

NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

Section 190E *Native Title Act 1993* (Cth)

Application Name: Tjiwarl
NNTT file no: WC11/7
Federal Court of Australia file no: WAD228/2011
Tribunal: Deputy President John Sosso
Place: Brisbane
Date: 13 January 2012

Legislation *Native Title Act 1993* (Cth) ss. 13, 24MD, 29, 47, 47A, 47B, 61, 62, 63, 64, 123, 190, 190A, 190B, 190C, 190D, 190E, 190F, 223, 225

Cases *Akiba v Queensland (No 2)* [2010] FCA 643 (2010) 270 ALR 564
Attorney-General (NT) v Ward (2003) 134 FCR 16
Daniels v Western Australia [1999] FCA 686
De Rose v South Australia [2002] FCA 1342
Griffiths v Northern Territory (2007) 165 FCR 391
Gudjala People #2 v Native Title Registrar [2007] FCA 1167
Gudjala People #2 v Native Title Registrar [2009] FCA 1572
Harrington-Smith v Western Australia (No 5) (2002) 197 ALR 138
Harrington-Smith v Western Australia (No 9) (2007) 238 ALR 1
James v Western Australia [2002] FCA 1208
Lawson v Minister for Land and Water Conservation [2002] FCA 1517
Lennon v South Australia [2011] FCA 474

Martin v Native Title Registrar [2001] FCA 16
Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (2005) 145 FCR 442
Northern Territory v Doepel (2003) 133 FCR 112
Patch v Western Australia [2008] FCA 944
Powder Family v Registrar, Native Title Tribunal [1999] FCA 913
Quall v Native Title Registrar (2003) 126 FCR 512
Risk v National Native Title Tribunal [2000] FCA 1589
Sampi v Western Australia [2010] FCAFC 26
Strickland v Native Title Registrar (1999) 168 ALR 242
Strickland v State of Western Australia [2010] FCA 272
Re Tjupan Peoples (1996) 134 FLR 462
Walker v Western Australia [2008] FCA 1559
Ward v Northern Territory [2002] FCA 171
Western Australia v Native Title Registrar [1999] FCA 1594
Western Australia v Native Title Registrar (1999) 95 FCR 93
Western Australia v Strickland (2000) 99 FCR 33
Western Australia v Ward (2002) 213 CLR 1
Wulgurukaba People #1 v Queensland [2002] FCA 1555
Yarmirr v Northern Territory (1998) 82 FCR 533
Yorta Yorta Community v Victoria (2002) 214 CLR 422

Introduction

[1] On 14 September 2011 Mr. Stephen Rivers-McCombs, a Delegate of the Native Title Registrar (“the Delegate”), gave notice, pursuant to s. 190D(1) of the *Native Title Act 1993* (Cth) (‘the Act’) of his decision not to accept the claim made in the Tjiwarl native title determination application for registration pursuant to s. 190A of the Act. The Delegate reached this conclusion because the application did not, in his opinion, meet the following statutory conditions:

- (a) s. 190B(5) – factual basis for native title;
- (b) s. 190B(6) – prima facie case; and
- (c) s. 190B(7) – traditional physical connection.

[2] By letter dated 14 September 2011, Ms. Ashleigh Freeman, Case Manager in the Western Australia Registry, wrote to the Applicant, care of Mr. Malcolm O'Dell, Principal Legal Officer of ("CDNTS") Native Title Services, the legal representative of the Applicant, notifying of the Delegate's decision.

[3] On 17 October 2011 Mr. O'Dell, on behalf of the Applicant, applied, pursuant to s. 190E(1) of the Act, for reconsideration of the claim.

[4] The application set out the following grounds for seeking reconsideration:

"The bases on which reconsideration of the claim made in the Application is sought is that the claim satisfies all the conditions in ss. 190B and 190C of the Native Title Act, in particular, the Applicant considers that, contrary to the conclusion reached by the Delegate, the claim satisfies the conditions in:

1. *section 190B(5) as we say, the area is now and was at the time of European occupation part of western desert society, which society dictates the traditional laws and customs acknowledged and observed by the current claim group and their predecessors, being those people of the western desert society at the time European occupation;*
2. *section 190B(6) as we say, the native title rights and interests claimed are derived from traditional laws and customs acknowledged and observed since European occupation; and*
3. *section 190B(7) as we say, the physical connection of at least one member of the claim group is derived from traditional laws and customs acknowledged and observed since European occupation."*

[5] An applicant may not seek reconsideration if an application has already been made to the Federal Court under s. 190F(1) for review, or if there has been a previous reconsideration request (s. 190E(3) and (4)). Neither of these circumstances is present and, consequently, the Tribunal is empowered to reconsider the claim.

[6] The reconsideration must be conducted by a single member of the Tribunal – s. 190E(5). On 19 October 2011 the President appointed me, pursuant to s. 123(1)(cb), to be the person to constitute the Tribunal for the purposes of reconsidering the decision of the Delegate of the Registrar not to accept the claim.

[7] The State of Western Australia has given numerous notices under s. 29 over the area of land and waters covered by the claim. There are some current s. 29 notices where the State of Western Australia has not asserted the expedited procedure for which the four months closing date has not expired. I have, consequently, in accordance with s. 190E(8), used my best endeavours to finish reconsidering the claim before those periods expire.

[8] On 24 October 2011 Ms. Freeman, wrote to the Applicant, care of Mr. O'Dell, informing the Applicant that the native title claim would be reconsidered for registration and that I had been appointed to carry out the reconsideration. Ms. Freeman pointed out that on

reconsideration a Member could consider not only the information before the Delegate but any other information that the Member considers relevant, and the Applicant was invited to provide any further information for consideration by 7 November 2011.

[9] Ms. Freeman also informed the Applicant that if the Member is of the view that, on its face, an application is likely to be accepted for registration, the State of Western Australia would be informed and afforded an opportunity to comment on any additional material provided. Ms. Freeman also provided information on other matters germane to the reconsideration.

[10] On 24 October 2011 Ms. Freeman also wrote to the Honourable Christian Porter MLA, Attorney-General of Western Australia, informing him that a request for reconsideration had been received in respect of the Tjiwarl claim and that if, on the face of any additional information provided, the Member was of the view that the claim would be likely to be accepted for registration, a copy of the additional material would be provided to the State to allow an opportunity for comment.

[11] On 3 November 2011 Ms. Monica Franz, Legal Officer of CDNTS wrote to Ms. Freeman requesting an extension of time for providing further information in support of the reconsideration. Ms. Franz wrote as follows:

"We confirm that the Applicant intends to file a further submission and information in support of its application for reconsideration dated 17 October 2011 which the Tribunal may have regard to under section 190E(7) of the Native Title Act 1993 (Cth).

We advise that owing to participation in a trial, senior counsel and expert anthropologist for the Applicant will not be in a position to file the additional materials by 7 November 2011 as requested by the Tribunal.

Accordingly, we respectfully request that the Tribunal extend time to file until 2 December 2011.

The Applicant accepts that, if afforded an extension of time, the Member will require a longer period of time to consider the outcome and this may mean that the outcome is not decided before the closing date of the section 29 future act notices currently notified."

[12] This application for an extension of time was granted, and on 2 December 2011 Ms. Franz provided to the Tribunal in support of the reconsideration the following documents:

- (a) Applicant's Submissions for the Registration Test ("AS") dated 2 December 2011; and
- (b) Report of Dr. Lee Sackett entitled "Tjiwarl Native Title Claim Application: Registration Test Matters" ("Sackett Report") dated November 2011.

[13] Dr. Sackett has extensive research experience in the area of the Tjiwarl application. In 1972-1973 he undertook PhD fieldwork with Aboriginal people living in and around Wiluna and met some of the ancestors of the Tjiwarl claimants (Sackett Report at para 3). His PhD thesis was subsequently supervised formally by Professor Robert Tonkinson and informally by

Professor Ronald Berndt, whose work on the Central Desert is later referred to. Since 2000 Dr. Sackett has been briefed by both the Goldfields Land Council and CDNTS to undertake research in and around the application area. In that regard he researched and prepared connection reports for the following native title determination applications to the north of the Tjiwarl application: Wiluna (WAD6164/98), Wiluna #2 (WAD247/04), Tarlpa (WAD248/08) and Birriliburu (WAD 6284/98). Further, he provided expert evidence in the following litigated claims to the east of the Tjiwarl claim area: Cosmo Newberry (WAD144/98) and Yilka (WAD297/08). Accordingly, Dr. Sackett is able provide expert opinions and his paper was of considerable assistance in undertaking this reconsideration.

[14] Having considered these materials, I determined that natural justice required that the State of Western Australia be notified. Reference can be made to the following finding of Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1594. His Honour when referring to “the applicant” is referring to the State of Western Australia (at [38]):

“When the Registrar received the Additional Material he was under an obligation to convey the substance of its content to the applicant and to give the applicant a reasonable opportunity to respond. The Registrar could choose simply to make a fair summary of the Additional Material. Alternatively, if it were more convenient, he might have simply photocopied that material and sent it to the applicant. As to questions of confidentiality, the Registrar had various avenues open to him. These include liaison with the claimants to reach an accommodation, the imposition of confidentiality conditions upon the State, and the like.”

[15] On 8 December 2011 Ms. Freeman corresponded with the State of Western Australia advising of the provision of the additional material, providing a copy of same (with confidentiality conditions) and allowing until 14 December 2011 for the provision of any comments thereon. Subsequently there was a request for an extension of time until 16 December 2011 for the provision of any comments. This was granted, but by close of business 16 December 2011 the State had not provided any comments. Accordingly, the reconsideration has proceeded on the basis of no additional material from the State of Western Australia.

[16] It will be noted that s. 190E(1) provides that the Applicant may apply to the Tribunal “to reconsider the claim”. The Member undertaking the reconsideration is not evaluating the decision of a delegate, but is required to independently assess the claim against the relevant statutory conditions. Nonetheless when seeking a reconsideration the Applicant must, pursuant to s. 190E(2)(c), state the basis on which the reconsideration is sought. It necessarily follows that a Member undertaking a reconsideration should have regard to the Applicant’s stated basis for seeking reconsideration. In doing so a Member will, where appropriate, have regard to the decision of the relevant delegate. This will be the case, for example, where there are elements of that decision which are not contested by the Applicant and with which the Member agrees. Furthermore in paying due attention to the basis of the reconsideration, where

this involves suggested errors in the reasoning or findings of a delegate, then it is appropriate that the Member address those issues when making his or her own decision. However, it is not the purpose of a reconsideration to review a delegate's decision. It would be potentially counter-productive for an Applicant to focus all their attention on the reasoning of the delegate and fail to address the broader issues that are before a Member on reconsideration. In doing so, an Applicant runs the risk of inadvertently channeling the reconsideration down narrow and potentially unproductive paths.

[17] It is on this basis that I have had regard to the decision of the Delegate. I have not approached this exercise on the basis that I am reconsidering his decision, but have referred to his reasons extensively in order to ensure that the Applicant's stated bases for seeking reconsideration are fully addressed.

Background to the Tjiwarl native title determination application

[18] The Tjiwarl native title determination application was filed with the Federal Court on 17 June 2011. The persons collectively comprising the Applicant of the claim are Mr. Keith Narrier, Mr. Kado Muir, Mr. James Calyun, Ms Shirley Wonyabong, Mr. Edwin Beaman, Ms Charmaine Tullock and Ms Judy Ashwin.

[19] The claim covers an area of approximately 13,623 square kilometres and is located in the Central Desert Region of Western Australia. The area covered by the claim lies within the Shires of Wiluna, Sandstone and Leonora.

[20] The area of the claim was previously entirely overlapped by the Sir Samuel native title determination application which was lodged with the Native Title Registrar ("the Registrar") on 27 September 1995. Delegates of the Registrar decided, pursuant to s. 190A of the Act, not to accept this application for registration on 29 April 1999 and 24 August 2007. The Federal Court dismissed the application pursuant to s. 190F(6) on 13 October 2008 – *Walker v Western Australia* [2008] FCA 1559.

[21] Ms Franz, in her Affidavit sworn on 17 June 2011 and filed with the Federal Court on the same day, deposed as follows:

“5. Since commencing employment at Central Desert in October 2009, I have worked on the area of unclaimed land south of the Tarlpa native title claim 9WAD 248/07).

6. The unclaimed land had been the subject of a dismissed native title determination application (WAD 6050/98) (“Sir Samuel”) which was represented by Goldfields Land and Sea Council (“GLSC”) and stretched across Central Desert, GLSC and Yamatji Marlpa Aboriginal Corporation’s representative areas.

