National Native Title Tribunal

Registration test decision

Application name	Tjiwarl
Name of applicant	Keith Narrier, Shirley Wonyabong, Charmaine Tullock, Kado Muir, Edwin Beaman, Judy Ashwin and James Calyun
State/territory/region	Western Australia
NNTT file no.	WC11/7
Federal Court of Australia file no.	WAD228/2011
Date application made	17 June 2011

Name of delegate Stephen Rivers-McCombs

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: 14 September 2011

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Stephen Rivers-McCombs

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 24 August 2011 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Tjiwarl claimant application to the Native Title Registrar (the Registrar) on 21 June 2011 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.

Given that the claimant application was made on 17 June 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 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 ss. 190B and 190C of the Act. This is commonly referred to as the registration test.

I also note that:

- A preliminary assessment of a draft version of the application was prepared by a delegate of the Registrar on 12 May 2011 and provided to the applicant's representative.
- Although the application was not filed in response to a future act notice, there are s. 29 notices that relate to the application, with due dates of 23 July 2011, 6 August 2011, 28 August 2011, 4 September 2011 and 1 October 2011 respectively. The time period for some of those relevant notices has now passed.
- On 30 June 2011, the applicant's representative requested an extension of the deadline for the provision of additional material. The Registrar's delegate with carriage of the matter at that time granted an extension of that deadline until 8 August 2011. The delegate also identified a decision date of 26 August 2011.
- Following a preliminary consideration of the material provided by the applicant on 8 August 2011, it was apparent that I could not, using my best endeavours, finish considering the application by the identified decision date and before the next affected s. 29 notices fell due on 28 August 2011 and 4 September 2011. The time period has not expired for one of the identified s. 29 notices and, in accordance with s. 190A(2), I have used my best endeavours to finish considering the claim prior to the expiry of that timeframe.

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.

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

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

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

I have considered the information contained in the Tjiwarl application (including documents accompanying the application). I have also considered the additional material provided to the Tribunal on 8 August 2011 by the applicant's representative (Central Desert Native Title Services). That material was comprised of:

- An affidavit sworn by one of the applicant persons, [Name of person A deleted], dated 8 August 2011.
- The affidavit of [Name deleted], a Legal Clerk at Central Desert Native Title Services, dated 8 August 2011.
- A transcript of the preservation evidence given by [Name of person B deleted] to the Court on 20 October 2004 in relation to previous proceedings. This was accompanied by a map of the locations at which [Name of person B deleted]'s evidence was given (prepared by Central Desert Native Title Services).
- A map prepared by Central Desert Native Title Services and entitled 'Tjiwarl (Lake Miranda) Native Title Claim Boundary Surrounding Features and Sites, August 2011', which identifies the location of certain places referred to in the affidavit of [Name of person A deleted] and the evidence of [Name of person B deleted].

In addition, the covering letter (dated 8 August 2011) accompanying the additional material referred the Registrar to evidence given in the future act determination *Shirley Wonyabong & Ors on behalf of the Tjupan People/Western Australia/Western Mining Corporation Ltd; Great Central Mines NL; Heron Resources NL; Wiluna Gold Pty Ltd; Mining Corporation of Australia Ltd* [1996] NNTTA 40. I have also taken this information into account.

Beyond the material provided by the applicant, I have considered:

- a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 23 June 2011 (GeoTrack: 2011/1068); and
- the results of my own searches against the Tribunal's mapping database, the Tribunal's case management database and the Register of Native Title Claims.

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

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 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. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed are as follows:

- On 12 May 2011, the Tribunal provided the applicant's representative with a preliminary assessment of a draft version of the Tjiwarl application, which did not include the additional material that the applicant has since provided. The delegate who prepared the preliminary assessment indicated their preliminary view that the draft application would be unlikely to satisfy the conditions of the registration test.
- On 29 June 2011, the Tribunal provided the State of Western Australia (the State) with a copy of the application (and its accompanying documents) and advised the State of its ability to provide submissions in relation to the application.
- On 29 June 2011, the Tribunal provided Central Desert Native Title Services, Goldfields Land and Sea Council Aboriginal Corp, and Yamatji Marlpa Aboriginal Corporation with copies of the application (and its accompanying documents).
- On 30 June 2011, the Tribunal received a written request from the applicant's representative to extend the deadline for the provision of additional information and to delay the application of the registration test. The delegate with carriage of the application at that time granted the requested extensions.
- On 9 August 2011, the State was provided with a copy of the additional material provided by the applicant to the Registrar and was advised of its ability to submit comments regarding that material.

As at the date of this decision, the Registrar has not received any submissions in relation to the claimant application from either the State or any of the representative bodies identified above.

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]–[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.

Turning 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).

I understand that, as discussed above, my only concern at this stage is whether the application sets out the information referred to in s. 61(1) – *Doepel* at [16] and [35] to [36]. I may not look beyond the information contained in the application, nor am I required to undertake any form of

merit assessment (except in the limited way outlined below) to determine whether or not the native title claim group described in the application 'is in reality the correct native title group' – *Doepel* at [37] and [39]. I understand that I consider the adequacy of any claim group description provided in the application in my assessment under s. 190B(3) and that I consider whether the applicant has been properly authorised in my assessment under s. 190C(4). I have therefore not turned my mind to those matters at this point.

I do, however, note that I may not be satisfied that the information referred to in s. 61(1) is contained in the application if, on its face, it appears that the application has not been made on behalf of '*all* members of the native title claim group' – *Doepel* at [35] (emphasis added).

I am satisfied that the application contains the information that is required by s. 61(1) with respect to the applicant persons. The application sets out the names of the persons comprising the applicant and – in Part A and in the affidavits sworn by the applicant persons – contains statements to the effect that those persons are members of the native title claim group and are authorised to make this application by all of the other members of the claim group.

Schedule A of the application contains a description of the native title claim group, which is set out fully in my assessment under s. 190B(3). Essentially, this description provides that the claim group comprises those people:

> (a) who, in accordance with traditional laws and customs, have a connection to the area covered by the application, through:
> (i) their own birth, or long association with the area covered by the application; or
> (ii) the birth, or long association with the area covered by the application, of their ancestors by which they claim country; and
> (b) in respect of whom that claim is recognised according to traditional laws and customs.
> [Those persons who are members of the claim group through the birth or association of their ancestors with the claim area are then further defined as being the descendants of certain named ancestors.]

There is nothing on the face of this description, or elsewhere in the application, which indicates that the application has been made by a subgroup of the native title claim group or has otherwise not been made on behalf of all of the group's members.

For the above reasons, I am satisfied that the application contains the information required by s. 61(1).

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 is provided in Part B of the application (page 17).

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).

As mentioned above, a description of the native title claim group is provided in Schedule A of the application.

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

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

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

The application is accompanied by dated and witnessed affidavits, which are sworn by each of the persons who comprise the applicant. In each of the affidavits, the deponent states their belief: that the native title rights and interests claimed have not been extinguished; that no part of the application area is covered by an entry on the Native Title Register; that the statements in the application are true; and that they are authorised by all of the persons in the native title claim group to make the application and to deal with matters arising in relation to it – at [2] to [5].

With respect to the requirement of subparagraph 62(1)(a)(v), the applicant persons each set out, in essentially the same terms, the traditional decision making process purportedly used to authorise them to make the application and to deal with matters arising in relation to it. By way of example, the affidavit of [Name deleted] provides that:

> 8. The process of decision making undertaken in authorising myself and others to act as the applicant follows the way that 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.
>
> 9. In the event that consensus can't be reached, people continue to meet until such time that consensus can be reached. In the event that consensus still can't be reached, then the decision is referred to the senior members of the group and/or the senior *wati* (lawmen). They then meet and a decision is made by consensus.

The applicant persons' affidavits then state, in effect, that the applicant was appointed at a meeting, held on 29 March 2011, which was of the kind referred to in [8] – at [13].

I note that, in considering the requirements of s. 190C(2) in relation to s. 62(1)(a), I need only be satisfied that the relevant affidavits contain the required information. The information contained in those affidavits does not need to satisfy me that the applicant persons are, in fact, properly authorised – see *Doepel* at [73] and [87]. Bearing that in mind, I have formed the view that the affidavits sworn by the applicant persons set out the details of the authorisation process used in terms which are sufficient for the purposes of s. 190C(2) in relation to s. 62(1)(a).

For the reasons given above, I am satisfied that the application is accompanied by affidavits which contain the information required by s. 62(1)(a)(i) to (v).

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).

Part A of Schedule B of the application contains a written description of the boundary of the area covered by the application. Part C of Schedule B contains a list of areas within the external boundary of the application area which are excluded from the area covered by the application.

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

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

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

Attachment C contains a map showing the boundary of the area covered by the application.

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).

Attachment D provides that the applicant has not carried out any searches to determine the existence of any non-native title rights and interests in relation to the area covered by the application, except for those which relate to s. 24MD(6B)(c) and s. 29 notifications.

