of the Tribunal's geospatial databases on 6 September 2010 confirms that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

Subsection 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subsection 61A(4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Schedule E of the application claims the right to possession, occupation, use and enjoyment of the claim area to the exclusion of all others. Schedule L indicates that the applicants seek to apply sections 47A and 47B such that any prior extinguishment is to be disregarded.

Therefore, subsection 61A(2) does not apply to my consideration in this case because the information in the application provides that the circumstances of subsection 61A(4) apply to it.

Reasons for s. 61A(3)

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

In my view, the application **does not** offend the provisions of s. 61A(3).

Schedule E of the application claims the right to possession, occupation, use and enjoyment of the claim area to the exclusion of all others. Schedule L also indicates that the applicants seek to apply sections 47A and 47B such that any prior extinguishment is to be disregarded.

Therefore, subsection 61A(3) does not apply to my consideration in this case because the information in the application provides that the circumstances of subsection 61A(4) apply to it.

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

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

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

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

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

The application at Schedule Q states that the applicant does not make any claim for minerals, petroleum or gas wholly owned by the Crown.

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

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

The application at Schedule P state that no offshore places comprise any part of the area that is the subject of the application.

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

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

The application does not make a statement that it excludes land or waters where the native title rights and interests claimed have been otherwise extinguished. However, there is nothing on the face of the application and accompanying documents to the contrary, and I am not otherwise aware that the application claims any rights and interests that may have been extinguished.

However, should any of the native title rights and interests claimed have otherwise been extinguished, the application states that such extinguishment should be disregarded under ss. 47A and 47B.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Martu #2**
NNTT file no.	**WC10/8**
Federal Court of Australia file no.	**WAD141/2010**
Date of registration test decision	**21 September 2010**

Section 190C conditions

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

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Not met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Not met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

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

Attachment B
Documents and information considered

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

1. The application that was filed in the Federal Court on 1 June 2010 and received by the Registrar on 2 June 2010.
2. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack 2010/1010, dated 11 June 2010 (the geospatial report), being an expert analysis of the external and internal boundary descriptions and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
3. *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208.
4. Extract from the Register of Native Title Claims for the application WAD6110/98—Martu—WC96/78.
5. Extract from the National Native Title Register for WAD6110/98—Jeffrey James & Others on behalf of the Martu People v The State of Western Australia and Others.
6. Reports of searches made of the Register of Native Title Claims, Tribunal's Schedule of Applications, National Native Title Register and other databases to determine the existence of interests in the application area, namely, overlapping native title determination applications, s. 29 future act notices and the intersection between Martu #2 application area and any gazetted representative body regions. These reports are against the Tribunal's databases and documented in the geospatial report.
7. Affidavit of [Name deleted], Principal Legal Officer, Central Desert Native Title Services Ltd, sworn 24 May 2010.

[End of document]