7. *Central Desert embarked on a research and consultation process over the area formally (sic) covered by Sir Samuel, with close assistance from GLSC.*

Community Meetings

8. *I have reviewed the files kept by Central Desert for the unclaimed area south of Tarlpa. The files record and I believe, community meetings were conducted by Central Desert on 6 May 2009, 22 July 2009 and 4 November 2009.*
9. *The community meetings were held by Central Desert with representatives of the GLSC present, to work through the requirements for proof of native title and to understand the process required to claim the unclaimed area.*
10. *At the meeting of the 4 November 2009, at which I was present, the community resolved that new claims would be researched and filed by Central Desert. The community further requested that GLSC provide to Central Desert all research reports done in support of Sir Samuel and that Central Desert engage Dr Lee Sackett to assist with the new claim.*
11. *On 14 and 15 April 2010 Central Desert conducted a two day community meeting to discuss the new claim. At this meeting the claim group membership for the proposed claim was discussed. Further research was required to be done on a number of families and the boundary of the proposed claim was further refined.*
12. *On 27 May 2010 Central Desert conducted a community meeting. At that meeting the claim group membership was further defined, although research as discussed at the 14 and 15 April 2010 still had to be conducted. The claim boundary was further amended in accordance with research done on the extent of the Western Desert cultural bloc at sovereignty. The eastern boundary, where the proposed claim met another proposed claim was further discussed with relation to the Tjukurr through that country. A number of names were suggested for the proposed claim and the decision for this was deferred to the next community meeting. A number of individuals were suggested to be the Applicant and this decision was also deferred to the next meeting.*
13. *On 11 August 2010 Central Desert conducted a community meeting to discuss the new claim, at that meeting the claim group membership was further discussed and refined based on the additional research. The claim boundary was agreed. This meeting could not reach consensus on the claim name and as such deferred the decision to a meeting of the wati (law men). This was done as under the traditional laws and customs of the area, the wati are the appropriate decision makers. No consensus could be reached on the claim Applicant and this was also deferred by the community to a meeting of the wati.*
14. *I have been informed that a meeting of the wati was conducted by male staff members of Central Desert in September 2010. I was not present at the meeting due to my gender.*
15. *On 15 November 2010 a meeting was held with the community group interested in that area. Dr Lee Sackett also attended to discuss his research. The meeting was intended to be an authorisation meeting, however it became apparent during the meeting that the claim group membership required further research.*
16. *At the community meeting the outcomes of the wati meeting were relayed to the group. The wati had chosen Tjiwarl as the name of the claim. Tjiwarl is the name of a spring, it means shining and I am informed by male Central Desert staff members that it was where the wati held their meeting. The claim boundary had already been finalised subject to the further research. The wati also chose the Applicant. It was requested that Central Desert conduct some further research on the Claim group membership and one individual who had been nominated for the Applicant.*

Further Research conducted by Dr Lee Sackett

17. *During February 2011, Dr Lee Sackett accompanied by Jeremy Maling, an anthropologist employed by Central Desert, conducted additional research in the field. That research involved consulting with people with regard to their connection to the proposed Tjiwarl claim area.*
18. *On 8 March 2011 I received a report by Dr Lee Sackett entitled Proposed Tjiwarl Native Title Claim: Additional Families.*
19. *The report articulated the final composition of the claim group for Tjiwarl."*

[22] Ms Franz further deposed (at paras 21 – 30), that an authorisation meeting was held on 29 March 2011, at which the persons attending were shown a map of the proposed Tjiwarl claim area, the proposed claim group description, the list of the proposed native title rights and interests to be claimed and the nominated Applicant.

[23] The Tjiwarl claimants resolved that Shirley Wonyabong, Kado Muir, Edwin Beaman, Keith Narrier, Charmaine Tullock, James Calyun and Judy Ashwin were to comprise the Applicant for the proposed Tjiwarl claim and that the native title determination application to be filed include a claim group boundary, claim group membership and native title rights and interests in accordance with the material circulated at the meeting by CDNTS.

Claim Group Description

[24] Schedule A of the Native Title Determination Application (Form 1) filed by the Applicant describes the claim group as follows:

- “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 removed]; and*
 - (b) *5(a)(ii) are the descendants of:*
 - (i) *[name removed];*
 - (ii) *[name removed];*
 - (iii) *[name removed];*
 - (iv) *[name removed];*
 - (v) *[name removed];*
 - (vi) *[name removed];*

- (vii) [name removed];
- (viii) [name removed];
- (ix) [name removed];
- (x) [name removed]; and
- (xi) [name removed].

Information considered when undertaking the reconsideration

[25] In reconsidering a claim, a Member must have regard to any information the Delegate was required to have regard pursuant to s.190A(3) – (5) when considering the claim – s.190E(7)(a). However, a Member can also have regard to any other information which is considered appropriate for the purposes of the reconsideration – s.190E(7)(b).

[26] For the purposes of s.190E(7)(a), I have had regard to the documents mentioned by the Delegate at pp. 5 - 6 of his reasons, as well as those documents identified elsewhere in his reasons. In addition I also have had regard to the documents outlined at [12].

Registration Test General Principles

[27] The Registrar is required, pursuant to s.190A(1), to consider any claimant application made pursuant to ss. 63 or 64(4), subject to the proviso outlined in s.190A(1A) and s.190A(6A). If such an application complies with the conditions prescribed by ss.190B and 190C the Registrar *must* register the claim on the Register of Native Title Claims – s.190A(6). In other words, *all* of the conditions prescribed by these sections must be complied with as there is no discretion vested in the Registrar to accept a claim if only a majority of the requirements of these provisions are met – per Mansfield J in *Quall v Native Title Registrar* (2003) 126 FCR 512 at 518/[17].

[28] When considering a claim, the Registrar *must* have regard to information contained in the application and, where permitted, in any other documents provided by the Applicant, any information obtained by the Registrar when searching registers of interests maintained by a government and any information provided by a government that is relevant to the matters outlined in ss.190B or 190C – s.190A(3). Importantly, the Registrar, *may*, in addition, “*have regard to such other information as he or she considers appropriate.*”

[29] The Registrar, or her delegate, has a relatively broad discretion to consider additional material where the relevant statutory condition allows it. Starting with the decision of O’Loughlin J in *Risk v National Native Title Tribunal* [2000] FCA 1589 at [24] - [25], the Federal Court has emphasised not only the correctness of considering a broader range of material than

that specifically prescribed in s. 190A(3) but also the risk that the Registrar (or her delegate) could be in breach of her statutory obligations if she ignored such material.

[30] The decision whether to accept or not accept an application for registration is a purely administrative function, the decision depending on whether the application satisfies the statutory criteria prescribed by ss. 190B and 190C – see *Powder Family v Registrar, Native Title Tribunal* [1999] FCA 913 at [26] – [27] per Kiefel J.

[31] In addition, to quote Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]):

“... the Tribunal’s task is defined by those provisions (i.e. ss. 190A – 190C). Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.”

Non-contested findings of the Delegate

[32] Reconsideration by a Member is, as previously stated, a review de novo. Nonetheless it is open to a Member to adopt, where appropriate, the reasons and conclusions reached by a delegate.

[33] As with the Delegate, I am required to assess the material before me to determine if the Tjiwarl application meets all the conditions prescribed by ss. 190B and 190C. Despite their chronological sequence, the initial focus of attention is s. 190C which prescribes conditions about procedural and other matters. Much of the information prescribed by s. 190C forms the basis for the application while s. 190B prescribes conditions about the merit of a claim. The absence of information prescribed by s. 190C (and by reference to ss. 61 and 62) in turn may prevent a delegate from determining if any or all of the merit conditions have been satisfied – see s. 190E(11)(b) where there is reference to it not being possible for a Member, when reconsidering a claim, to determine whether the claim satisfies all the conditions of s. 190B because of the failure to satisfy s. 190C.

[34] In this matter the Delegate was satisfied that the application met all of the requirements mandated by s. 190C and some of those mandated by s. 190B, but not the requirements of s. 190B(5), (6) and (7). Nonetheless for the purposes of this reconsideration I have independently assessed all of the conditions mandated by both sections.

[35] The Applicant (AS para 3) referred to the findings of the Delegate where he considered that the Tjiwarl claim met some of the conditions of ss. 190B and 190C and *“respectfully agrees with the delegate’s assessment against those provisions.”*

Subsection 190C(2)

A Delegate is required, pursuant to s. 190C(2), to be satisfied that the native title determination application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62.

[36] The Delegate determined that the following requirements mandated by ss. 61 and 62 were met:

<i>Provision</i>	<i>Requirement</i>
61(1)	Persons who may make application
61(3)	Applicant's name and address
61(4)	Application authorised by persons
62(1)(a)	Application accompanied by a sworn affidavit
62(1)(b) and (2)(a)	Identification of boundaries
62(1)(b) and (2)(b)	Map of external boundaries
62(1)(b) and (2)(c)	Searches of non-native title rights and interests
62(1)(b) and (2)(d)	Description of claimed native title rights and interests
62(1)(b) and (2)(e)	General description of the factual basis of the claim
62(1)(b) and (2)(f)	Current claim group activities
62(1)(b) and 2(g)	Other applications
62(1)(b) and 2(ga)	Details of s. 24MD(6B)(c) notifications
62(1)(b) and (2)(h)	Details of s. 29 notices.

[37] None of these findings is challenged by the Applicant and, having considered the material before me I accept and adopt the reasons and findings of the Delegate at pp. 8 - 13 of his Registration Test Decision in relation to each of the above matters.

[38] I am **satisfied** that the application contains all details and other information, and is accompanied by any affidavit or other document required by ss. 61 and 62.

Subsection 190C(3)

[39] Subsection 190C(3) requires the Registrar to be satisfied that no person included in the native title claim group was a member of any previous application if:

- (a) the previous application covered all or part of the area of the current application;
- (b) the previous application was entered 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.

[40] The focus of the inquiry mandated by s. 190C(3) is to identify if there are any common claim group members between the current application and any previous, but still registered, application that overlaps the same land and waters.

[41] The Delegate formed the view (at p. 14) that there were no native title determination applications that overlapped the area claimed in the Tjiwarl application. I have independently examined the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 23 June 2011 (GeoTrack: 2011/1068) and searched the Tribunal's mapping database and Register, and have reached the same conclusion.

[42] I am, therefore, **satisfied** that no person included in the native title claim group for the application was a member of the native title claim group for any previous overlapping but extant application.

Subsection 190C(4)

[43] The Registrar or her delegate is required by s. 190C(4) to be satisfied that either:

- (a) the application has been certified by the relevant Aboriginal representative body; 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.

[44] As the application has not been certified by the relevant Aboriginal representative body, the focus of the Delegate's consideration was s. 190C(4)(b). The requirements of s. 190C(4)(b) cannot be satisfied unless, pursuant to s. 190C(5), the application:

- (a) includes a statement to the effect that the requirements of s. 190C(4)(b) have been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that it has been met.

[45] Pursuant to s. 251B of the Act, a native title claim group authorise a person or persons to make a native title determination application by either:

- (a) where there is a traditional decision-making process, in accordance with those traditional laws and customs; or
- (b) where there is no such process, with a process of decision-making agreed to and adopted by the claim group.

[46] The Delegate, when considering ss. 190C(4) and (5), had regard to the information contained in Attachment R of the native title determination application which states:

“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. If consensus cannot be reached, the decision is referred to a meeting of the wati (lawmen) who will then make the decision.

The authorisation of this claim was referred to a meeting of the wati held in September 2010. That meeting informed the larger native title claim group of their decision and subsequently authorisation was conducted on 29 March 2011.

The authorisation process is evidenced by the Affidavit of Monica Jo Franz dated 16 June 2011 filed in this matter.”

[47] The Delegate (at p. 15) was satisfied that the requirements of s. 190C(5) had been met because:

- (a) Part A of the native title determination application included statements that each of the “applicant persons” is a member of the claim group and such 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*”;
- (b) Attachment R of the application contains information relevant the grounds on which the Delegate should consider the requirements of s. 190C(4)(b);
- (c) The affidavit of Monica Jo Franz sworn on 17 June 2011, included in Attachment R, provides a more detailed account of the authorisation process;
- (d) The affidavits of [name removed], [name removed], [name removed], [name removed], [name removed], [name removed] and [name removed], all of which accompany the affidavit of Ms. Franz provide relevant material, namely descriptions of the claim group’s traditional decision making process and how it was used in this matter.

[48] Having considered the material set out above, I have likewise formed the view that it, cumulatively, satisfies the requirement of s. 190C(5). However, while satisfying the requirement of s. 190C(5) is a condition precedent to meeting the requirement of s. 190C(4)(b), it does not of itself mean that the substantive requirement of that paragraph will be automatically met. The focus of s.190C(5) is procedural, whereas the focus of s. 190C(4)(b) is more substantive and requires further consideration.