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 of the application contains a description of the native title rights and interests claimed in relation to the lands and waters covered by the application. The description is more than a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

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).

I note that it is not enough to merely recite the assertions contained in s. 62(2)(e) and that a 'general description' of the factual basis is required to meet the condition imposed by s. 62(2)(e) – *Queensland v Hutchison* [2001] FCA 416 at [17] to [23]. However, I also understand that the description can be something less than the information necessary to satisfy the requirements of s. 190B(5) – *Wulgurukaba People #1 v State of Queensland* [2002] FCA 1555 at [19]; see also *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 at [92].

Schedule F of the application outlines the factual basis on which it is asserted that the claimed native title rights and interests exist, addressing directly the matters referred to in s. 62(2)(e)(i) to (iii). Schedules A, E and M also contain information relevant to the factual basis. That is, namely, a description of the native title claim group, a description of the native title rights and interests claimed, and a description of some claim group members' traditional physical connection with the application area. Schedules F, A, E and M contain more than merely a recitation of the assertions contained in s. 62(2)(e). I am satisfied that they provide a general description which is sufficient for the purposes of s. 62(2)(e).

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 refers to the rights and interests referred to in Schedule F as examples of activities carried out by claim group members. Schedule F states that the rights and interests held by the claim group in relation to the application area are those described in Schedule E. Schedule F also details, at [20], some activities carried out by claim group members in its description of the claim group's traditional physical connection with 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.

I am satisfied that the application contains all details and other information required by s. 62(2)(g).

Schedules H and O identify a number of applications that have, in the past, been made in relation to the area covered by the claim. Both Schedules state that all of the proceedings to which the applications related have been dismissed.

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).

Attachment HA provides details of s. 24MD(6B)(c) notifications made in relation to the whole or part of the application area of which the applicant was aware as at 5 November 2010.

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).

Attachment I gives details of s. 29 notifications relating to the whole or part of the application area of which the applicant was aware as at 14 April 2011.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and

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

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

I understand that the requirement that I be satisfied in the terms set out in s. 190C(3) is only triggered if the previous application meets all of the criteria contained in s. 190C(3)(a) to (c) – *Western Australia v Strickland* [2000] FCA 652 at [9].

I have been provided with a geospatial assessment and overlap analysis that was prepared by the Tribunal's Geospatial Services on 23 June 2011 (GeoTrack: 2011/1068) (the geospatial assessment). The geospatial assessment found no applications on the Register of Native Title Claims (the Register) or the Schedule of Applications – Federal Court which overlapped the area covered by the current application. My own searches against the Tribunal's mapping database and the Register confirmed that assessment. I am therefore satisfied that there are no applications to which the conditions in paragraphs (a) to (c) of s. 190C(3) apply. I do not need to consider the requirements of s. 190C(3) further.

For the reasons given, I am satisfied that the condition of s. 190C(3) is 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.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(b) are met.

I have considered whether the application has been authorised in the sense required by s. 190C(4)(b) because the application has not been certified in the terms discussed in s. 190C(4)(a).

I understand that I cannot be satisfied that the condition in s. 190C(4) has been met unless the application complies with the requirements set out in s. 190C(5). I have therefore considered whether the application contains the information required by s. 190C(5) before turning to s. 190C(4). I note, however, that passing the threshold test in s. 190C(5) does not necessarily lead to compliance with the requirements of s. 190C(4)(b). That is because s. 190C(4)(b) demands that the available material satisfies me that the applicant persons have in fact been properly authorised – see *Doepel* at [78].

Application of s. 190C(5)

I note first that Part A of the application contains the statements required by s. 190C(5)(a). There, the application includes statements:

- that each of the applicant persons is a member of the native title claim group – at [3]; and
- that the applicant persons '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")' – at [2].

As to the level of detail needed for the application to meet the condition in s. 190C(5)(b), I note that French J has observed that '[t]he insertion of the word "briefly" at the beginning of [s. 190C(5)(b)] suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained' – *Strickland v Native Title Registrar* [1999] FCA 1530 at [57]; approved by the Full Federal Court in *Western Australia v Strickland* [2000] FCA 652 at [77] to [78].

Attachment R contains information relevant to the grounds on which the Registrar/delegate should consider that the requirement in s. 190C(4)(b) has been met and includes the following:

> At a meeting held at Leinster on 29 March 2011, the native title claim group authorised the applicant to file the Tjiwarl native title claim.
>
> Authorisation was made in accordance with the decision making process of the native title claim group that is derived from traditional law and custom. This process is one whereby decisions are made by consensus of the native title claim group.
>
> ...
>
> The authorisation process is evidenced by the Affidavit of [Name deleted] dated 16 June 2011 filed in this matter.

The affidavit of [Name deleted] (the [Name deleted] affidavit) is included in Attachment R and provides a more detailed account of the process just summarised.

I also believe that the affidavits of the applicant persons, which accompany the affidavit, provide material relating to the grounds on which the Registrar/delegate should consider that the requirement in s. 190C(4)(b) has been met. That material is, namely, descriptions of the claim group's traditional decision making process and accounts of how it was used to authorise the applicant in this case.

Together, Attachment R – including the [Name deleted] affidavit – and the s. 62(1)(a) affidavits accompanying the application provide the grounds on which the Registrar/delegate should consider that the requirement in s. 190C(4)(b) has been met. In my view, this material contains sufficient detail to meet the requirement of s. 190C(5)(b).

I am therefore satisfied that the application contains the information required by s. 190C(5).

Application of s. 190C(4)(b)

I have formed the view that I am satisfied that the applicant has been authorised to make the application, and to deal with matters arising in relation to it, by all the other persons in the native title claim group. My reasons are set out below.

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

Section 190C(4)(b) first requires that the persons who jointly comprise the applicant are each members of the native title claim group.

The persons who comprise the applicant each swear in their affidavits, which accompany the application, that s/he is a member of the native title claim group. There is no information before me which indicates that the applicant persons are not members of the claim group. I am therefore satisfied that each of the applicant persons is a member of the claim group and that the first limb of the condition in s. 190C(4)(b) is met.

Second limb of s. 190C(4)(b) – the applicant is authorised to make the application, and to deal with matters arising in relation to it, by all the other persons in the claim group

The second limb of s. 190C(4)(b) requires that I be satisfied that the applicant is authorised to make the application, and to deal with matters arising in relation to it, by all the other persons in the native title claim group.

The term 'authorise', as it is used in s. 190C(4)(b), is defined in s. 251B. Section 251B(a) provides that an applicant will be authorised by all the persons in a native title claim group to make an application, and to deal with matters arising in relation to it, if:

- the claim group has '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'; and
- the persons in the claim group have authorised the applicant in accordance with that process.

Section 251B(b) allows authorisation to flow from a process agreed to and adopted by the claim group, but only where the group does not have a mandated traditional decision making process. I understand from the material provided in the application that the applicant claims to have been authorised by a traditionally mandated process. I have therefore assessed the current application against the requirements of s. 251B(a).

I first set out the relevant information contained in the applicant's authorisation material. I then consider that material against my understanding of the requirements of s. 190C(4)(b).

Applicant's authorisation material

As mentioned above, the information concerning the process by which the applicant is said to have been authorised is contained in Attachment R – including the [Name deleted] affidavit – and in the s. 62(1)(a) affidavits accompanying the application.

The deponent of the [Name deleted] affidavit, [Name deleted], is a legal officer at Central Desert Native Title Services (CDNTS). I understand that CDNTS has carriage of the current application and that it has representative body responsibilities for a significant portion of the area covered by the application.

The relevant traditional decision making process of the Tjiwarl claim group is set out in the [Name deleted] affidavit in the following terms:

> **Tjiwarl Decision Making Process**
>
> 28. There is a clear process for decision making which the Tjiwarl claim group conduct dictated by traditional law and custom and in my experience is the same process used by other claim groups who identify as being part of the Western Desert cultural bloc.
>
> 29. I have attended community meetings with the Tjiwarl claim group and have observed this decision-making process. Decisions are made by consensus being reached at community meetings. The consensus is reached after lengthy discussion and reference to elders within the group. If the group do not reach consensus, the matter is referred to a meeting of the *wati*, as occurred in this case. The decision by the *wati* is final.

This account of the claim group's traditional decision making process is supported by the affidavits sworn by each of the applicant persons – at [8] to [9].

Although the [Name deleted] affidavit mentions that the matter was referred to a meeting of the *wati*, my understanding is that that meeting reached only a provisional – as opposed to final – decision regarding the composition of the applicant. The applicant persons are, in fact, said to have been appointed at a meeting of the wider Tjiwarl claim group that was held on 29 March 2011 (the March meeting), some months after the meeting of the *wati*.