[49] When considering the requirement of s. 190C(4)(b), it is helpful to refer to the decision of French J (as he then was) in *Strickland v Native Title Registrar* (1999) 168 ALR 242 where his Honour considered the requirements of this subsection. The application being considered by French J contained the following statement: *“The applicants are entitled to make this application as people authorised by the native title claim group to make the native title determination.”*

[50] French J gave the following helpful analysis of the requirements of s. 190C(4)(b) in the context of the above statements (259 - 260/[56] – [57]):

“The State submits that the registrar cannot be satisfied that the requirements of s 190C(4)(b), read with s 251B, have been met as no grounds have been set out by which a process of decision-making is identified. It is said that s 251B of the Act envisages that there is a ‘process of decision-making’ which has been gone through in order to authorise the making of the claim on behalf of the claimant group. That process, it is submitted, can either be in accordance with traditional law and customs or, in the absence of such a process, agreed to by the group. What is not envisaged by s 251B, it is argued, is that authorisation is a process involving no consultation with the claim group. Hence there was no ‘authorisation’ in accordance with the Native Title Act.

[57] The affidavit attached to the application meets the requirements of s 190(5)(a) which requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the registrar should consider that it has been met. The insertion of the word ‘briefly’ at the beginning of s 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained. The sufficiency of the grounds upon which the registrar should consider that the requirement has been met is primarily a matter for the registrar. The specified grounds in this case constitute an assertion that as elders the two applicants have authority under traditional law and custom acknowledged by the members of the native title claim group to make decisions of this kind. The brevity of the assertion may be criticized and it might be thought consistent with the two applicants merely arrogating authority to themselves without any meaningful consultation with the members of the native title claim group. On the other hand, neither the registrar nor this court is in a position to reject the contention that all relevant authority is vested in the elders of the relevant native title claim group and that the applicants fall into that category. It is noted that s 190C(4) does not confine the registrar to the statements made in the affidavit or the information provided in the application in reaching the relevant state of satisfaction. Nor is the registrar so confined by s 190C(5) ... this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications.”

[58] It will be noted that his Honour referred to the importance of the authorisation provision and the need for more information than simply formulaic assertions. The requirement imposed on a Delegate by the combined operation of ss. 190C(4)(b) and (5) was discussed by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112. His Honour observed (at 134/[78]):

“The contrast between the requirements of subs (4)(a) and (b) is dramatic. In case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the act of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and (5) may inform how the Registrar is to be satisfied of the conditions imposed by s 190C(4)(b), but clearly it involves some inquiry though the material available to the Registrar to see if the necessary authorisation has been given.”

[59] The requirement that the Applicant be authorised by “all” members of the claim group has not been interpreted literally by the Federal Court. The word “authorise” is defined in s. 251B. This definition was interpreted in a liberal manner by Stone J in *Lawson v Minister for Land and Water Conservation* [2002] FCA 1517 as follows (at [25]):

“s 251B specifies what is required to establish that ‘all the persons in a native title claim...authorise a person or persons to make a native title determination application’..The effect of the section is to give the word ‘all’ a more limited meaning than it might otherwise have. If there is no traditional process of decision-making ‘in relation to authorising things of that kind’ then, in accordance with s 251B(b), authorisation in accordance with a process of decision-making ‘agreed to and adopted, by the persons in the native title claim group’ is sufficient. In s 251B(b) there is no mention of ‘all’ and, in my opinion the subsection does not require that ‘all’ the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process.”

[60] There are two limbs to s. 190C(4)(b). It will be noted that s. 190C(5) requires both a statement that the requirement of s. 190B(4)(b) has been met and “briefly” setting the grounds why those requirements have been met. As pointed out the word “briefly” informs the nature of the information required. As French J, as quoted earlier, pointed out in *Strickland v Native Title Registrar* (1999) 168 ALR 242 (at [57]), a detailed explanation of the process is not required.

[61] With respect to the first limb, the Delegate noted (p. 16) that each of the persons comprising the Applicant deposed that they were a member of the claim group. There was no contrary material before the Delegate and he was therefore satisfied that the first limb of the condition in s. 190C(4)(b) was met. I have also reached the same conclusion.

[62] The second limb is the requirement that the Applicant was authorised by all the other persons in the native title claim group to make the application and deal with matters arising in relation to it. The Delegate referred to the affidavit of Ms. Franz and set out the following two paragraphs dealing with the 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.”

[63] In paragraphs 8 and 9 of each of the affidavits of the persons collectively comprising the Applicant is the following statement:

“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.”

[64] Ms. Franz deposed (paras. 8 – 13) to various community meetings that were convened and attended by members of the claim group in the period May 2009 – August 2010. No consensus was reached on the composition of the proposed Applicant, and this issue was referred to a meeting of the *wati* which occurred in September 2010. As the Delegate noted (at p. 17), the decision of the *wati* was only provisional, and it was relayed to a further claim group meeting which was held on 15 November 2010. An authorisation meeting of the claim group was convened on 29 March 2011. Ms. Franz deposed (at para 20) that CDNTS maintains a database of contact details of persons identified as connected to the Tjiwarl claim area, and on 16 March 2011 notices were sent to all such persons of the authorisation meeting to be convened on 29 March 2011. In addition Ms. Franz caused the notice of the meeting to be:

- (a) pinned to the notice board of Gunbarrel Groceries in Wiluna for Tjiwarl claim members to see; and
- (b) put up in the window of CDNTS's office in Wiluna for Tjiwarl claim group members to see when visiting that office from time to time.

[65] Ms. Franz deposed (at para 23) that she was unaware of any complaints or concerns from any Tjiwarl claim group member that they did not receive notification of the authorisation meeting.

[66] I note that the steps taken by CDNTS in alerting persons connected to the Tjiwarl claim of the authorisation meeting are consistent with the approach of the then New South Wales representative body considered and approved of by Stone J in *Lawson v Minister for Land and Water Conservation* [2002] FCA 1517 at [8] and [22].

[67] Ms. Franz attended the authorisation meeting and deposed (at para 25) that Tjiwarl claimants were shown a map of the proposed claim area, claim group description, a list of native title rights and interests and the nominated persons to comprise the Applicant. A copy of the slideshow given was attached to her affidavit and independently provided to the Tribunal in an email of 11 July 2011. I have perused the slideshow material, and it includes a map of the claim area, the claim group description, a list of proposed native title rights and interests and the nominated persons to comprise the Applicant. The Tjiwarl claimants present passed resolutions, including the composition of the Applicant. Those resolutions are set out in paragraph 26 of Ms. Franz's affidavit and at page 18 of the Delegate's decision.

[68] The Delegate pointed out (p. 18) that Ms. Franz did not depose to the voting for and against the resolutions. The affidavits of the persons comprising the Applicant are also silent on this point, nonetheless paragraph 13 of those affidavits contains the following information:

"On 29 March 2011, a meeting was held of all of the native title claimants for the purpose of authorising the lodging of a native title claim and appointing an applicant. The details of the claim were discussed in some detail and consensus was reached on the claim boundary, the claim group description and the native title rights and interests being claimed."

[69] The Delegate was willing to infer from paragraph 13 that the meeting followed the claim group's traditional decision making process, and that the decision to appoint the Applicant was reached by consensus. I have reached the same conclusion.

[70] It is not necessary that the Applicant is authorised by *all* the members of the claim group, or that there be a unanimous vote of every member, but rather it is *"sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process"* per Stone J in *Lawson v Minister for Land and Water Conservation* [2002] FCA 1517 at [25].

[71] The Delegate was satisfied (p. 21), having regard to the material before him that:

- (a) claim group members were given every reasonable opportunity to participate in the 29 March 2011 authorisation meeting; and

- (b) attendance at the authorisation meeting was sufficient for the purposes of the claim group's traditional decision making process.

[72] The Delegate also pointed out that the material before him did 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. Nor did it provide specific details regarding the number of persons attending the meeting. However, he formed the view that the material was nonetheless sufficient to satisfy him that the requirements of s. 190C(4)(b) had been met.

[73] I have reached the same conclusion. There is sufficient information before me that members of the claim group were given appropriate and adequate notification of the proposed authorisation meeting and that the persons comprising the Applicant were authorised in accordance with the traditional decision making process of the Tjiwarl claim group. It is the case that the level of information that one would like to have about the number of persons attending the meeting, the names of those attending and facts about how the decision making process actually operated, lacks the specificity that would be ideal. However, like the Delegate, I am nonetheless satisfied that the cumulative weight of the material enables me to be satisfied that the requirements of s. 190C(4)(b) have been met.

[74] The Delegate made reference to the decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171. His Honour sets out at [24] and [25] very detailed requirements which would need to be addressed when assessing whether an authorisation meeting has been properly convened. Reliance on those paragraphs of O'Loughlin J's decision, however, needs to be put in context.

[75] O'Loughlin J was considering a s. 66B meeting in the context of a divided claim group with two "*warring factions*" (at [26]). A perusal of the Federal Court decisions on the question of authorisation discloses that the Court evaluates compliance with the requirements of s. 251B and ss. 190C(4) and (5) in a contextual manner. Where there is a history of internal claim group disputes, the Court requires detailed information about the processes adopted in calling and holding authorisation meetings, including detailed note keeping of the type outlined by O'Loughlin J. Where there is no material before the Court of internal claim group disputes, the Court has adopted the requirements of authorisation in a less prescriptive manner, emphasising the practicalities of the authorisation process – see *Strickland v Native Title Registrar* (1999) 168 ALR 242 and *Noble v Murgha* [2005] FCAFC 211.

[76] Even when there are disputes, the Court has taken a "commonsense" approach to the nature of the information required of the authorisation meeting. The Delegate referred to the

following passage from *Lawson v Minister for Land and Water Conservation* [2002] FCA 1517 where Stone J said ([28]):

“In an ideal situation one might wish for more precise identification of the Claim Group members and information on what proportion of the membership actually attended the meeting. I do not think, however, that the Act requires decisions of native title claim groups to be scrutinized in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to peruse their entitlements under the Act will be severely compromised.”

[77] Accordingly, I am **satisfied** that the Applicant is authorised by all other persons in the native title claim group to make the application and deal with matters arising in relation to it.

Subsection 190B(2)

[78] Subsection 190B(2) flows from s. 62(2)(a) and (b), namely that the Registrar or her delegate must be satisfied that the information and map contained in the application as required by the stated paragraphs 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 task required of a delegate is to assess whether the information and map enable *both* the external boundaries and the areas not covered by the application to be identified.

[79] The external area of the application is described in Schedule B, Part A of the application. Paragraph 8 of the Form 1 provides a metes and bounds description of the external boundaries of the claim. This boundary was explained by the Delegate at page 22 of his Decision.

[80] The area of the application is also depicted in a map contained in Attachment C which was prepared by CDNTS and which is dated 21 February 2011.

[81] Areas within the external boundary of the claim which are not covered by the application are outlined in Schedule B Part C. As the Delegate noted (at p. 22) this description deals only with general exclusions and not specific tenures. However, he formed the view that the exclusions were described in a way that provided an objective means of accurately identifying the excluded areas. I have reached the same conclusion.

[82] The description outlined in [79] and the map in [81] were assessed by Ms. Ashlea Soubeyran of the Tribunal. Her assessment, which is contained in a Memorandum dated 23 June 2011, was as follows: *“the description and map are consistent and identify the application area with reasonable certainty.”* It should be noted that while the Geospatial Services assessment is of assistance, it is not determinative of the issue. A delegate, or Member on reconsideration, is required to make an independent assessment.

[83] The Delegate (at p. 22) was satisfied that the information and map described the external boundaries of the application such that they could be identified with reasonable certainty.

[84] The areas and land and waters within the external boundary not covered by the application are outlined in paragraph 11 (a) – (f) of Schedule B Part C of the application. The areas excluded are generally of a generic nature, namely by reference to past or intermediate period acts (11(a)), previous exclusive possession acts (11(c) – (d)) and areas where native title rights and interests have been extinguished (11(e)), specifically referring to unqualified grants in fee simple (11(f)(i)), public roads (11(f)(vii)) etc.

[85] The map required by s. 62(2)(a) need not show the excluded areas. This was a matter considered by Lindgren J in *Harrington-Smith v Western Australia (No 5)* (2002) 197 ALR 138 where his Honour said (at 140/[7]):

“Section 62(2) also specifies ‘a map showing the boundaries of the area [covered by the application]’, but not any areas within those boundaries that are not covered by the application. Accordingly, the map is required to show only the outer or perimeter boundaries of the area of land and waters covered by the application, not the boundaries of internal areas that are ‘excluded’, ‘omitted’ or ‘excised’ from that area.”

[86] Further, the Federal Court has, on a number of occasions, held that general and formulaic exclusions in appropriate circumstances are acceptable. This was best explained by Nicholson J in *Daniels v Western Australia* [1999] FCA 686 where his Honour said (at [29], [31] – [32]):

“29 ... the Registrar must impose a ‘reasonable certainty’ test in relation to the application of s 62(2)(a) with the other provisions of the Act. That is important to bear in mind in construing consistently the provisions of s 62(2)(a). There are reasons why this should be so. Firstly, at the time an application is filed and at the time the registration test is applied to it applicants would be unlikely to be in possession of tenure information. Secondly, issues of validity in respect of interests may be incapable of concession until the native title determination decides relevant issues. Thirdly, the Act would not operate consistently if the reasonable certainty test was met under s 190B(2) but the application nevertheless attracted a s 84C strike out application because a higher test was applicable under s 62(2) itself.

31 (1) Parliament has made clear that s 62 requires claimant applications to be approached with attention to ‘detail’. This requires, among other things, that such applications must, in compliance with par 62(2)(a)(i) and (ii), contain information identifying ‘the area covered by the application’ and ‘any areas within those boundaries that are not covered by the application’.

32 (2) These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time of the application or amendment to an application is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be a satisfactory compliance with the statutory requirement. A description of a class or formula character of an area of exclusion such as ‘areas affected by valid category A past acts’ may be the fullest description that an applicant can give at the time of an application or application for amendment of an application. It is capable in the light of a subsequent determination of the nature and validity of those Acts of resulting in satisfaction of the legislatively prescribed criteria in s 62(2)(a).”

[87] Schedule D requires details of searches to ascertain the existence of any non-native title rights and interests in the area covered by the application. Attachment D to the application refers only to the information provided in Attachments HA and I. Attachment HA outlines notifications made under s. 24MD(6B) and Attachment I outlines any s. 29 notices as at 14 April 2011.

[88] As Nicholson J held, a “reasonable certainty” test is to be applied, and such a test requires a delegate to be cognisant of the limitations facing an Applicant in terms of access to detailed tenure information, and also the inherent uncertainties of native title litigation whereby issues of extinguishment are notoriously difficult to resolve, and may not be resolved until the end of either lengthy negotiations or litigation.

[89] I am **satisfied** that the information and map contained in the application are sufficient to identify with reasonable certainty the claimed land and waters.

Subsection 190B(3)

[90] Subsection 190B(3) requires that the Registrar, or her delegate, must be satisfied either that the persons in the native title claim group are named in the application or that they are described sufficiently clearly so that it can be ascertained whether any particular person is in the claim group.

[91] It was the view of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]) that s. 190B “has requirements which do not appear to go beyond consideration of the terms of the application: s 190B(2), (3) and (4).” Later in his judgment (128/[51]) Mansfield J said:

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

[92] In short, when assessing compliance with s. 190B(3) a delegate should focus on the wording of the application itself, and extraneous material should not be relied upon to cure what is patently an ambiguity or deficiency in the claim group description in the application.

[93] In this matter the claim group description as set out in Schedule A has previously been set out at [24]. The description does not name all the members of the claim group, so the task before me is to ascertain if that description satisfies the condition of s. 190B(3)(b). This task is a relatively narrow one. It is not the duty or responsibility of a delegate, or a Member on

reconsideration, to consider if the description is correct or not. As Dowsett J explained in *Gudjala No 1* (at [33]): “subs 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification.”

[94] In addition, when making such an assessment it is necessary to remember that “the Act is clearly remedial in character and should be construed beneficially” – Carr J *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at 109/[67].

[95] The task required by s. 190B(3) necessarily involves a weighing exercise. The key factor which a delegate needs to focus on is the issue of identification. But care needs to be taken not to assume that an overly forensic and arithmetic approach is adopted.

[96] The Delegate (at p. 24) pointed out that the description contained in Schedule A provided two avenues for claim group membership: descent from named ancestors or through connection by birth or long association with the claim area.

[97] With respect to the descent criterion, the Delegate was of the view that it was sufficiently clear and provided a conceptually simple way to ascertain whether or not any particular person is a member of the claim group through association with the claim area of the type described in paragraph 5(a)(ii) of Schedule A. In reaching this conclusion the Delegate referred to the decision of Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93. In that case the claim group identified members of the claim group by “the Three Rules”. The first of those rules was by means of biological descendancy from named people. The second was adoption by the named people or their descendants and the third was the biological descendants of those adopted pursuant to the Second Rule. Carr J said (at 109/[67]):

“The question is whether the application of the Three Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly.”

[98] I am likewise of the view that the descent criterion is sufficiently clear and provides a conceptually simple way to ascertain whether a particular person is a member of the claim group.

[99] The other criterion was descent through either, their own or their ancestors, birth or long association with the claim area and in respect of whom the claim is recognised according to the claim group’s traditional laws and customs. [name removed] is specifically nominated by paragraph 6(a) as a person to whom this criterion applies. The Delegate reached the following conclusion (at p. 24):

“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.”

[100] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93, Carr J explained (at 109/[67]): *“It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently.”* Of particular relevance to this matter is the analysis of O’Loughlin J in *De Rose v South Australia* [2002] FCA 1242, where His Honour was dealing with a claim by persons who identified as part of the Western Desert Cultural Bloc (“WDCB”). Ten Aboriginal men and women sought a determination of native title over De Rose Hill Station. The claim was brought by them on behalf of others who contended that they were *Nguraritja* for the land. *Nguraritja* is the *Yankunytjatjara* and *Pitjanjatjara* word for the traditional owners of the land.

[101] While it was not necessary to deal with the matter, O’Loughlin J considered the claim group description in light of s. 251B and the requirements of s. 61(4). The application was made on behalf of: *“Those other Aboriginal persons acknowledged in accordance with traditional laws and customs to be owners of the claim area predominantly through historical, spiritual and ancestral relationships with the land.”*

[102] In their principal submissions, the claimants identified the native title claim group as follows: *“The application is made by the named individuals on their own behalf and on behalf of other individuals who fulfill the criteria of nguraritja according to traditional law and custom.”*

[103] O’Loughlin J made the following observations (at [926] and [928]):

“926...Therefore, to identify who is a member of the native title claim group that seeks a determination of native title over the claim area, it is necessary to examine the rules that govern the right to be called Nguraritja for the claim area. In Attachment E to their final submissions, the claimants adopted the findings of Mr Craig Elliott, who identified the four major reasons by which Aboriginal people could be Nguraritja under traditional laws and customs. The individual might have been born on the claim area or, even though not born there, he or she might have had a long-term physical association with the claim area. Then again, he or she may have had an ancestral association with the claim area. Finally, the person might have geographical and religious knowledge of the claim area to such a degree that the person will qualify as Nguraritja. I find that, for an Aboriginal person to be Nguraritja under traditional laws and customs as described by the claimants, the person must satisfy at least one of the four criteria listed above. But there is one further factor that is an essential criteria to being Nguraritja: the individual must be acknowledged as Nguraritja for his or her land by other Nguraritja ...

*928 By application of the above criteria it is possible, in my view, to conclude who is, and who is not Nguraritja for the claim area. It is not necessary that every single applicant must be personally named, although they do need to be identified by a set of appropriate criteria ... Notwithstanding the terms of the Table in sub 61(1) of the NTA – which requires authorisation by **all** persons – I do not think that the word*

'all' is to be taken to include literally every single person. For example, infants and people with mental disabilities might be Nguraritja but, because of their incapacity, they would be unable to give approval. Then again, the whereabouts of other persons might not be known. The word 'all' should be taken to mean 'all' those who are reasonably available and who are competent to express an opinion. In the circumstances, I am satisfied that the applicants have adequately established a method by which the members of the potential native title claim group may be identified."

[104] Having regard to the approach of O'Loughlin J in *De Rose*, I have come to the same conclusion as the Delegate. The criteria are sufficiently clear to enable the ascertainment of a person's membership of the claim group. A degree of factual inquiry is required, but as Carr J in *Western Australia v Ward* explained, this does not mean that the description is not sufficient.

[105] Accordingly, I am **satisfied** that the persons in the claim group are described sufficiently clearly and that the application satisfies the requirements of s. 190B(3)(b).

190B(4)

[106] 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.

[107] It will be noted that the wording of the subsection draws attention to the description "*in the application*". Further s. 62(1)(b) requires that a "*claimant application*" must contain the details specified in s. 62(2). Accordingly, both ss. 62(2)(d) and 190B(4) focus on the efficacy of the description as found in the application as distinct from any other external material.

[108] This was the view of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 at 119/[16]. His Honour also provided guidance on the sufficiency of the description. He endorsed (at 139/[99]) "*the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning.*"

[109] The claimed native title rights and interests are contained in Schedule E of the application, and are 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 land 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 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 the areas where native title is wholly recognisable, the native title rights and interests are the non-exclusive rights."*

[110] The Delegate (at p. 26) was of the view that the claimed native title rights and interests were understandable and had meaning. I have, on the whole, reached the same conclusion.

[111] It will be noted that in paragraphs (a) and (b) of the list of non-exclusive rights, the phrase "for any purpose" is used. I deal with the implications of the use of this phrase in the context of s. 190B(6). At this stage I do note that the Federal Court has previously pointed out that vague, open-ended and non-exhaustive list of native title rights and interests are problematic. As highlighted in *Doepel*, the claimed rights and interests must be understandable and have meaning. Vague and open-ended asserted rights and interests may fail this test.

[112] The description, subject to the above caveat, is both understandable and has meaning and I am **satisfied** that the application meets the condition of s. 190B(4).

Subsection 190B(8)

[113] The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware that, because of section 61A, the application should not have been made.

[114] Section 61A prohibits the filing of a native title determination application where:

- (a) there is an approved determination of native title – s. 61A(1);
- (b) a previous exclusive possession act was done in relation to the area – s. 61A(2);
- (c) a previous non-exclusive possession act was done in relation to the area and the application claims exclusive native title rights and interests – s. 61A(3).

[115] The section is specifically worded to be subject to the operation of ss. 47, 47A and 47B.

[116] The Delegate (at pp. 44 - 45) concluded that the application satisfied the condition of s. 190B(8) because:

- (a) the geospatial assessment referred to previously revealed that no part of the application area was covered by an approved determination of native title;
- (b) Schedule B Part C of the application excludes, subject to the provisions of ss. 47, 47A and 47B, areas covered by a previous exclusive possession act; and

[117] Schedule E (set out earlier) 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.

[118] I have independently searched the Native Title Register established pursuant to Part 8 of the Act and have not found any determination of native title over the claimed land and waters. Further, I have perused Schedules B and E and have reached the same conclusion as the Delegate.

[119] I am therefore **satisfied** that the application meets the condition of s. 190B(8).

Subsection 190B(9)

[120] Subsection 190B(9) provides as follows:

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

- (a) *to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas – the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or*
- (b) *to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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 subsection 47(2), 47A(2) or 47B(2)).”*

[121] The Delegate was of the view (p. 45) that the application met each of the conditions in s. 190B(9):

- (a) the application at Schedule Q states: *“The applicant makes no claim to any minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or State of Western Australia.”;*

- (b) the application at Schedule P states: “No offshore places comprise part of the claim area the subject of this application”; and
- (c) the application at Schedule B Part C excludes areas where native title rights and interests have been extinguished. Part B however, qualifies that exclusion to areas where ss. 47, 47A and 47B applies.

[122] The Delegate (at p. 45) was of the view that the application met each of the three sub conditions of s. 190B(9). I have reached the same conclusion and adopt, for the purposes of this reconsideration, the reasons of the Delegate. I am therefore **satisfied** that the requirements of s. 190B(9) have been met.

Contested findings of the Delegate

[123] I will deal hereafter with each of the grounds where the Delegate was not satisfied the application met the relevant conditions mandated by s. 190B. In assessing whether each condition is met I will, where relevant, outline the response of the Applicant.

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

General Principles

[124] Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that 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;
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[125] The Registrar’s task pursuant to s. 190B(5) is relatively narrow. The Registrar is to consider the asserted facts and, assuming they are true, assess whether they support the claimed assertions.

[126] 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 be ultimately adduced to establish the asserted facts” per Mansfield J in Northern Territory v Doepel at 120/[17] endorsed by the Full Federal Court in Gudjala People No 2 v Native Title Registrar (2008) 171 FCR 317 at 338/[83].

[127] Prior to the Full Court’s decision in *Gudjala*, there was a series of Federal Court judgments that suggested that the Registrar would need to be presented with some additional information or evidence to support the assertions, and that the assertions alone in the application may not suffice. Further, those judgments also suggested that whilst there was a correlation between s. 190B(5) and s. 62(2)(e), the latter provision only referred to a “*general description*” whereas the former provision “*may require more, for the Registrar to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not some summary of it*” per Kiefel J *Queensland v Hutchison* (2001) 108 FCR 575 at 584/[25] and *Wulgurukaba People #1 v Queensland* [2002] FCA 1555.

[128] The correct approach to interpreting s. 190B(5) has now been determined by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. The Full Court considered the interaction between ss. 62 and 190A, the former mandating the requirements for commencing an application and the latter establishing the registration test regime. The Court held (at 340/[90]) that:

“... the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit.”

[129] The Court then dealt with the nature and quality of the information required by s. 62, and in particular the details required by s. 62(2)(e). It should be noted that the matters referred to in s. 62(2)(e)(i), (ii) and (iii) are worded almost identically to s. 190B(5). The Court said (at 340-341/[92]):

“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. In particular, 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.”

[130] The Court (at 341/[93]) went on to observe that if the primary Judge “*approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim ... then it involved error.*”

[131] Nonetheless, a delegate, or Member on reconsideration, must be provided with more than mere restatements of the claim. This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 as follows (at [29]):

“... 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 that 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.”