I understand from the [Name deleted] affidavit that CDNTS organised the March meeting. According to the deponent, she, on behalf of CDNTS, notified claim group members of the March meeting by causing:

- on 16 March 2011, 'notices for the meeting on 29 March 2011 to be posted from [CDNTS'] Perth office to the Tjiwarl claim members listed on the Tjiwarl mailing list at that time' – at [21];
- a copy of the notice 'to be pinned to the notice board of Gunbarrel Groceries in Wiluna for Tjiwarl claim members to see' – at [22]; and
- a further copy of the notice 'to be put up in the window of [CDNTS'] Wiluna office for Tjiwarl members to see when they visit the office from time to time' – at [22].

The 'Tjiwarl mailing list' referred to contains the contact details of those persons 'identified as connected to the Tjiwarl claim area' – at [20]. I understand that the list used to notify claim group members of the March meeting had been compiled in the light of the results of extensive

anthropological research regarding the claim group's composition, which was conducted on behalf of CDNTS between November 2009 and March 2011 – see [10] to [13], [15] to [19]. I note further that, according to the [Name deleted] affidavit, CDNTS held eight (8) claim group meetings between May 2009 and November 2010 and that the mailing list was updated at each of those meetings – at [20].

I have been provided with a copy of the meeting notice distributed by CDNTS. The notice was entitled 'Meeting Notice: Tjiwarl Claim Authorisation Meeting' and outlined the time, date and location of the meeting. It also set out a brief agenda for the meeting in the following terms:

> Agenda:
> 1. Claim authorisation
> 2. BHP Yeelirrie attending
> 3. BHP Nickel West discussions
> 4. General Future Acts and Heritage agreements
> 5. Other business

In addition, the notice gave people who needed assistance with travel to the meeting the names and contact numbers of certain CDNTS staff.

The [Name deleted] affidavit states that the deponent attended the meeting together with other CDNTS staff. The affidavit then provides as follows:

> 25. The Tjiwarl claimants were shown a map of the proposed Tjiwarl claim area, the claim group description, list of native title rights and interests to be claimed and the nominated Applicant.
> ...
> 26. The Tjiwarl claimants made the following resolutions with respect to the decision of the *wati*:
>
> a. [Name of applicant persons deleted] are to be the named Applicant for the proposed Tjiwarl claim.
>
> b. The Applicant to file on their behalf an application in the form produced by [CDNTS] with:
>
> i. the claim boundary as shown in the meeting;
>
> ii. claim group membership as shown in the meeting; and
>
> iii. claimed native title rights and interests as shown in the meeting.

The [Name deleted] affidavit does not set out the voting for and against the above resolutions. The affidavits of the applicant persons are also silent with respect to whether the meeting's support for the applicant was unanimous. However, the s. 62(1)(a) affidavits do each state that the meeting reached consensus regarding the other resolutions identified in the [Name deleted] affidavit – at [13]. I am willing to infer from that, and from the assertions in the applicant persons' affidavits that the meeting followed the group's traditional decision making process, that the decision to appoint the applicant was also reached by consensus.

My approach to the s. 190(4)(b) assessment

First, I note that I understand that s. 251B gives the word 'all' in s. 190C(4)(b) 'a more limited meaning than it might otherwise have' – *Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) at [25]; see also *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [48]. With respect to the current application, I am aware that I am not concerned with whether literally every member of the native title claim group has authorised the persons who comprise the applicant to make the application. Instead, my focus is on whether the applicant persons are authorised in accordance with the process mandated by the claim group's traditional law and custom.

In undertaking my consideration of the applicant's authorisation material, I have had regard to the decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171 (*Ward*). In that case, his Honour was presented with evidence concerning the alleged authorisation of an applicant at a meeting of unidentified persons. Noting the dearth of evidence in respect of that meeting, O'Loughlin J identified the following questions as ones, which in substance at least, needed to be addressed:

> Who convened [the meeting] and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24] to [25].

In my view, these comments provide some guidance as to the kinds of matters which the information provided may need to address in order to satisfy me that the applicant persons have been properly authorised by a meeting of the claim group members.

In relation to the questions that concern the notification of, and attendance at, a claim group meeting, I have also had regard to the decision of Stone J in *Lawson*, a case in which authorisation was said to have stemmed from a meeting of the wider claim group. I note, in particular, that her Honour held that, although authorisation was not required from every individual member of the native title claim group, it was important that claim group members were 'given every reasonable opportunity to participate in the decision-making process' – at [25].

I am aware that the decisions in *Ward* and *Lawson* related to proceedings to replace an applicant under s. 66B. Further, I note that *Lawson* was immediately concerned with whether the requirements of s. 251B(b) had been met, rather than whether a mandated traditional decision making process had been properly complied with. In *Ward*, the information before the Court was so vague that it was not apparent whether the alleged process related to s. 251B(a) or to s. 251B(b). I understand that the reasons of Stone and O'Loughlin JJ are therefore not directly applicable to the present situation, it being one that clearly falls for consideration under s. 251B(a).

Nonetheless, it is, in my view, appropriate to draw on the decisions in *Ward* and *Lawson* in assessing the current application. In relation to the relevance of Stone J's decision in *Lawson*, I note that I understand from the affidavits of [Name deleted] and the applicant persons that the traditional process used by the Tjiwarl claim group involved decisions being made at a meeting of the wider claim group. I believe that it is therefore appropriate to inquire as to whether claim group members were afforded every reasonable opportunity to attend that meeting and, therefore, to participate in the decision making process.

Given that the authorisation process was conducted through the use of a meeting, I also believe that it is appropriate to use the questions posed in *Ward* as framework for assessing the material before me. In doing so, however, I have had regard to Stone J's observation that one should take a 'practical approach' to those questions and should be careful not to scrutinise the available material in an 'overly technical or pedantic way' – *Lawson* at [28]. I also note that I am, in the end, concerned with whether the persons who comprise the applicant are authorised in accordance with their group's traditionally mandated process, not with whether the questions identified in *Ward* have each been directly and fully addressed.

Consideration

I am satisfied that the applicant is authorised by all persons in the native title claim group to make this application, noting that:

- The applicant's authorisation material identifies that CDNTS organised the March meeting and outlines the reasons for it – namely, authorisation of the applicant, in addition to the other matters listed in the agenda excerpted above.
- I have inferred that at least some of the CDNTS staff who attended the March meeting were also responsible for running it. I understand from the [Name deleted] affidavit that, as at the time she swore the affidavit on 17 June 2011, the deponent was 'not aware of any claim member raising concerns about the decision making process used at the [March meeting]'. I therefore feel that it is safe to infer that the claim group members who attended the March meeting believed that the identity of the individual(s) who conducted the meeting, and the way in which they did so, was not inconsistent with the group's traditional decision making process and that it was appropriate.
- I am satisfied that, for the reasons discussed above, those who attended the March meeting agreed by consensus that the applicant persons are authorised to make the current application and to deal with matters arising in relation to it.

I note that the applicant's authorisation material does not expressly identify the level of attendance needed for a community meeting to make a binding decision under the claim group's traditional decision making process. Neither does it provide specific details regarding the number of claim group members who actually attended the meeting. However, bearing in mind that I should not take an overly technical or pedantic approach to these matters, I have formed the view that the material is nonetheless sufficient to satisfy me that the requirements of s. 190C(4)(b) have been met.

In particular, I note that:

- I am satisfied that claim group members were given every reasonable opportunity to participate in the March meeting. CDNTS appears, in my view, to have used its close understanding of the claim group's composition to ensure that all (known) claim group members were given reasonable notice of the meeting and of its purpose. In addition, I note [Name deleted]'s comment that, at the time of swearing her affidavit, she was 'not aware of any complaints or concerns raised by any Tjiwarl claim group member that they did not receive notification of the authorisation meeting on 29 March 2011, or of the purpose of that meeting' – at [23].
- I am satisfied that the attendance at the meeting was sufficient for the purposes of the group's traditional process. In reaching this view, I have given particular weight, in light of CDNTS' apparent understanding of the claim group's composition and its efforts to notify the March meeting, to [Name deleted]'s statement that she was not aware of any complaints regarding the process followed at the meeting. My view has also been informed by the sworn belief of the applicant persons that they are authorised in accordance with the claim group's traditional decision making process, and that the March meeting was 'a meeting ... of *all* of the native title claimants' – at [7] and [13] (emphasis added).

My decision

For the above reasons, I am **satisfied** that the application meets the requirements of s. 190C(4).

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, Part A of the application provides a description of the external boundaries of the application area. The description is in terms of metes and bounds referencing cadastral boundaries, coordinates and the surrounding Wutha native title determination application (WAD6064/1998; WC99/10). Part C lists general exclusions from the area covered by the application.

A colour map entitled 'Tjiwarl (Lake Miranda) Native Title Claim and Surrounding Features Feb 2011' is provided at Attachment C. This was prepared by CDNTS and is dated 21 February 2011. It includes:

- the application area depicted by a thick bold orange dashed line;
- topographic image background;
- cadastral boundaries colour coded and labelled;
- scalebar, northpoint, coordinate grid and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the area covered by the application must be 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/delegate to be satisfied that this can be said, the written description and the map should be sufficiently consistent with each other.

In determining whether the boundary description provided in Schedule B and the map in Attachment C are sufficient for the purpose of s. 190B(2), I have had regard to the geospatial assessment provided by the Tribunal's Geospatial Services (referred to above in relation to s. 190(C)(3)). The geospatial assessment concludes that the map and boundary description provided in the application are consistent and identify the application area with reasonable certainty. I have considered the boundary description in Schedule B and the map in Attachment C and I agree with that assessment.

Part C of Schedule B lists only general exclusions and does not refer to specific tenures. However, in my view, the exclusions are described in a way that provides an objective means by which the areas excluded from the application area can be accurately identified.

For the reasons given, I am **satisfied** that the application meets the condition of s. 190B(2).

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

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application, or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

Schedule A identifies the native title claim group in the following terms:

> 5. The native title claim group comprises those people:
>
> (a) who, in accordance with traditional laws and customs, have a connection to the area covered by the application, through:
>
> (i) their own birth, or long association with the area covered by the application; or
>
> (ii) the birth, or long association with the area covered by the application, of their ancestors by which they claim country; and
>
> (b) in respect of whom that claim is recognised according to traditional laws and customs.
>
> 6. The persons referred to in paragraph:
>
> (a) 5(a)(i) include [Name deleted]; and
>
> (b) 5(a)(ii) are the descendants of:
> [Names deleted].

Because Schedule A describes the claim group, instead of naming its members, s. 190B(3)(b) applies.

I understand that s. 190B(3)(b) does not require the Registrar/delegate to consider the correctness of the description. I am aware that the focus is instead on whether the description of the native title claim group is sufficient to allow the membership of any particular person to be ascertained – *Doepel* at [37]. This must be done by a set of rules or principles that can, through their application, be used to determine an individual's membership of the claim group – see *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [25]. I note also that it is contemplated that this may involve some form of factual inquiry – *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [67].

I understand the description contained in Schedule A to essentially provide two avenues for claim group membership: through descent from an ancestor who was connected to the claim area; or through a connection achieved via one's own birth or association with the area.

Connection through descent

My understanding of the description contained in Schedule A is that the effect of [6(b)] is to identify those persons who are members of the claim group through their ancestors' birth or association with the claim area as being persons who are descendants of the named ancestors. In

my view, the criterion referred to in [5(b)] – namely, that the claim must be recognised under the group's traditional laws and customs – is taken into account at [6(b)] such that descent from any of the named ancestors is sufficient to establish claim group membership.

In *WA v NTR*, Carr J held that a description which identified claim group members as descendants of certain named ancestors was sufficiently clear. This was because it was possible, by way of a factual inquiry, to determine whether or not a person was a descendant of any of the named ancestors and therefore whether they came within the group description – *WA v NTR* at [67].

For the same reasons adopted by Carr J, I am satisfied that the rule contained in [6(b)] of the claim group description is sufficiently clear. Its application may require some factual inquiry, but it provides a conceptually simple way for one to ascertain whether or not any particular person is a member of the claim group through an association with the application area which is of the type described in [5(a)(ii)] of Schedule A.

Connection through own association

The claim group description in Schedule A provides that the group also includes people:

- who, in accordance with the group's traditional laws and customs, have a connection to the application area through their own birth or through their own long association with the area – at [5(a)(i)]; and
- in respect of whom that claim is recognised according to the group's traditional laws and customs – at [5(b)].

My understanding is that [Name deleted] is one of those people, but that others may also meet the criteria and therefore be included in the claim group.

I am satisfied that the criteria just outlined are sufficiently clear to enable a person's membership of the claim group to be ascertained. Application of the rules will involve consultation with the claim group to determine whether the association by birth or long association with the claim area is of a kind recognised under the group's traditional law and custom. However, I believe that the fact that such an inquiry would be required does not make the description unclear because the description sets out the principles against which the factual inquiry will take place.

Conclusion

Given my view regarding each of the two main elements of the native title claim group description in Schedule A, I am **satisfied** that the description, as a whole, meets the requirements of s. 190B(3).

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).

I understand that *Doepel* is authority for the proposition that, at s. 190B(4), the Registrar/delegate must be satisfied that the claimed native title rights and interests 'are understandable and have meaning' – at [99]. I discuss whether the rights claimed can be established, prima facie, as 'native title rights and interests' (as that phrase is defined in s. 223) in relation to the requirement in s. 190B(6).

Schedule E of the application provides as follows:

> 14. In this Schedule, the following words and phrases have the following meanings:
>
> "exclusive right" means the right of possession, occupation, use and enjoyment of land and waters to the exclusion of all others;
>
> "non-exclusive rights" means:
> (a) the right to access, to remain in and to use that part for any purpose;
> (b) the right to access resources and to take for any purpose resources in that part;
> (c) the right to engage in spiritual and cultural activities on that part;
> (d) the right to engage in spiritual and cultural activities on that part [sic];
> (e) the right to maintain and protect places and objects of significance in or on that part;
> (f) the right to protect resources and the habitat of living resources in that part;
> (g) the right to make decisions about the use and enjoyment of land and waters; and
> (h) the right to receive a portion of any resources taken by others from the land and waters,
> and do not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others.
>
> **Native title where it is wholly recognisable**
>
> 15. In relation to the lands and waters of the area covered by the application, except for the areas where native title has been partially extinguished, the native title rights and interests is [sic] the exclusive right.
>
> **Native title where it is partially recognisable**
>
> 16. In relation to the lands and waters of the area covered by the application, except for areas where native title is wholly recogniseable [sic], the native title rights and interests are the non-exclusive rights.

In my view, the native title rights and interests claimed are understandable and have meaning. I am therefore **satisfied** that they can be readily identified and that the requirement of s. 190B(4) is met.

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 **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision. Before doing that, however, I set out how I have approached the task at s. 190B(5) generally and the material which the applicant has provided and which I have had regard to in reaching my decision.

My approach to s. 190B(5) generally

The task at s. 190B(5) is limited. As Mansfield J explained in *Doepel*, s. 190B(5):

> ... 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] (emphasis added); approved by the Full Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [83] to [85].

Although mindful that I may not look behind the facts asserted in the applicant's material, those facts must contain sufficient detail to properly support the assertions particularised in paragraphs (a) to (c) of s. 190B(5). In this respect, I have had regard to the comments of the Full Federal Court in *Gudjala FC*. There, the Court highlighted the link between the requirements of ss. 62(2)(e) and 190B(5). Their Honours then outlined the requirements of s. 190B(5) in the following way:

> The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be *in sufficient detail to enable a genuine assessment of the application* by the Registrar under s 190A and related sections, and be *something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based* – at [92] (emphasis added).

I note that, at this point, the Court also made similar comments to those of Mansfield J in *Doepel*, namely that 'the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim' – at [92].

In light of *Doepel* and *Gudjala FC*, I have assessed the material provided in support of the application on the basis that the facts asserted in it are true; I have not assessed the quality of the evidence that might lie behind those asserted facts. In considering whether the asserted factual basis is sufficient to support the particular conclusions outlined in s. 190B(5), I have also been careful not to require more than a general description of the factual basis of the claim. However, I *have* required that it be in sufficient detail to enable a genuine assessment under s. 190B(5) and that it consist of more than merely assertions at a high level of generality. I also note that, although the wording of s. 62(2)(e) informs the standard set by s. 190B(5), an application which has met the requirement of s. 62(2)(e) will not necessarily pass at s. 190B(5). As the Full Court commented in *Gudjala FC*, an application may fail at later stages of the registration test if the material required by s. 62 is not furnished 'fully and comprehensively' – at [90].

With respect to the level of factual detail needed to meet s. 190B(5), I note that, in addition to the Court's comments in *Gudjala FC*, I have also had regard to the decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). In particular, I note that in *Gudjala 2009* Dowsett J cautioned that, in assessing the adequacy of a description of the factual basis of a claim, the Registrar/delegate 'must be careful not to treat, as a description of the factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof' – at [29]. Further, I note that in *Gudjala 2007* his Honour held that s. 190B(5) requires 'that the alleged facts support the claim that the *identified* claim group (and not some other group) held the *identified* rights and interests (and not some other rights and interests)' – at [39] (emphasis added).

In my view, these comments from Dowsett J are consistent with, and reinforce, the Full Court's characterisation of s. 190B(5) as requiring more than general, high level assertions. The asserted factual basis must, in my view, contain a certain level of particularity: the factual material must contain details that can be understood as applying, or having relevance, to the *particular* native title claimed by the *particular* group over the *particular* area covered by the application.

I note that I am aware that the Full Court in *Gudjala FC* allowed an appeal against Dowsett J's decision in *Gudjala 2007*. However, their Honours' reasons do not appear to contain any criticism of Dowsett J's characterisation of the requirements of s. 190B(5), which his Honour applied again, after the matter was sent back, in *Gudjala 2009*. I therefore feel that it is appropriate to have regard to Dowsett J's analysis of the requirements of s. 190B(5).