Materials considered

[132] A Delegate, or Member on reconsideration, is not limited to considering material contained in the application. In *Doepel Mansfield* J said (at 119/[16]): “*Section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant.*” In undertaking my assessment of the requirements of s. 190B(5) I have had regard to the material outlined by the Delegate at page 28 of his Decision. In addition I have also had regard to the Applicant’s Submissions dated 2 December 2011 and the report of Dr. Lee Sackett entitled “*Tjiwarl Native Title Claim Application: Registration Test Matters*” dated November 2011.

Subparagraph 190B(5)(a)

[133] The first paragraph of s. 190B(5) requires me to be satisfied that there is a factual basis for the assertions that the native title claim group have, and the predecessors of such persons had, an association with the area.

[134] Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 stated (at [52]): “*I do not mean that all members (of the claim group) must have such association at all times. However, there must be evidence that there is an association between the whole group and the area.*” In short, the test is not that there is evidence before the Delegate that each member of the claim group has an association over the whole area, but that cumulatively, there is material before a Delegate that shows an association between the whole group and the whole area of the claim. Further, Dowsett J also observed (at [52]): “*Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty.*” This analysis of Dowsett J was not disapproved of by the Full Federal Court.

[135] Further a delegate, or Member on reconsideration, is “not obliged to accept the very broad statements contained in Schedule F which have no geographical particularity” per French J *Martin v Native Title Registrar* [2001] FCA 16 at [26].

[136] The Delegate (at p. 29) considered that there was a sufficient factual basis to support the asserted association of the claim group with the claim area, but an insufficient basis for the association of the claim group’s predecessors.

[137] The Delegate (at pp. 29 – 30) set out in his reasons the following excerpt from Schedule F of the Form 1:

“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 the 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.....*

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 utilizing 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 country, through intrinsic associations of both people and country with Tjukurrpa."*

[138] In addition, the Delegate referred to paragraph 28 of Schedule F which states that the indigenous laws acknowledged and customs observed by the native title claim group are those of the "*people of the Western Desert*", in particular the rules for the recognition of a person holding rights and interests in relation to an area. Reference was also made to Schedule G of Form 1 where it is stated that "(t)he native title 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." The Delegate drew attention to Schedule M, which deals with traditional physical connection, where at paragraph 45 it is stated: "*A number of senior members and some younger 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.*"

[139] CDNTS provided additional information to the Delegate in correspondence dated 8 August 2011. Included in the additional material was an affidavit of [name removed] affirmed on 8 August 2011. The Delegate referred at length (pp. 30 – 32) to the affidavit.

[140] [Name removed] deposed (at para 5) that his *nyaamiri* (skin) is *Tjiarurru*. His mother taught him the *nyaamiri* system, and wherever he travels in the western desert he is accepted into a community based on his skin name. His *Tjukurrppa* (dreaming) is Dingo (para 6) and consequently he has a special relationship with those animals (para 7). He deposed (at para 8) that he belongs to the *Ngalia* people, who are part of the broader western desert society, and speaks a mixture of *Ngalai*, *Tjupan* and *Wangkatha* languages, which are all part of the western desert linguistic tapestry.

[141] [Name removed] ancestors are *Warutjukurr* to *Kunia* through his grandfather and *Kapui* through his grandmother (para 11). It is part of his tradition that a person in a *Tjamu* or *Kaparli* (grandson/granddaughter) relationship may say the name of a deceased grandparent. *Warutjukurr* is an ancestral dreamtime being. (para 12).

[142] [Name removed] deposed (at para 14) that his mother told him that prior to his birth she lived on Kaluwiri in the claim area and used to travel around to Depot and Booylgoo Springs and from there to Albion Downs and Wiluna. After she married, she took work dogging on Kaluwiri with her husband and was happy to be back on her own country again. She was able

to show her husband some of her country, and felt at home anywhere. She mentioned in particular *Kaluwiri*, *Gidgee*, Booylgool Spring, Depot Spring, *Yeelirrie*, Albion Downs, Mount Keith, Yakabindie, Barr Smith Range, KathleenValley, Violet Range, Mount Sir Samuel, Lake Miranda, Sandstone, Lake Mason, Youno Downs, Noibla, Altona, *Yulala*: “all those places we went to because that is my old run” (para 15).

[143] As a young boy [name removed] travelled along the Leonora to Wiluna Road with his parents being taught about country, and travelled around Yakabindie, Albion Downs, Mount Keith, Leinster Downs and Depot Springs. From the age of seven his parents owned a small pastoral property east of Wiluna where he lived (para 17). While stopping at these locations contact was made with other members of the claim group, including the [name removed], the Wiluna mob of the [name removed] family and the [name removed]. A focus of these meetings was Yakabindie station (para 23) where he mentions meeting [name removed], [name removed], [name removed] and “[name removed]” (para 25).

[144] [Name removed] affidavit contains numerous references to places of ceremonial or other importance to members of the claim group. For example, he deposes that Henry’s Well and Townsend Well were two of the main stopping places for young men going through the law (para 41), that [name removed] used to stay at the law ground at *Tjiwarl* (Logan Spring) (para 43) and *Ingakatala* (Mt Sir Samuel) where his mother and other claim group members used to camp (para 42).

[145] Reference is also made to the plant and animal life of the areas that he visited. [Name removed] deposes to the *Tjikali* (parsnip like plant) growing in the Depot Springs area (para 30) and the wild potatoes (*madja*) growing in the Boolygoo Range (para 31). The three “bosses” for the *madja* were his mother, [name removed] and [name removed]. Their permission was required by non-locals before people could dig for *madja* in that area (paras 32 and 33), and locals, in turn, had to camp out the previous night before digging otherwise the *Kukaparr* (spirit beings) would get you. One of the main food places is the Yakabindie claypan (*Yakumanti*), where a highly prized grain, *kurumin*, is found and where increase rituals are performed (paras 47 and 48).

[146] Apart from recounting his physical connection with named locations, [name removed] also deposed to his spiritual connection to various places by means of dreaming stories, including, but not limited to:

- (a) Lake Miranda (*Pingkalinkali*) (paras 20-21);
- (b) Barr Smith Range area north of Jones Creek, referring to hills, creeks and dreaming sites, and the significance of the signs of “smokey haze” (paras 26-28);

- (c) Depot Springs area and the white cockatoo and bird dreaming (para 30);
- (d) Boolygoo Range (para 29), *madja* dreaming (para 34);
- (e) East of Lake Miranda, the *Tjinkuna* (carpet snake) dreaming (para 38);
- (f) Henry's Well (*Ngalpirri*) and Townsend Well (*Tjampurwa*) carpet snake and dragon fly dreaming (para 40);
- (g) Montague Range, his daughter's dreaming story (para 44);

[147] In addition to dreaming stories, other places of spiritual and personal significance were recounted by [name removed]. He deposed to visiting the grave of his "daughter" by the *wangkayi* way at Albion Downs (para 45) and the burial place at Kathleen Valley of one of his old *Tjamu's* (para 46).

[148] With its correspondence of 8 August 2011, CDNTS also provided to the Delegate, an affidavit of Ellen Mayberry sworn on 8 August 2011 to which was attached the preservation evidence of [name removed] heard on 20 October 2004. Ms. Mayberry, who is a legal clerk employed by CDNTS, deposed (at para 4) that the current claim area was previously partially covered by a number of overlapping claims, which were dealt with together by the Federal Court, and for which preservation evidence was heard on country between 18 – 20 October 2004. [Name removed] (para 6) is a descendant of [name removed] and a member of the claim group. Part of her preservation evidence was given on the claim area and part in Leonora. The transcript is of evidence given at Pink Hill, Lake Miranda and Leinster Sports Centre.

[149] [Name removed] stated that she was born on 1 August 1937 at Wiluna Peanut Farm in the bush. She identifies as *Tjupan* or *Warnmala* (p. 313) having been reared by her mother (p. 314). There was animosity between the *Tjupan* and *Koara* mobs, and her maternal grandfather was a *Tjupan* man who married a *Koara* woman, resulting in considerable animosity (p. 313). She speaks both *Tjupan* and *Koara* languages (p. 314-315). She married a [name removed], who was "half Indian and half Sou-wester" (p. 315) "because that was right with him" (p. 317). She explained that she had to marry the "right" way; she was *tjarraru* and had to marry a *panaka* man. If a person doesn't marry the right way: "we'll get knocked in the head, get speared also". Under cross-examination from Mr. Waters of Counsel the following evidence was given (p. 339):

"MR WATERS: Okay. And do you know anybody that's married the wrong way?

[name removed]: No, we're all married – that's why I married my husband from – he Sou-west and he's – that's why I married but they all agree. My parents agreed on that. They said I could marry him."

[150] Her mother was [name removed] and her mother's Aboriginal name was [name removed] (p. 299). Her mother was born in the bush in Mount Vernon or Barwidgee (p. 301) and then moved to Darlot (p. 338). Her mother was of the "*Tjupan family and Warnmala family*" (p. 306).

[151] Her father was [name removed] who was born on Erlistoun Station in Laverton. She was told by her father that he was part of the Koara mob (p. 304). Her mother later lived with a white man [name removed], with whom she had two children (p. 304).

[152] [Name removed] was looked after as child by her parents and the old people around Leinster including [name removed], [name removed], [name removed] and her maternal grandmother (p. 300). Her maternal grandmother was born near Wongawol (p. 301), but apparently died when [name removed] was very young (p. 305). Her maternal grandfather lived around Wongawol but was forced out of that area by a white pastoralist, [name removed], who used firearms to evict Aboriginal people: "*he went to a tree and hid and that bloke, [name removed], gallop past, Then he run another way he went. They say he got away from him.*" (p. 339). [name removed] maternal grandfather then moved to Darlot.

[153] At the age of five she was sent to the Mount Margaret Mission at Laverton (p. 306) but on holidays would return to Mount Sir Samuel or to her mother's sister, [name removed] in Kalgoorlie (p. 343). She would go camping in the bush when visiting her family. When she was 13 she ran away from the Mission and returned to Mount Sir Samuel and Leinster Station (p. 342) and hid from Native Welfare. She was hidden by [name removed] and worked on the station and later (from age 16) cleaning a pub at Agnew for some years. (pp. 309 – 310). She later lived on Yakabindie Station where she would visit her *Tjukurrpa* places and Mount Sir Samuel.

[154] The evidence of [name removed] dealt with the following matters:

- (a) her *karpali*, including her grandmother and her sister and her family, used to live in and around Wongawol, until they were chased by white people (she refers to "[name removed]") to Darlot (pp. 301 – 302) and then to Mount Sir Samuel;
- (b) her mother, father and the other old people used to walk to Wiluna and then to Kathleen Valley and Jones Creek collecting and eating bush tucker along the way (pp. 302 – 303);
- (c) she would go out into the bush around Leinster with her mother collecting and eating bush tucker. They were sometimes joined by her father and [name removed] (p. 306);
- (d) her mother would dig for wild potato at Depot Springs at the bottom of a hill which is a men's place (p. 326)

- (e) she identified Pink Hill (near the pub at Mount Sir Samuel) as her *Tjukurrpa* and recounted a story about her mother visiting that hill when she was pregnant with her and as a result of that visit saying it would always be [name removed] hill (pp. 277 – 279). This story and the other relating to Lake Miranda involve the carpet snake and its place in the spiritual life of members of the claim group;
- (f) she also identified other sites near to Pink Hill in and around Lake Miranda where her *Tjukurrpa* and the *Tjukurrpa* of her aunt ([name removed]) are located (pp. 282 – 288);
- (g) stated that her daughter [name removed] *Tjukurrpa* was a rockhole on the old road leading into Leinster; again it was a story relating to finding an animal (goanna) while she was pregnant (p. 291);
- (h) stated that her granddaughter [name removed] *Tjukurrpa* was at the Pinnacles, and also related to a goanna story while her daughter in law was pregnant (pp. 291-292);
- (i) referred to and identified a rockhole near Lake Miranda where all “the families ... come and have a drink” (p. 289);
- (j) stated that her country (*ngayuku parna*) is Lake Miranda, Darlot, Wiluna, Barwidgee, Mount Sir Samuel and Agnew (p. 318) and that she walked through all of that country with her parents as they didn’t have a motor vehicle. This is her mother’s country, her father’s country was around Erlistoun and Laverton. Lake Miranda is *Tjupan* country (p. 319);
- (k) as a baby she was reared by her parents at Jones Creek, and later she would take her children to show them the place. Jones Creek is *parna*, which means “that’s our ground” (p. 324)

[155] To put all of these places in context it is sensible to first deal with those that fall outside the external boundaries of the claim. First Wiluna is located approximately 30 kilometres north of the north-central boundary of the claim. Barwidgee is very near to the north-eastern boundary. Wongawol lies approximately 150 kilometres north-east of the claim area, whilst Leonora and Erlistoun are at least that distance from the south-east boundary of the claim. Yakabindie, Townsend Well, Lake Miranda, Mount Sir Samuel, Henry’s Well and Leinster Downs are all located within the south-eastern boundary of the claim. Depot Springs, Booylgoo Spring and Range and Kaluwiri are all located in the south-western portion of the claim. The Montague Range is located in the extreme north-western portion of the claim and is just east of the rabbit proof fence. Finally, Logan Springs, Albion Downs, Mount Keith and the Barr Smith Range are located in the north-eastern portion of the claim.