The material considered

In forming my view as to whether the requirements of s. 190B(5) are met, I am able to consider material beyond that contained in the application – *Doepel* at [16]. Pursuant to s. 190A(3)(a), I have therefore had regard to material provided by the applicant, which is in addition to that contained in the application. Although set out at the beginning of these reasons, I note for convenience and

clarity that, in addition to the information contained in the application, I have had regard to the following material in undertaking the s. 190B(5) assessment:

- The affidavit of one of the persons who comprises the applicant, [Name of person A deleted], dated 8 August 2011.
- The affidavit of [Name deleted], a Legal Clerk at Central Desert Native Title Services, dated 8 August 2011.
- A transcript of the preservation evidence given by [Name of person B deleted] to the Federal Court on 20 October 2004 and the accompanying map (prepared by CDNTS), which were both attached to the affidavit of [Name deleted].
- The map prepared by CDNTS and entitled 'Tjiwarl (Lake Miranda) Native Title Claim Boundary Surrounding Features and Sites, August 2011'. This identifies the location of certain places referred to in the affidavit of [Name of person A deleted] and the evidence of [Name of person B deleted].
- The summary of evidence given at Mail Change Well and Lake Miranda as reported in *Shirley Wonyabong & Ors on behalf of the Tjupan People/Western Australia/Western Mining Corporation Ltd; Great Central Mines NL; Heron Resources NL; Wiluna Gold Pty Ltd; Mining Corporation of Australia Ltd* [1996] NNTTA 40 (*Wonyabong*).

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

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

The requirements of s. 190B(5)(a)

With respect to the assertion contained in paragraph (a) of s. 190B(5), I note that Dowsett J has held that the factual material must be sufficient to support the assertion:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – *Gudjala 2007* at [52].

Consistent with my earlier comments regarding the requirements of s. 190B(5) generally, I also note that, in considering whether the asserted factual basis sufficiently demonstrates both that present and past association, I am not obliged to accept 'very broad statements' that, for instance, have no 'geographic particularity' – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

Below, I set out my reasons for why I consider that there *is* a sufficient factual basis to support the asserted association of the claim group with the claim area. I then, however, explain why I have formed the view that the factual basis *is not* sufficient as it relates to the association of the group's predecessors with the area covered by the application.

Association of the claim group with the claim area

The information before me

Schedule F of the Form 1 describes the association of the claim group and their predecessors with the claim area in the same general terms. In particular, it provides:

> **Association With the Area**
>
> 18. The native title claim group, by the traditional laws acknowledged and customs observed by them, have, and their predecessors had, a connection to the area covered by the application viewed in isolation and in its context in a wider area or areas of which, under those laws and customs, it forms an undifferentiated part (collectively, in this Schedule F, the area). That connection involved and at all relevant time [sic] has continued to involve spiritual, physical, historical, (customary) legal, economic and social elements.
>
> 19. The spiritual element of the connection, comprises:
>
> (a) the beliefs of the members of the native title claim group as people of the Western Desert that *Tjukurrpa* are responsible for the existence and form of the landscape, and continue to be a presence or influence in the area, and at places associated with the area;
>
> (b) the responsibility of the members of the native title claim group to protect the places on the area associated with the *Tjukurrpa*; and
>
> (c) the responsibility to prevent the improper disclosure of beliefs and practices, which relate to places associated with the area.
>
> [This is followed by a list of the *Tjukurrpa* associated with the claim area.]
>
> ...
>
> 20. The physical element of the connection comprises:
>
> (a) the physical presence of members of the native title claim group and their predecessors on the area covered by the application;
>
> (b) the use of the resources of the area covered by the application by the native title claim group and their predecessors; and
>
> (c) the actions by the members of [the] native title claim group and their predecessors to protect places on the area covered by the application.
>
> 21. The historical element of the connection comprises the considerable time depth of the spiritual, physical, legal, economic and social elements of connection maintained by the native title claim group members and by their predecessors with the area.
>
> 22. The (indigenous) legal element of the connection is the status the native title claim group members have in respect of the area covered by the application, and the relationship they have with it as those who, under the laws acknowledged and customs observed by them are 'proper' in relation to the sites in and the spiritual features of the area.
>
> 23. The economic element of the connection comprises native title claim group members living on the area utilising the resources of the land and waters for sustenance and trade and otherwise to their benefit, in pursuance of their entitlements under the traditional laws acknowledged and customs observed.

24. The social element of the connection is the reflection under the traditional laws acknowledged and customs observed by the native title claim group and their predecessors, in the relationship between people and people, of the relationships between people and county, through intrinsic associations of both people and country with *Tjukurrpa*.

In addition to the information contained under the heading 'Association With the Area', I also note that:

- further to the assertion made by the applicant at [22], [28] includes a statement to the effect that the claim group is recognised under the laws and customs of the Western Desert as holding the native title rights and interests referred to in Schedule E (these are set out above in relation to s. 190B(4));
- in Schedule G, the applicant states that claim group members 'carry on, and their predecessors carried on, activities such as to fully exercise the rights and interests referred to in Schedule F'; and
- in Schedule M, the applicant states that '[a] number of senior members and some young members of the native title claim group have a traditional physical connection to the claim area in that they lived for significant periods of time in the claim area'.

I also consider that this information in the Form 1 is relevant to the general description of the factual basis as it relates to the asserted association of the claim group with the application area.

In addition to the information contained in the Form 1, the extra material provided by the applicant also contains the details set out below.

I deal first with the affidavit sworn by [Name of person A deleted] on 8 August 2011. In relation to the spiritual association that the claim group has with the application area, [Name of person A deleted] deposes that he has been taught a number of *Tjukurrpa* or Dreaming stories by his mother or other old people – see [16], [19] to [20], [26] to [29]. In terms of geographical coverage, within the application area, I note that the *Tjukurrpa* stories discussed by [Name of person A deleted] relate to the following locations:

[Locations deleted].

In addition to briefly describing *Tjukurrpa* stories that relate to these areas, [Name of person A deleted] also identifies the Dreaming of particular individuals and the areas that they are associated with.[1] I understand from [Name of person A deleted]'s affidavit that the association of certain individuals with specific areas gives those individuals particular responsibilities under the group's laws and customs. For example, [Reference deleted]. My understanding is that this sort of association relates both to what is described in Schedule F as the spiritual element of the claim group's connection with the claim area and also to the '(indigenous) legal element'.

Also in relation to that legal element of the association, [Name of person A deleted] states that:

[1] [Reference deleted].

58. I've been through the law, so I'm a *wati*. *Wati* have a responsibility to take care of and look after the country, the sites and make sure that those sacred places are respected and taken care of. Those responsibilities are handed down from other [*w*]*ati* and they come from *Tjukurrpa*, Dreaming.

...

61. In my country, this claim area, I can camp and live, I can hunt, I can chop wood, visit places. If someone from another country visits our country, they call upon the elders and say 'Where is the right place to go? Are there places that I shouldn't go to?'

I understand these statements to provide a more detailed explanation of what it means in practice for the claim group to be recognised under the laws and customs of the Western Desert as '"proper" in relation to the sites in and the spiritual features of the area', as described in Schedule F.

In relation to the physical connection between claim group members and the application area, [Name of person A deleted] deposes that, although he currently lives outside of the application area in Leonora:

16. As a little boy, one of my earliest memories is being taught about country along the Leonora to Wiluna road. I travelled all around that area with my mother and father. On his time off my father would visit this country with mum. We travelled around Yakabindie, Albion Downs, Mount Keith, Leinster Downs and Depot Springs. My mum used to tell me stories about that country, so I would know it.

17. When I was about 7 years old, my father stopped working as a dogger and my parents owned a small pastoral property just east out of Wiluna which we went to live on. We continued to maintain our connection to this country well into my adulthood.

[Name of person A deleted] then states that, after living in Wiluna, he moved with his parents to Leonora and that it took about a year for them to travel down the Wiluna-Leonora road. My understanding is that around this time – or at least during his childhood – [Name of person A deleted] would visit places in the claim area with his parents. In this respect, [Name of person A deleted]'s affidavit contains the following:

22. My family would stop and visit at Yakabindie and at Jones Creek. ...

23. When my family stopped at those places we would see the same people there. I would see the [Name deleted], the Wiluna mob of [Names deleted], any of our family travelling through. They would either be stopping at Yakabindie station or somewhere like that.

24. We would also visit families at Albion Downs. There was [Name deleted] at Albion Downs, can't remember who else was there. The main people living at Yakabindie, was [Name deleted] and [Name deleted], [Name deleted], my brothers and sisters when they were there, the [Name deleted]. And you would spot people on the road like the [Name deleted] [.] ...

Further, [Name of person A deleted]'s affidavit contains the following information regarding the physical association of him and his family with the application area:

- [Name of person A deleted] talks about having a physical presence on the claim area in his adult life – in particular, visiting Montague Range with his wife and parents, visiting the grave of an ancestor at Albion Downs with his wife and mother, going on the claim area to introduce children to country, and visiting significant sites to continue his education in the claim group's law and custom – see [44] to [45], [49] and [57].
- [Name of person A deleted] describes harvesting potatoes in the Boolygoo Range area, gathering emu eggs in the Montague Range area, collecting *kurumin* in the *Yakumanti* (Yakabindie Claypan) area, and refers generally to hunting and chopping wood on the application area – at [31] to [34], [44], [48] and [59] to [61].
- [Name of person A deleted] recalls that: 'the first conflict Mum and Dad got into was with a guy down at Lake Miranda. A local contractor who [was] supplying concrete to the mine thought it was a simple job to take the sand dune apart, so there is a big hole in the sand dune now where he's extracted the sand before we stopped him' – at [39]. He then states that: 'Protecting that has been a full time job. Old Roley Hill, when I was about 15 years of age told me to look after the ranges' – at [39].

The transcript of the preservation evidence given by [Name of person B deleted] on 20 October 2004 is similarly relevant to the association of the claim group with the application area. I note, at this point, that [Name deleted] affirms in her affidavit that [Name of person B deleted] is a descendant of [Name of apical ancestor deleted] and is therefore a member of the claim group – at [6]. In her evidence, [Name of person B deleted]:

- identifies sites in the area around [Locations deleted] where her *Tjukurrpa*, and the *Tjukurrpa* of her Aunt and daughter are located – see 279, 287 and 290;
- discusses the way in which she has been taught by her parents and other old people that access to certain sites near Lake Miranda, Mount Sir Samuel and Wiluna (which, I note, is beyond the northern boundary of the claim area) is regulated and restricted to men – see 283, 298 and 324 to 325;
- identifies Mount Sir Samuel as being her country, as the result of an event that happened there in her youth (in addition to a number of other locations, which I note lie reasonably close to, but outside, the boundaries of the claim area) – see 313 and 318;
- describes how, although now living in Kalgoorlie, she has lived – as a child and an adult – at Leinster Station and Yakabindie Station and frequently camped in the bush around those areas, including at Mount Sir Samuel and Lake Miranda – see 305, 308, 312 and 328;
- mentions how she takes, or has taken, her children to visit Jones Creek and notes that it is her camp, and has significance for her, because her mother used to live there – see 324 and 346 to 347;
- describes how she has hunted or gathered bush tucker and other resources when in the bush – see 328 to 332;

- notes that '[a]ll the families' use rock holes around Lake Miranda as a water source – at 289; and
- discusses how she prevented mining activities at Lake Miranda in the late 1990s – see 298.

The evidence presented in the *Wonyabong* future act determination, which the applicant has referred me to, described the spiritual significance of a number of sites within the current claim area for the *Tjupan* and *Ngalia* peoples. My understanding is that both of those communities either comprise entirely or form part of the current claim group. This is because [Name of person B deleted], in her evidence, identifies herself as a *Tjupan* person and [Name of person A deleted], in his affidavit, identifies himself as belonging to the *Ngalia* people. I also note that [Name of person A deleted] and his mother and father were responsible for providing a significant amount of the evidence presented to the Tribunal in relation to the *Wonyabong* determination. The sites that were identified in that evidence cover many of the same locations discussed in [Name of person A deleted]'s affidavit and [Name of person B deleted]'s evidence (for example, Lake Miranda, Albion Downs, Mount Keith and the area around Boolygoo Station). The evidence also described how access to specific areas is limited to certain sexes or is otherwise restricted.

Consideration of the factual material supporting the first limb of the s. 190B(5)(a) assertion – that the claim group is associated with the claim area

I note first that, in my view, the information in the Form 1 contains insufficient detail to support the asserted association between the claim group and the area covered by the application. Although the material identifies the kinds of associations which the applicant asserts that the claim group has with the claim area, those associations are described at a high level of generality. In particular, the geographic locations that associations relate to are not identified and there is a lack of detail regarding how this particular claim group is associated with the claim area in the ways identified.

However, I am satisfied that the additional material provided by the applicant offers the detail that is required to support the asserted association between the claim group and the application area.

In relation to the spiritual element of the association outlined in Schedule F, I note that [Name of person A deleted]'s affidavit and the evidence of [Name of person B deleted] identify:

- how they and members of their families are spiritually associated with a number of identified sites within the claim area;
- how individuals have particular authority or responsibilities in respect of certain areas under that spiritual system; and
- how certain sites within the claim area are, I infer, spiritually significant to the claim group as a whole.

With respect to this last point, I note, for example, that, although [Name of person B deleted] is individually associated with a specific site at [Location deleted], the evidence given in relation to the *Wonyabong* determination shows that the site is also important to, at least, the *Tjupan* and *Ngalia* peoples.

As to the physical element of the association between the claim group and claim area, [Name of person A deleted] and [Name of person B deleted] each:

- name specific places within the claim area where they have lived or visited regularly;
- identify certain resources that the claim group gather, harvest or hunt on the claim area, and identify where some of those resources are located; and
- describe specific instances where they have taken steps to protect spiritually significant sites in the claim area.

I note that the material that relates to the physical presence of [Name of person A deleted] and [Name of person B deleted], and of their families, on the claim area does not speak directly to the physical presence of the claim group as a whole. However, my understanding is that the information relating to those individuals' physical association with the claim area has been provided as an example of the type of association broadly described in Schedule F as being held by the claim group as a whole. In this respect, I note the comments in [Name of person A deleted]'s affidavit where he refers to visiting [Name deleted] and to visiting and/or encountering members of the [Name deleted], [Name deleted] and [Name deleted] families at sites within the claim area. Those family names feature both in the list of persons who comprise the applicant and in the list of apical ancestors that is used to describe the claim group. [Name deleted] is one of the applicant persons and has sworn, in her s. 62(1)(a) affidavit, that she is a member of the claim group – at [1]. I note also [Name of person B deleted]'s comment that '[a]ll the other families' use rock holes around Lake Miranda as a water source.

For the reasons given, I am satisfied that there is a sufficient factual basis to support the asserted association between the claim group as a whole and the area covered by the application.

Association of predecessors with the claim area

Although I am satisfied that there is a sufficient factual basis to support the asserted association between the claim group and the claim area, there must also be material which supports the asserted association between the claim group's predecessors and the application area over the period since sovereignty.

The information before me

Schedule F asserts that the claim group's predecessors have had an association with the claim area in the six (6) ways described earlier 'at all relevant time [sic]' – at [19]. Schedule G asserts that the claim group's predecessors carried on the rights and interests referred to in Schedule F (and then set out in Schedule E). In my view, only the following information in the applicant's additional material is relevant to those assertions.

In his affidavit, [Name of person A deleted] (b. 1970) deposes that:

- his mother was born in or near Laverton and lived in and travelled to various places in the claim area, which [Name of person A deleted] identifies;
- his mother told him that her country, which she described as her 'old run', included a number of locations and sites in the claim area that [Name of person A deleted] lists – at [15];

- he was taught by his mother and other old people about the spiritual connection between the community and the claim area, as described above;
- a relative from his great grandparents' generation is buried in [Location deleted] and that other 'old people', who lived in that area, are buried there – at [45];
- that there is another burial place in [Location deleted] and that one of his grandparents lived near there – at [46]; and
- that '[t]he old people', which included his grandmother, had a camp at Mount Sir Samuel – at [42].

I note, in addition, that when presenting evidence to the Tribunal in relation to *Wonyabong*, [Name of person A deleted] said that his grandparents were of country.

[Name of person B deleted] (b. 1937) states in her evidence that Mount Sir Samuel and, I infer, Leinster and Lake Miranda are her country on her mother's side (in addition to places outside the claim area, namely Darlot, Wiluna, Barwidgee and Agnew) – at 318. It appears from [Name of person B deleted]'s evidence that her mother was born outside the claim area, though potentially as close as Barwidgee, which lies approximately 7 km to the northeast of the claim area – see 301. Her mother's association with the just noted parts of the claim area is said to arise solely from her living, working and travelling around those areas – see 278, 282 to 284, 318 to 319, 323 and 326. It is not asserted that [Name of person B deleted]'s mother's association with the claim area was linked to any association that her predecessors may have had with the area.

I understand from [Name of person B deleted]'s evidence that her mother's mother was born near Wongawol, which lies approximately 150 km to the northeast of the claim area – at 301. [Name of person B deleted] does not say where her mother's father was born. However, she recounts a story told by her mother that her mother's mother and father lived around Wongawol until they were chased by white people down to Lake Darlot and across to Mount Sir Samuel – at 301 to 302. The only other statement that *may* refer to the association of her grandparents' association with a part of the claim area prior to [Name of person B deleted]'s lifetime is [Name of person B deleted]'s reference to her mother's father having been able to visit a spiritually significant site near Lake Miranda as a result of 'go[ing] through the law' – at 335.