[156] The Delegate (at p. 33) also referred to evidence given by members of the claim group to Member O’Neil when she conducted an expedited procedure objection inquiry in 1996 which was reported as *Re Tjupan Peoples* (1996) 134 FLR 462. Evidence was given “on country” at Mail Change Well and Lake Miranda on 28 May 1996 by a number of people who identified as *Tjupan* and *Ngalia* peoples. Set out below are extracts from Member O’Neill’s determination dealing with evidence given by Mr. Willy Hill and Mr. Kado Muir at Mail Change Well (469):

“Mr Muir said that the Carpet Snake Dreaming (story), as initially recounted by Mr Willy Hill, was widely understood in the community as the traditional explanation for the formation of the lake system comprising Lake Darlot, Lake Miranda and Lake Mason, and of other features in the landscape. The journey of the Carpet Snake being from ‘Ayers Rock way’ to the western margins of the Tjupan country involved many twists and turns, engagements with other beings, fights and contests. In these events landscape features were created. The being’s diversion to the north (from Lake Miranda) to the hills around Mail Change Well involved a chase with two other beings and a fight, which resulted in the formation of the hills within the tenement E36/323. At various places the Carpet Snake being’s activities resulted in water holes being made, typically near the dry lakes to the south.

At the Albion Downs borefield the Carpet Snake was speared by a man, and the thrashing of the Carpet Snake being created the many natural wells.

Mr Muir said that the country comprising the tenement E36/323 is very significant the community and to men in particular. In relation to the importance of this specific country, Mr Muir outlined very briefly a previous dispute his community had had over cultural heritage studies carried out for a mining company in respect of a mining project on Yakabindie Station. The dispute is not presently active, but Mr Muir claimed it as an example of an occasion when the proper Aboriginal people were not consulted and appropriate action was not taken to limit the impacts on the sites of significance to his community.”

[157] Evidence was also given by Mrs. Dolly Walker (at 470 – 471):

“The Tribunal also heard from Mrs Dolly Walker, an older woman of the community, who said she gathered grass and wild turnip seeds on some of the tenements (specifically E36/285). She showed examples of the seeds and supplied a damper made from traditionally ground seed meal. She said that there were prohibitions on men visiting (or using) food from some areas, mentioning the area around Boolygoo Station.

Mrs Walker said that that country should be avoided, and was ‘dangerous country’ because the Dreaming beings still lived there. If accompanied by the right people, it was possible to travel in the dangerous country. She said that she did travel over the country to gather seeds and other food.”

[158] So far as the first limb of s. 190B(5)(a), namely that native title claim group currently has an association with the area, the Delegate concluded (p. 34) that the material in the Form 1 contained insufficient material to support the asserted association as “*those associations are described at high level of generality.*”

[159] However, the Delegate was satisfied (p. 34) that the additional material supported the assertion association of the claim group and the application area.

[160] In relation to the spiritual element of association, he concluded that [name removed] affidavit and the evidence of [name removed] identified:

- 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 relation to certain areas;
- how certain sites within the claim area are spiritually significant to the claim group.

[161] In relation to the physical element of association, both [name removed] and [name removed]:

- named specific places within the claim area where they have lived or visited regularly;
- identified resources the claim group gather, harvest or hunt and specified locations for them within the claim area; and
- described instances where steps have been taken to protect spiritually significant sites within the claim area.

[162] The Delegate noted (p. 34) that the material dealing with physical presence primarily related to [name removed] and [name removed], however he was of the view that it was given as an example of the type of association broadly described in Schedule F as being held by the claim group as a whole. In that regard he referred to references in [name removed] affidavit to other members of the claim group and their families living and carrying out activities within various parts of the claim area.

[163] I have reached the same conclusion as the Delegate. There is a requirement that the material presented provides, with some specificity, linkages between the whole of the claim group with all of the area of the claim. The material before the Delegate is sufficient for this purpose. It is clear from reading [name removed] affidavit, the evidence given by [name removed] and the evidence given to Member O'Neill in *Re Tjupan Peoples*, that there is a broad connection, both spiritual and physical, with various members of the claim group and the whole of the claim area. Although the material is primarily presented by two persons, there are also references to numerous other persons who are part of the claim group and who have associations throughout the claim area.

[164] The material is detailed and geographically specific. It not only mentions particularly locations visited or otherwise interacted with by members of the claim group, but it also gives compelling explanations of how those places fit into the spiritual life and history of the claim group. The carpet snake dreaming is an example of this.

[165] It is clear that there are certain parts of the claim area which are of greater significance to the claim group, and there is a particularly rich fabric of spiritual and physical association with the area running north south from Leinster Downs to Wiluna. Lake Miranda and its surrounds is a particularly significant spiritual area for the claim group.

[166] Consequently I am **satisfied** that there is a sufficient factual basis to support the association between the claim group as a whole and the whole of the area covered by the application.

[167] The Delegate however, was not satisfied that the material presented provided a sufficient factual basis for the second limb of s. 190B(5)(a), namely, the assertion that the predecessors of the claim group had an association with the area.

[168] In reaching this conclusion the Delegate set out the evidence provided by both [name removed] and [name removed] (at p. 35). He correctly drew attention to the fact that both persons referred to the association of their parents, grandparents and “old people” to the claim area. In the case of [name removed] the Delegate noted: *“It is not asserted that [name removed] mother’s association with the claim area was linked to any association that her predecessors may have had with the area.”* He then went on to point out that [name removed] maternal grandmother was born at Wongawol and inferred that her maternal grandfather also came from this location as both were chased by white people to Lake Darlot and across to Mount Sir Samuel.

[169] The material presented to the Delegate only allowed him to infer that an association with the claim area commenced in the early 1900s. The Delegate said (at p. 36):

“By my estimation, the period touched on by [name removed] affidavit and [name removed] 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...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.”

[170] Further the Delegate (p. 37) concluded that the information regarding the association of the claim group’s predecessors with the claim area was too limited in its geographical coverage. The evidence given by [name removed] and [name removed] pointed to an association by their predecessors which was confined almost entirely to the south-eastern quarter of the claim area.

[171] If, on reconsideration, I was provided only with the material that was before the Delegate, I would have reached the same conclusion with respect to the issue of the *predecessors* of the

claim group having an association with the area. His finding on that issue was, in my opinion, correct and the reasons enunciated free from error.

[172] Before dealing with the issue of the *predecessors* of the claim group, I will deal briefly with the *association* of the ancestors of the claim group to the area of the claim. The ancestors of the claim group are the immediate predecessors, whereas the original inhabitants of the claim area are the historical predecessors. To avoid confusion, I will refer to the ancestors of the members of the claim group for the purpose of this discussion as the “ancestors”.

[173] I have formed a different view to that of the Delegate on the question of the *association* of the ancestors of the claim group to the claim area. The Delegate correctly points out that much of the material points to a strong association of the ancestors of the claim group with the south-eastern quarter. There are numerous references in the material before me to Leinster Downs, Lake Miranda, Henry’s Well, Townsend Well and Yakabindie, all of which are located in the south eastern quarter.

[174] To be satisfied pursuant to s. 190B(5)(a) there must be “*evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty*” per Dowsett J *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [52].

[175] Nonetheless, in the material before the Delegate there was evidence not only of a physical and spiritual association by the ancestors of the claim group with the south-east quarter, but also of an association with the whole of the claim area. For example, [name removed] evidence she stated that her country was Lake Miranda, Darlot, Wiluna, Barwidgee, Mount Sir Samuel and Agnew and she walked through that country as a child because her parents didn’t have a motor vehicle. Barwidgee lies outside the claim area to the north-east and Wiluna is directly north outside of the claim area. I infer from this evidence that she, her siblings and her parents walked at least in a north-south manner throughout the entirety of the claim area. She also stated that her mother would dig for wild potato at Depot Springs, which is in the south-western portion of the claim area. It seems fairly clear that [name removed] mother lived and worked throughout the claim area, moving from Wiluna to the south-eastern part of the claim, and throughout the western and south-western portions of the claim area.

[176] While the preponderance of the material before me evidences a particularly strong association with the eastern and south-eastern portions of the claim area by the ancestors of the claim group, there are sufficient references to the other parts of the claim area for me to infer an association with the whole of the claim area as explained by French J in *Martin v Western Australia* [2001] FCA 16 at [24] – [26].

[177] Turning now to the issue of the predecessors (as distinct from the ancestors) of the claim group, in addition to the material before the Delegate, I have also had the benefit of considering the detailed report of Dr. Lee Sackett referred to previously as well as the Applicant's submissions of 2 December 2011 prepared by Mr. Malcolm O'Dell of CDNTS. Both documents deal at length with the question of the association of the predecessors of the claim group with the claim area. However, in addition to this matter, both documents contain useful historical and contextual material which has been of assistance both in the context of a consideration of the requirements of s. 190B(5), and also generally.

[178] It is stated in the Applicant's submission (paras 13 – 14) that the first records of European presence in the claim area were in the early 1890's, with gold being discovered in close proximity in 1892. By 1896 the areas north (Lakeway) and east (Lake Darlot) of the claim area were beginning to become populated by Europeans who were mining gold.

[179] It is further stated (para 17) that the Tjiwarl claim has been filed *both* on the basis that the claim area and the claim group "*fall to be considered as part of the society described by anthropologists as the WDCB.*" Reference is made in this regard to the work of Elkin and Berndt, and the later acceptance of the concept of a vast area of linguistic and socio-cultural homogeneity in central Australia by the Federal Court in *De Rose v South Australia* [2002] FCA 1342 and *Jango v Northern Territory* (2006) 152 FCR 150.

[180] Of significance, it is contended in the Applicant's submission (para 17) that the claim area was at the time of European settlement, and consequently at sovereignty (1829), within the area of influence of the WDCB. The Tjiwarl claim was filed on the basis (para 18):

- “(a) at sovereignty there were persons who are the predecessors of the current claim group who were “associated with the Tjiwarl claim area and that those predecessors also fell within the influence of the WDCB; and*
- (d) Under the laws and customs of the WDCB the current members of the Tjiwarl claim group claim and hold native title rights and interests; and*
- (e) The native title claim group have continued to hold the native title under the laws and customs of the WDCB.”*

[181] The submission proceeds to outline various aspects of WDCB laws and customs, including *Tjukurrpa* or dreaming, kinship, skin, language and personal dreamings. Of particular significance to this reconsideration is the discussion of the aspect of WDCB laws and customs concerning the 'migration' of people within the areas influenced by that system. My attention was drawn to the lengthy consideration of this aspect of WDCB laws and customs by O'Loughlin J in *De Rose v South Australia* [2002] FCA 1342. His Honour concluded (at [372]):

“372 I see no reason why the migratory movements of the Pitjantjatjara to the east – whether as a result of drought or war or marriage – should not be accepted as part of the history and social structure of the Aboriginal people of the Western Desert Bloc. This conclusion, which is no more than an inference that is based more on the evidence of Anangu witnesses than it is on the opinions of the experts, gains some support from the frequency of intermarriage and the consequential movement between the Pitjantjatjara and Yankunytjatjara people. In my opinion, the conclusion reached by Professor Maddock in his report is an appropriate assessment of the anthropological evidence:

‘Although the applicants, like Western Desert people generally, are well removed from the baseline of sovereignty, the available evidence does not suggest a total rupture of continuity with the pre-contact culture, in spite of territorial shifts, population movements and provable changes in law and custom. Accordingly, Aboriginal evidence in the case will be important. It will, on the one hand, throw light on the time depth of the applicants’ association with the claim area (ie on their continuity with previous occupants); on whether there is much more than spiritual affiliations to their association with the land; and on their laws and customs.’

[182] Earlier in his judgment O’Loughlin J dealt expressly with an issue of central importance to the Tjiwarl application, namely the migration of persons identifying as part of the WDCB to other lands that formed part of that Bloc. O’Loughlin J said ([345] – [346]):

“345 ... the claimants submitted that they need only establish that they are descended from people who are from the wider region (ie the Western Desert) and that those people followed the traditional laws and customs. Since acquisition of land in this region is not solely from transmission through descendants, it is not necessary that the claimants be the biological descendants of those inhabiting the claim land at sovereignty. The claimants have submitted that their forebears lived in the wider region, and followed the traditional laws and customs of the wider region, and that the laws and customs of the wider region are essentially the same as those that are followed within the claim area. As to that, there was little dispute that the traditional laws and customs that once applied to the claim area were essentially the same as those of the Western Desert region...Although it is not necessary for the claimants to prove biological descent from those who occupied the land at the time of sovereignty, I do feel that there has to be some continuity – even though it might be through migration, marriage or even tribal dispute – between those who formerly occupied the land and the present claimants.”