Consideration of the factual material supporting the second limb of the s. 190B(5)(a) assertion – that the claim group's predecessors had an association with the claim area

First, I note that, in my view, the broad assertions contained in the Form 1 simply restate the asserted association between the claim group's predecessors and the claim area that is described in s. 190B(5)(a). They do not therefore assist in providing a factual basis that has the level of detail needed to satisfy the condition in s. 190B(5). As a result, that detail must be contained in the additional information provided by the applicant.

By my estimation, the period touched on by [Name of person A deleted]'s affidavit and [Name of person B deleted]'s evidence must begin in the early 1900s. There is no material that speaks to the situation stretching back from that point to the time that sovereignty was asserted over Western Australia in 1829. That is not to say that an applicant's factual information must deal with the entirety of the period since the assertion of sovereignty. For example, the association of a group's predecessors with a claim area during the period between sovereignty and the arrival of

European settlement in the region may be readily inferred – see *Gudjala 2007* at [50] to [54]. Even if the asserted facts do not go back as far as European settlement, a full and comprehensive, though still general, description of a factual basis may still invite the inference that the claim group's predecessors had maintained the necessary association since sovereignty. However, the applicant's factual information must be sufficient to support the inference.

The factual material in relation to the current application does not identify the period in which European settlement first reached the claim area or the surrounding region. Nonetheless, even if I were to assume that settlement in the area occurred some time after the assertion of sovereignty, the applicant's factual information would still not satisfy me that there is a sufficient factual basis to support the asserted association of the claim group's predecessors with the claim area going back to that point. In my view, the material before me is too limited and vague and, in the case of [Name of person B deleted]'s evidence, would appear to contradict rather than support the s. 190B(5)(a) assertion.

In the case of the information concerning [Name of person B deleted]'s predecessors, her evidence indicates that her grandparents were the first to become associated with any part of the claim area. This must have post-dated sovereignty by a significant period. In addition, the fact that [Name of person B deleted] refers to her grandparents travelling to Mount Sir Samuel as the result of being chased by a white man would appear to indicate that their association with that area began after European settlement in the region had begun. So far as [Name of person A deleted]'s affidavit and the evidence presented in *Wonyabong* are concerned, the only reference to the association of any predecessors with the claim area, prior to the generation of [Name of person A deleted]'s grandparents, is to someone of [Name of person A deleted]'s great grandparents' generation being buried at Albion Downs. This is, in essence, the extent of the information concerning the association of the claim group's predecessors with the claim area. It does not, in my view, invite the inference that the claim group's predecessors have maintained an association with the claim area over the period since sovereignty.

I also note that, in addition to the concerns just outlined, the information regarding the association of the claim group's predecessors with the claim area is, in my view, too limited in its geographical coverage. Although an applicant's factual basis does not need to assert an association between the claim group's predecessors and every single part of the area covered by an application, it must indicate an association with the broader claim area. In this case, the references to [Name of person A deleted] and [Name of person B deleted]'s predecessors' association with the claim area are confined almost entirely to the south-eastern quarter of the claim area. [Name of person B deleted]'s evidence, I note, also goes in large part to supporting that her predecessors were associated with areas that are well outside the claim area. In my view, this kind of factual basis material does not support an inference that the claim group's predecessors were associated with the claim area, as a whole, even during the period with which the material is concerned.

For the reasons given, I have formed the view that the factual basis is insufficient to support the asserted association between the predecessors of the claim group and the claim area over the period since sovereignty. On the whole, therefore, the applicant's material is **not sufficient** to support the assertion described in s. 190B(5)(a).

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

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

The requirements of s. 190B(5)(b)

Section 190B(5)(b) requires that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the claim group that give rise to the claim to native title rights and interests. The wording of s. 190B(5)(b) is, I note, almost identical to the phrasing of paragraph (a) of s. 223(1), which defines the term 'native title right and interests'. In my view, it is therefore important to interpret s. 190B(5) in light of the case law concerning s. 223(1)(a). Of particular significance, in this regard, is the decision of the High Court in *Yorta Yorta Community v Victoria* [2002] HCA 58 (*Yorta Yorta*), which includes discussion of the meaning of the word 'traditional' as it is used in s. 223(1)(a) – see *Gudjala 2007* at [26] and [62] to [66] with respect to the relevance of *Yorta Yorta* to the task at s. 190B(5)(b).

According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

- it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice' – at [46];
- the origins of the content of the law or custom concerned can be found in the normative rules of a society which existed before the assertion of sovereignty by the Crown – at [46];
- that normative system has had a 'continuous existence and vitality since sovereignty' – at [47]; and
- the relevant society's descendents have acknowledged the laws and observed the customs, which that normative system gives rise to, since sovereignty and without substantial interruption – at [87].

I note that, in this context, the term 'society' is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs' – *Yorta Yorta* at [49]. I also note that 'some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal' – *Yorta Yorta* at [83] (emphasis in original). However, the factual basis must show that the laws and customs currently being observed still have their roots in pre-sovereignty laws and customs – *Gudjala 2009* at [22].

In my view, I must therefore be satisfied that there is a factual basis which is sufficient:

- to identify the relevant society – being a group united by the acknowledgement and observance of a body of law and custom – which existed before, or at the time of, sovereignty and from which the claim group is descended;
- to support the assertion that the laws acknowledged and customs observed by the claim group derive from that society's normative system; and
- to support the assertion that the laws and customs, which derive from that normative system, have been acknowledged and observed without substantial interruption since sovereignty, having been passed down through the generations to the claim group.

In addition, the factual basis must show how the traditional laws and customs of the group give rise to the claim to native title rights and interests—*Gudjala 2007* at [39]. This, however, need only be in a general sense because the assessment of whether the factual material is sufficient to support each of the specific rights or interests claimed is the task undertaken at s. 190B(6) – *Doepel* at [126] to [127].

The applicant's factual material in support of the s. 190B(5)(b) assertion

In relation to the society that existed at sovereignty and whose normative system is said to give rise to the relevant laws and customs, the applicant states in Schedule F that:

> 34. The members of the native title claim group are, biologically and socially recognised descendants of people of the Western Desert at sovereignty.
>
> 35. The people of the Western Desert were at sovereignty and are today, a body of persons united in and by their acknowledgement and observance of laws and customs (subject to regional variations), which at all such times have been continuously [sic] and are acknowledged and observed in their application to the area covered by the application, subject to adaptive change.

Earlier in Schedule F, the applicant also states that the people of the Western Desert:

- 'are those Aboriginal persons who identify with varieties or dialects of the one language that is associated with the land and waters of the Western Desert but has no single indigenous name' – at [29]; and
- include people that are associated with 'a particular kinship system, [which places] an emphasis on generational moieties in ritual organisation and a distinctive approach to male initiation' – at [30].

With respect to the relevant laws and customs of the Western Desert society, Schedule F includes the following information:

- The *Tjukurrpa* or Dreaming is the fundamental concept in the belief system of the people of the Western Desert, which both explains the form of the landscape and regulates people's relationship and interaction with it. This system is said to have normative content because people face punishment by the community, such as being ostracised, if they breach the rules laid down by the *Tjukurrpa* – at [25] to [26].
- The laws and customs of the people of the Western Desert recognise persons who meet the criteria used in Schedule A to define the claim group as holding the rights and interests in the claim area that are set out in Schedule E – at [28] and [37].
- The laws and customs of the people of the Western Desert have undergone adaptive change – principally to take account 'of the increasing number of births in communities and hospitals' – and now place a greater emphasis on parental and grandparental connections to country, and on long association with an area – at [36].
- Examples of the ways in which the laws and customs of the people of the Western Desert regulate the relationship between people and land and waters are identified in general

terms. These include: providing 'for persons being recognised by others associated with sites in an area as having traditional authority in respect of the area and its related cultural information'; persons with authority over certain areas having the ability to restrict access to certain sites; the requirement that strangers get permission from those persons holding authority before visiting the relevant areas; access to sites being restricted on the basis of gender, age and ritual knowledge; and access to spiritual knowledge being restricted on the basis of those factors – at [31].

The additional information provided by the applicant does not relate directly to the Western Desert society as it existed at sovereignty or to its laws and customs. [Name of person A deleted]'s affidavit does, however, include reference to his skin being *Tjarurru* and to his ability to be accepted into other Western Desert communities on the basis of his skin name – at [5]. He also states that the *Ngalia* people, to which he belongs, form part of the Western Desert society, and refers to people from other Western Desert communities consulting with, I infer, claim group elders as to where they may or may not go on country – at [8] and [61]. I understand this to reflect the rule referred to in Schedule F under which strangers to country must seek the permission of persons recognised by Western Desert law and custom as holding authority in relation to the relevant area.