346 The evidence in this case has disclosed that many of the claimants or their parents or grandparents had migrated to the claim area from the west. It would be reasonable to conclude that the archaeological remains within the claim area which were identified by Professor Veth are those of Western Desert Bloc Aboriginals. The next and more difficult question is whether those Anangu followed the same traditional laws and disclosed a biological connection between the claimants and those who inhabited the area pre-sovereignty, there was evidence that, in my opinion, was sufficient to establish a form of connection between the claimants process of incorporation that reflected the pattern of migratory movements.”

[183] When considering the approach taken by O’Loughlin J, it is important to ascertain if there are other decisions of the Federal Court which have accepted that the WDCB is a “society” for the purposes of the Act, and not merely an anthropological construct. This very issue was considered by Sackville J in *Jango v Northern Territory* (2006) 152 FCR 150, where his Honour made the following findings (247/[346], 248-249/[350], 249/[351] and 249/[352]):

“346 Professor Sutton expresses the view (Proposition 2.1) that in the anthropological literature the ‘Western Desert’ is associated with Aboriginal people who share, although not uniformly, certain cultural characteristics. He identifies those characteristics as follows:

- (a) Identification with varieties or dialects of the one language, which in turn is associated with the Western Desert, but has no single indigenous name. The dialects of the language of the Western Desert include Yankunytjatjara and Pitjantjatjara;
- (b) Association with a particular kinship system not found elsewhere in Aboriginal Australia;
- (c) An emphasis on generational moieties in ritual and marriage organization;
- (d) A distinctive approach to male initiation;
- (e) A strong sense of the ‘accidental’ factor of birth or conception in land tenure; and
- (f) An absence of certain kinds of local and social organizational institutions found elsewhere in Australia.

Given that the Commonwealth criticizes the applicants’ use of the Western Desert as mounting merely to an ‘anthropological ... construct’, it is important to appreciate that Professor Sutton expresses the following opinion:

‘The cultural and linguistic unity of the Western Desert is recognised by Aboriginal people in the region. The ‘Western Desert bloc’ as it is known among scholars is not merely an analytical construct arrived at by non-Aboriginal academics, but the academic recognition of a pre-existing unity of a striking nature, given its size relative to other cultural blocs in Aboriginal Australia.’

350 Peter Wilson gave evidence that people of the area he understood as the Western Desert shared the “law, Tjukurrpa, the Creation”. He explained that the Tjukurrpa constitutes an Aboriginal person’s identity, notwithstanding that there are different Tjukurrpa for different sites or tracks. It is true, as Mr Hughston pointed out, that Peter Wilson accepted that, subject to some variations the Tjukurrpa also forms part of the law for certain people such as the Warlpiri, whose country is outside the Western Desert. But that fact is not inconsistent with the existence of the Western Desert bloc as a society whose people are united in their acknowledgment of particular laws and customs.

351 The evidence of Aboriginal witnesses, although not extensive on this question, therefore lends some support to Professor Sutton’s views. They also receive some support from the report of the Carruthers survey expedition in 1889 that all the “tribes” seen by the members of the expedition in a large area of the Western Desert were similar in “appearance, habits, and customs”. The anthropological literature (some of which is referred to in the Sutton Report) also contains references to the similarities of the customs of Western Desert people. The anthropologist, Professor Annette Hamilton, pointed out in 1982 that:

‘mutual intelligibility of language makes the situation of the Western Desert unusual, if not unique in Aboriginal Australia. If the boundaries of the tribe “are the boundaries of intelligibility, then the Western Desert itself is the ‘tribunal unit’ and this involves a pre-contact population of as many 10,000 people’ (Berndt 1966:32).

(Hamilton, A, “Descended from Father, Belonging to Country: Rights to Land in the Australian Western Desert” in Laycock, E and Lee, R (eds), Politics and History in Band Societies (Cambridge University Press, 1982), P 96.)

352 For these reasons, I do not think that the concept of the Western Desert bloc, in the sense of a society whose members acknowledge and observe a body of laws and customs, can be rejected on the ground that it is an anthropological construct divorced from an underlying reality. The evidence supports the conclusion that the Western Desert bloc can be regarded as a society in that sense...”

[184] Sackville J also dealt with the issue of migration within the Western Desert. He noted (254/[367]) that the *“evidence in the present case suggests that population movements in the Western Desert occurred well before European settlement.”* He referred to the works of Professor Elkin (1939 and 1940) where Elkin discussed the continuous southwards movement of the Aborigines of western South Australia stating:

“Under pressure of droughts and at best constant desert conditions the groups pressed towards the south, seldom if ever to return, lengthening the mythological tracks and cutting themselves off from the spread of new forms and social and kinship organization and terminology.”

[185] Sackville J then considered further academic works on migration of Western Desert peoples, including the works of Tindale and Berndt as well as the evidence of Professor Sutton and reached the following conclusion (256/[375]):

“It is necessary to bear in mind that none of the anthropologists appears to have regarded the movement of people in the Western Desert as a novel phenomenon. For obvious environmental and survival reasons, population shifts predated European settlement of central Australia. The ‘displacement’ of some people from their traditional lands, either temporarily or permanently, is inconsistent neither with the survival of the Western Desert bloc as a society nor the continuous existence of at least some of its traditional laws and customs.”

[186] Although not referred to in the material submitted by CDNTS, I am cognisant of a number of other Federal Court decisions where the Court has explicitly recognised the Western Desert Cultural Bloc as a society and made consent determinations accordingly: see, for example, *James v Western Australia* [2002] FCA 1208 and *Lennon v South Australia* [2011] FCA 474.

[187] I have therefore proceeded on the basis that the WDCB is a society for the purposes of the Act, that migration within the Western Desert is of longstanding and not inconsistent with the survival of the WDCB as a society and that the “colonisation” of new areas as a result of migratory movements is part of the laws and customs of the WDCB. The three issues that need to be addressed in the context of this matter are:

- (a) were there people at sovereignty in the area of the Tjiwarl claim who fell within the WDCB?;
- (b) did the Tjiwarl People also fall within the WDCB?; and
- (c) have the Tjiwarl People continued to hold under their traditional laws and customs those of the WDCB?

[188] Dealing first with the original inhabitants of the claim area, Dr. Sackett outlines at length the research of Daisy Bates. Outlined below are extracts from his report on this matter (paras 46 – 48):

“46. According to Bates, the claim area traditionally was held by people she recorded as Ngaiuwonga. Bates reported (again, see Map 1):

‘The ‘Ngaia, Ngaiu or Ngai-yu wonga occupied the Lake Way district (ngaia, ngaiu, ngai-yu – I, me [wangka means talk, speech or language]). The Waianwonga were their north-western neighbours, the Ngadha Wonga bounded them on the west, the Wajjari on the south-west, the Bardu wonga on the south-east, and on the south were the tribes of the Eastern Goldfields (Bates 1985:67).

47. Bates made a number of further points about the Ngaiuwonga and their neighbours. Of significance here, she noted that Ngaiuwonga country embraced not just the immediate ‘Lake Way district’, but lands to the north, and, as well, country south to ‘Mt. Sir Samuel and Lawlers (Bates 1914:396), ie Ngaiuwonga lands extended southwards to the southern portions of the lands of the Application area...

48. In much the same way that Bates reported that the ngaiu of Ngaiuwonga meant ‘I, me’ she (Bates 1985:67) noted the ngadha of Ngadhawonga likewise meant ‘I, me’. While it is possible that this sort of dialect/language, and group, distinguishing occurs in non-Western Desert areas, it certainly is common across the Western Desert, where dialect names or labels commonly flag or point to instances of difference...”

[189] Dr. Sackett draws attention (para 52) to an intermediate subdivision of the Ngaiuwonga people, the so-called “tribelets”, which existed above the family or patri-group level, but below the tribal level. These “tribelets” took their name, according to Bates, from a named place in the area of the subdivision. One such “tribelet” was the “Yander”. The location of the “Yander” is ambiguous (para 54) and Bates refers to Lake Way and other times to a place 60 km west of Wiluna township. Dr. Sackett refers (para 56) to nine “Yander Pedigrees” in the Bates material and discusses them in detail. His conclusion was as follows (para 65):

“In sum, Bates’ materials suggest the people then occupying or associated with what seems to be substantial portions of the claim area saw themselves, and/or were seen by others, as something of a group – the (Southern) Ngaiuwonga. A subset of the Ngaiuwonga people, associated with Yander, occupied country around the Wiluna- Lake Way area, to the near north of the claim area.”

[190] Dr. Sackett then goes on to deal with the issue of whether the Ngaiuwonga people were part of the WDCB. He concludes that they were (paras 68 – 69):

“68. In my earlier report I (Sackett 2009:65) concluded that, based on what Bates said about Ngaiuwonga law and customs, the data she provided in the Yander Pedigrees, and other information she recorded and reported, her Ngaiuwonga were Western Desert people. I noted as well that my views on the ethnographic situation were in a sense seconded by the findings of linguists Mark Clendon regarding the language(s) of the Application area.

69. Clendon (2006:9) worked with 16 claimants from the former Sir Samuel 1 & 2, and Tgupan 2 claims, comparing their vocabularies and speech with those of the Western Desert Language and (recognised) non-Western Desert Languages to the west. His findings were informative indeed. They include conclusions to the effect that:

‘The [former Sir Samuel] claimants speak a distinct variety of the Western Desert language which is without doubt the same as that which Bates recorded in this region a century ago..There is therefore a clear relationship between the claimant’s Aboriginal speech, and the language spoken historically in the general region of which the claim area is part (Clendon 2006:85).’

[191] Having concluded that the Ngaiuwonga were a Western Desert people speaking a dialect of the Western Desert language, Dr. Sackett then addressed the extent of Ngaiuwonga country, in particular whether it extended to cover the application area. Again, Dr. Sackett quotes at length from Bates and his own previous research (paras 72 – 87) and reaches the following conclusion:

“88. In my view, it can fairly straightforwardly be concluded that places Bates associated directly with Ngaiuwonga country lay within the limits of the Western Desert. As canvassed in this report, these run from Yandergunna (and country to the west of it), to the north of the northwest portions of the Application area, southerly to (in all likelihood) Munro/Munroes Well, in the west of the Application area, southeasterly to the Booylgoo Range, and south to Mount Holmes (and possibly Red Knob to the west of it).

89. In my opinion, the status of country to the west of that bounded by the above places is unclear. It may be that the Western Desert/Western Desert society extended/extends beyond the places I have noted. However, it equally may be country farther west was/is not within the limits of the Western Desert.”

[192] What then of the people who inhabited the application area at the time of first European contact in the late nineteenth century? The material before me provides a convincing case that those people were part of the WDCB and their language was similar to that spoken by members of the Tjiwarl claim group. When discussing the Yander Pedigrees, Dr. Sackett includes copies of the typewritten genealogical charts prepared by Daisy Bates. What is noteworthy and striking is that, for example, in the *Jangari* (Diagram 1 p. 18) and *Wardaburg* (Diagram 4 p.22) Pedigree charts under almost all of the marriages are the words “N.C.”, or no children. Dr. Sackett makes the following comments on the *Jangari* Pedigree chart (para 58):

“First, it appears that none of the siblings had children. The “N.C.” notation is common in Bates’ Yander and Ngaiuwonga (and other) Pedigrees. Needless to say, what appears to be a relative dearth of descendants would have implications for Yander and Ngaiuwonga country.”

[193] Accordingly, it was the submission (AS para 43) of the Applicant that, with possible exceptions, the inhabitants of the Tjiwarl claim area at the point of European contact died out, with the void being filled by the ancestors of the current claim group, who moved into this country pursuant to the usual and traditionally accept migratory practices of members of the WDCB.

[194] The Applicant concedes (AS para 18) that the “predecessors” of the claim group who were inhabiting the claim area at sovereignty are not the ancestors of the claim group. However, the predecessors were part of the WDCB and are likely to have spoken a language similar to that of the claim group. It is further contended (AS para 42) that it is not a requirement of the laws and customs of the WDCB that to hold native title rights and interests in land that there must be a biological link to those in occupation at sovereignty.

[195] I accept that this is a proposition that is open to the Applicant. In *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said in the Summary of Reasons for Judgment:

"Only two of the twenty-six Aboriginal witnesses were born on De Rose Hill Station and it has been argued against the interests of the claimants that only Aboriginal people who are born on the land can be regarded as Nguraritja for that land. I do not agree nor do I agree that the claimants must establish a biological descent from those who occupied the land at the time of Sovereignty. I have concluded that I should accept the evidence that a person may become Nguraritja for any one of the four reasons that were identified by Mr Craig Elliott, the anthropologist who gave evidence on behalf of the applicants. Those reasons, in relation to a particular person and a particular piece of land, area as follows:

- (a) the land is his or her country of birth;*
- (b) he or she has had a long-term physical association with the land;*
- (c) he or she possesses an ancestral connection to the land; or*
- (d) he or she possesses geographical or religious knowledge of the land;*

and, in addition to those four criteria, the person is recognised as Nguraritja by other Nguraritja."