Apart from that, and as already noted above, the affidavit of [Name of person A deleted], the evidence of [Name of person B deleted] and the evidence presented in *Wonyabong* include reference to:

- how the *Tjukurrpa* system regulates the relationship that certain members of the current claim group and their recent predecessors have with the land, waters and resources of the claim area;
- how the *Tjukurrpa* system recognises the authority of certain current claim group members, and their recent predecessors, over the claim area;
- claim group members being responsible, under that system, for taking care of significant sites;
- [Name of person A deleted] and [Name of person B deleted]'s knowledge of the *Tjukurrpa* system being passed down to them by their parents and by other old people;
- [Name of person A deleted] and [Name of person B deleted]'s grandparents 'going through the law'; and
- [Name of person A deleted] and other people from the claim area teaching children about country.

Consideration of the factual material supporting the s. 190B(5)(b) assertion

The factual material must, first and foremost, identify the relevant pre-sovereignty society, and its laws and customs, with some degree of detail. In this regard, I note Dowsett J's comments in *Gudjala 2009*:

> In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-

> sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case – at [29].

In my view, the factual material regarding the pre-sovereignty society of the people of the Western Desert, and its laws and customs, lacks the necessary level of factual detail in two (2) important and interrelated respects.

First, there is almost no information that relates to how the ancestors of the current claim group formed part of the Western Desert society as it existed at sovereignty. I note [Name of person A deleted]'s statements which indicate that he is, and perhaps other members of the claim group are, now recognised as belonging to a wider Western Desert society. I note also [Name of person A deleted]'s comment that he belongs to the *Ngalia* people, who are said to form part of that society. However, there is no information which deals with whether the *Ngalia* community formed part of the Western Desert society at sovereignty. There is also no information which deals with whether the *Tjupan* people, of which [Name of person B deleted] states that she is a member, are or were a part of the Western Desert society, either past or present. Moreover, the applicant's material does not explain the relationship between the *Ngalia* or *Tjupan* people and the claim group as it has been described in Schedule A. So far as the claim group as a whole is concerned, its relationship to the Western Desert society is simply asserted, in Schedule F, to arise from its members being descended from people who belonged to a pre-sovereignty Western Desert society. Although the indicia of communities that belong to the Western Desert people are briefly mentioned in Schedule F, how the claim group relate, or their predecessors related, to those indicia is not explained.

Second, there is a lack of information in respect of whether or how the laws and customs of the Western Desert provided for the recognition of certain persons or groups as holding rights and interests in relation to the land and waters of the claim area. In this regard, I note the statement in Schedule F that the laws and customs of the Western Desert have undergone adaptive change such that they now place more emphasis on parental and grandparental connection to country, and on individuals' own association with it. This appears to be consistent with the criteria used in Schedule A to describe the native title claim group and to justify its claim to the native title rights and interests set out in Schedule E. However, the factual basis material does not, in my view, invite the inference that these laws and customs observed and acknowledged by the current claim group members, and their immediate predecessors, are rooted in those of the relevant pre-sovereignty society. There is insufficient material regarding the claim group's ancestors and their laws and customs to enable me to make a genuine assessment of the factual basis that is said to support that assertion.

I note that I accept that the information contained in [Name of person A deleted]'s affidavit, [Name of person B deleted]'s evidence and in the summary of evidence presented in *Wonyabong* is consistent with, and provides specific examples and details in respect of, the laws and customs relating to land and waters that are described generally in Schedule F. In particular, that additional material describes how the rules laid down by the *Tjukurrpa* system regulate people's use of, and interaction with, certain sites and resources within the claim area. I also acknowledge that the affidavit of [Name of person A deleted] and the evidence of [Name of person B deleted]

indicate that these laws and customs have been, and are being, passed down by older to younger generations, going back at least as far as [Name of person B deleted]'s grandparents' generation. However, as described above, there is a paucity of material regarding two vital and interrelated points:

- how claim group members form, and their ancestors formed, part of the Western Desert society; and
- how the laws and customs being practiced by current claim group members and their immediate predecessors are rooted in the normative system of the pre-sovereignty society of the Western Desert.

In the light of those deficiencies, the information just noted is, in my view, insufficient to invite the inferences needed to support the s. 190B(5)(b) assertion.

For the reasons given, I am **not satisfied** that the applicant's factual basis is sufficient to support the assertion described in s. 190B(5)(b).

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

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

Paragraph (c) requires that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs referred to in paragraph (b) – see *Martin* at [29] with regard to the relationship between paragraphs (c) and (b). Given the linkage between the two (2) paragraphs, the reference to 'traditional' laws and customs in paragraph (c) must also be interpreted in light of the High Court's decision in *Yorta Yorta*. As a result, a factual basis which is insufficient to support the assertion contained in s. 190B(5)(b) must also be insufficient to support the s. 190B(5)(c) assertion.

For the reasons given in relation to s. 190B(5)(b), I have formed the view that the applicant's factual basis material is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title rights and interests. In reaching that conclusion, I specifically formed the view that the factual basis could not support the inference that the laws and customs currently acknowledged and observed by the claim group have their roots in the normative system of a pre-sovereignty society. As a result, I could not be satisfied that the factual basis material supports an inference that the claim group have continued to acknowledge or observe traditional laws and customs that relate to the land and waters of the claim area.

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

Combined result for s. 190B(5)

For the reasons set out above, I have formed the view that the factual basis provided is not sufficient to support the assertions described in paragraphs (a) to (c) of s. 190B(5). Therefore the application does **not satisfy** the condition of s. 190B(5).

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

As with s. 190B(5)(b) and (c), the reference to 'native title rights and interests' in s. 190B(6) must, in my view, be understood in light of the definition of that term in s. 223(1). I note that this is consistent with the reasoning of Dowsett J in *Gudjala 2007*, and that that aspect of his Honour's decision was not criticised by the Full Court in *Gudjala FC – Gudjala 2007* at [85] to [87].

As paragraph (a) of s. 223(1) states, the term 'native title rights and interests' means those rights and interests in relation to land and waters which are 'possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal Peoples or Torres Strait Islanders'. The meaning of the term 'traditional', as noted above, has been articulated by the High Court in *Yorta Yorta*. As explained in my reasons in relation to s. 190B(5)(b), I have formed the view, that the applicant's factual basis is insufficient to support the asserted existence of traditional laws acknowledged, and traditional customs observed, by the claim group that give rise to the claim to native title rights and interests. It must therefore follow that I am not satisfied that any of the native title rights and interests claimed can be established, prima facie.

The application does **not satisfy** the condition of s. 190B(6).

Subsection 190B(7)
Traditional physical connection

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

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

In *Gudjala 2007*, Dowsett J held as follows:

> The Delegate considered that the reference to '*traditional physical connection*' should be taken as denoting, by use of the word 'traditional', that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in *Yorta Yorta*. As I can see no basis for inferring that there was a society of

> the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7) – at [89] (emphasis in original); not criticised by the Full Court in *Gudjala FC*.

I understand his Honour's comments as supporting the view that there must be material which shows that the traditional connection referred to in s. 190B(7) is in accordance with laws and customs that are rooted in the normative system of a pre-sovereignty society, from which the claim group is descended. Given that the term 'traditional' in s. 190B(7) must also be understood in the sense described in *Yorta Yorta*, it necessarily follows from my conclusions in respect of s. 190B(5) that I am not satisfied that any member of the claim group either has or had a 'traditional' physical connection with any part of the claim area.

Therefore I am **not satisfied** that the application meets the requirements of s. 190B(7).

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

Reasons for s. 61A(1)

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

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

The geospatial assessment states that no determinations of native title have been made within the area covered by the application. I have conducted my own search against the Tribunal's mapping database and I agree with that assessment.

Reasons for s. 61A(2)

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

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

The general exclusions listed in Part C of Schedule B have the effect of excluding from the application any area in relation to which a previous exclusive possession act was done (except for those areas to which ss. 47, 47A, or 47B apply).

Reasons for s. 61A(3)

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

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

Schedule E states that the applicant only claims the right to possession, occupation, use and enjoyment of land and waters to the exclusion of all others in respect of areas where native title has not been partially extinguished.

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

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

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

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

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

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

Schedule Q states that the applicant makes no claim to any minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or by the State of Western Australia.

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

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

The area covered by the application does not include any offshore places.

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

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

Part C of Schedule B excludes from the area covered by the application any areas where native title rights and interests have been otherwise extinguished. Under Part B of Schedule B, this exclusion does not include areas to which ss. 47, 47A or 47B apply.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Tjiwarl**
NNTT file no.	**WC11/7**
Federal Court of Australia file no.	**WAD228/2011**
Date of registration test decision	**14 September 2011**

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)			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)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Not met
	re s. 190B(5)(a)	Not met
	re s. 190B(5)(b)	Not met
	re s. 190B(5)(c)	Not met
s. 190B(6)		Not met
s. 190B(7)(a) or (b)		Not met
s. 190B(8)		Aggregate result: 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**