[196] It will be noted that, in addition to dealing with the issue of biological descent, O'Loughlin J also accepted that under the laws and customs of the WDCB, there are "multiple pathways" of connection to country. This approach was also accepted by French J in *Patch v Western Australia* [2008] FCA 944, which was a consent determination in favour of the Birriliburu People whose country is north of the claim area. The Birriliburu are members of the WDCB, which was the relevant "society" for the purposes of the consent determination ([16]). French J (as he then was) made the following comments [20]:

"The association of individuals and groups with particular areas of country comes about through a variety of mechanisms. These include conception, birth, growing up or initiation on the country, acquisition of knowledge through long residence or descent from a person who has had such a connection. Landholding groups are not patrilineally-patrilocally structured. The members of the groups are landholders through their shared association with and to the land. The groups are open and inclusive so people have potential access to a number of areas through the mechanisms mentioned above."

[197] Of further interest is that Dr. Sackett asserts (para 15) that the ancestors of the Tjiwarl claim group came from the lands of, inter alia, the Birriliburu.

[198] The Applicant also referred me to the Research Report on Wiluna prepared by Dr. Lincoln Hayes of the Tribunal which is dated October 2008. Dr Hayes provides a very helpful account of the impact of white settlement on the Aboriginal people living in and around the claim area (pages 16 – 18). Of assistance in this reconsideration is the following extract from his report (page 18):

"However, by the time Daisy Bates had her first encounter with members of the Wiluna tribes in 1910 there were few of them remaining. When Bates was camped outside Meekatharra in 1911 she was approached by a small group of Aboriginal people from 'far beyond Peak Hill' (1938: 109). One of these people was a man

named Jaal, who showed Bates what she called 'jeemarri', flint stone knives that were transported in the stomach, and regurgitated when required. The magic of concealing these knives was peculiar to Jaal's country, a secret kept at a shrine called Maiamba, in the vicinity of a place called 'Yarnder' (1938: 111). Bates identified this location, 'Yarnder', in her 1912 work (Bates 1985: 64), as a key camping place of the Ngaiu wonga tribe west-north-west of Lake Way, along the route to Peak Hill, although no specific location was given.

Bates claimed that Jaal was the last remaining member of the original tribe of the Wiluna area, and he bequeathed the Maiamba shrine to her in the event of his death:

Jaal told me that he was the last man of his group, and to me he left this shrine Maiamba, from which he and his people had headed off the white man who had come many times looking for gold. I was not to take anyone there until all of the natives who belonged to it were dead and gone, and Maiamba an orphan water. Jaal said he would go with me to Maiamba, but soon after this episode he was taken to Bernier Island.

Jaal's country and its Maiamba shrine lay east of Meekatharra at Lake Way, now the extensive gold mines of Wiluna to which by right of bequest, I am the hereditary heiress, for the jeemarri area is mine, by deed of give of my last grandson there (1938: 111).

Despite Bates' apparent claim to ownership of the Wiluna goldfields, her account provides an important example of her view that the people of the region, like Jaal's group, had rapidly declined in numbers, almost to the point of extinction."

[199] Dr. Hayes also deals extensively with the issue of desert migrations, pointing out (page 19) that by the 1980s in the Wiluna area *"the majority of the older adult Aboriginal population ... was traditionally connected to country beyond the region itself"* and quotes from the work of Peter Bindon who stated that the traditional homelands of almost all of the 400 adult Aborigines resident at or near Wiluna lay in the arid regions to the north and west of the town.

[200] From all of the material submitted I am satisfied that the following propositions necessarily follow:

- (a) the indigenous persons occupying the claim area at sovereignty were members of the WDCB and their system of laws and customs were those of the WDCB;
- (b) through a series of events following contact with Europeans, the original inhabitants of the claim area either passed away or were moved out from this area;
- (c) the system of laws and customs practiced by the ancestors of the Tjiwarl at sovereignty were those of the WDCB;
- (d) the ancestors of the Tjiwarl claim group migrated to the claim area from areas to the north and north east in the late nineteenth century and early twentieth century;
- (e) the system of laws and customs under which the Tjiwarl currently operate are those of the WDCB;
- (f) the laws and customs of the WDCB allow and recognise migration within WDCB country;

- (g) there is no requirement that Tjiwarl must be biological descendents of the persons occupying the claim area at sovereignty, provided that both the predecessors of the claim group and the members of the claim group operated under the laws and customs of the WDCB; and
- (h) the laws and customs of the WDCB allow for “multiple pathways” for the acquisition of native title rights and interests, including through ancestors, but also through other means as explained by both O’Loughlin and French JJ in the decisions quoted earlier.

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

Subparagraph 190B(5)(b)

[202] Subparagraph 190B(5)(b) requires that the factual basis supports the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[203] It will be noted that the wording of s. 190B(5)(b) is almost identical to paragraph 223(1)(a) which is part of the section defining native title rights and interests. In undertaking a s. 190B(5)(b) assessment, therefore, close attention needs to be placed on the relevant authorities explaining the operation of s. 223(1)(a). Of most significance in this regard is the decision of the High Court in *Yorta Yorta Community v Victoria* (2002) 214 CLR 422. I adopt for the purposes of this reconsideration the statements of law found at paragraphs [46] – [47] and [86] – [87] of the lead judgment.

[204] Of further assistance is the useful summary of the *Yorta Yorta* principles by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [26]. This analysis was not overturned by the Full Federal Court on appeal, and I adopt it for the purposes of this aspect of the reconsideration. I have also found helpful the following summation by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 of what is required to demonstrate traditional laws and customs for the purposes of the definition of “native title” and “native title rights and interests” (at [22]):

- *“a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;*
- *that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and*
- *that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs.”*

[205] In summary I need to be satisfied, pursuant to s. 190B(5)(b), that I have material before me that would establish a factual basis that the traditional laws and customs currently acknowledged and observed by the claim group are rooted in the traditional laws and customs of a society in existence at sovereignty over the area of the claim and which has continued in existence in a substantially uninterrupted form since sovereignty to the present day.

[206] The Full Federal Court in *Gudjala* did indicate that it is necessary for a Delegate to be satisfied that at sovereignty there was an Indigenous society in the claim area observing identifiable laws and customs (at [96]). The Full Court also held (at [93]) that it would be an error to approach a s. 190B(5) assessment “*on the basis that it should be evaluated as if it was evidence furnished in support of the claim.*”

[207] I note, in particular, the thrust of the Full Court’s direction in *Gudjala*. Plainly it is not the role of a delegate to engage in a “second guessing” exercise or to impose on an Applicant too high a duty. Instead all a delegate need do is look at the material, whether positive or prejudicial, and form a view in accordance with the statutory mandate. In doing so a delegate should not analyse material with a view to ascertaining its probative strength or weakness.

[208] The Delegate referred (at pp. 38 – 39) to the material contained in Schedule F dealing with the assertion that the native title claim group are biologically and socially recognised as descendants of people of the Western Desert at sovereignty (see paras 25, 26, 29, 30, 31, 34, 35 and 36). Further the Delegate referred to [name removed] affidavit and, in particular, his skin being *Tjarurru*, that he belongs to the Ngalia people who are part of the WDCB, the *Tjukurrpa* system, going through the ‘law’ and teaching children about country. The Delegate also referred to aspects of [name removed] evidence.

[209] The Delegate was of the view that the factual material before him regarding the pre-sovereignty society lacked the necessary factual detail in two important respects. I set out in full below the reasons provided by the Delegate (pp. 40 – 41):

“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 removed] 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 removed] 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 removed] 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 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 removed] affidavit, [name removed] evidence in the summary 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 removed] and the evidence of [name removed] 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 removed] 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."

[210] In response the Applicant (AS para 50) submits that the basis of the Tjiwarl claim is that it forms part of the WDCB and, further, the predecessors of the Tjiwarl claimants at sovereignty were also part of the WDCB. Through desert migratory processes and the multiple pathways of connection permitted under WDCB laws and customs, the ancestors of the claim group, and the current claim group itself, acquired native title rights in the area of the Tjiwarl claim through their long association with it, and the subsequent birth of their children in the claim area.

[211] Having regard to the conclusion I reached in s. 190B(5)(a), it necessarily follows that I agree with the Applicant's submission. Nonetheless, the Delegate quite correctly highlights the fact that [name removed] identifies as *Ngalia*, and there was no information before him as to the origins of the *Ngalia* and whether they formed part of the WDCB. Likewise [name removed] stated that she identified as *Tjupan*, and again there is a dearth of material on the relationship of the *Tjupan* people and the WDCB. While the absence of explanation of the relationship of *Ngalia* and *Tjupan* to the WDCB was a serious shortcoming in the material originally submitted by the Applicant, this deficiency was rectified in Dr. Sackett's paper.

[212] Dr. Sackett states (para 97) that a number of claimants identified their ancestors and themselves as either *Tjupan* or *Tjupany* speakers. Persons falling within that category included [name removed], [name removed], [name removed] and [name removed]. He then traces the origin of the word *Tjupan* which first appeared in research material in 1953 as a proposed replacement term for Pini in the Tindale maps and discusses the various academic discussions of the *Tjupan*, *Tjupany* country and the relationship of the *Tjupan* to other people in this part of Western Australia. His conclusion is as follows (paras 104 – 106):

“104. In my view, two things emerge from this. First, the reports of researchers from earliest to more recent appear to track a shift in name: from Pi’ni/Tjupan. At the same time, they appear to track a shift in the area of the Pi’ni/Tjupan to the west.

105. Whatever the case in this regard, in my view the evidence is solid that the Tjupan were/are part of the Western Desert/Western Desert society. As best can be determined, Tjupan origins were/are in lands to the northeast/east of the Tjiwarl claim area. In other words, those lands are comfortably east of the western extents of the Western Desert/Western Desert society. It is not surprising, then, that Liberman found his Tjupany to be culturally and linguistically Western Desert.

106. That is, in my opinion, Tjupan was/is merely one of the Western Desert Language’s many dialects. Its speakers originally occupied Tjupan lands, and shared a language and culture with their Western Desert neighbours.”

[213] Dr. Sackett suggests (para 107) that only the [name removed] family identify as *Ngalia*. He refers to [name removed] who said her mother’s people were *Ngalia* and that there was a *Ngalia* language. Likewise her son, [name removed], said his claim to country was on behalf of the *Ngalia* people. Reference was also made to an older *Ngalia* native title determination application which entirely overlapped the central-eastern portion of the Birriliburu claim, and to some references to *Ngalia* in ethnographic literature. Dr. Sackett’s conclusions were as follows (paras 110 and 111):

“In sum, other than in conjunction with the now withdrawn Ngalia Native Title Claim, I encountered no mention of Ngalia in or near the Birriliburu claim area – or the Tjiwarl claim area.

111. Not only have I not found earlier ethnographic evidence associating Ngalia and either the Birriliburu or the Tjiwarl areas, other claimants in those areas indicate it is not a name they recognize. Indeed other claimants appeared nonplussed by the usage. For example:

- *a Birriliburu claimant and Wiluna resident announced on 18 February 1999, ‘Ngalia? We don’t know that Ngalia.’*
- *a former Sir Samuel claimant and Leonora resident said on 27 October 2005, ‘I never heard that Ngalia...I heard it from [name removed], whatshername.’*
- *a former Sir Samuel claimant and Leonora resident averred on 24 November 2005, ‘Only heard [Ngalia] when all this Native Title come up.”*

[214] Dr. Sackett also points out (paras 112 and 113) that [name removed] brother [name removed] stated that their mother was a *Mantjitjara* woman and she spoke *Mantjitjara*. His conclusion on *Ngalia* is as follows (paras 114 – 115):

“114. The evidence from a number of early and more contemporary sources suggests that Ngalia had/has, other than a self-identity label for [name removed] family members, no claim area associations – at least as a group name. This raises the question as to where the Ngalia notion came from in the first instance? There are a couple of handy explanations. For one, [name removed] (personal communication) has said that at least two senior Birriliburu claimants told her Ngalia was a term for friend, much as yamatji is a term for friend in lands further to the south. For another, Glass and Hackett (2003:204) had ‘Ngaliya’ as the name of or for the ‘Ngaanyatjarra language’.

115. In my view, what is crucial here is not what, if anything, Ngalia might be, but the fact that the few [name removed] family members who self-identify as Ngalia associate the name with country that is clearly in the Western Desert/Western Desert society. That is, they are, however they self-identify, part of Western Desert society.”

[215] Dr. Sackett’s material and analysis have been of considerable assistance in the reconsideration. The material before the Delegate was ambiguous and the questions he posed about the relationship between *Tjupan* and *Ngalia* and the WDCB were critical to the issue of whether there are traditional laws and customs acknowledged and observed by members of the claim group which give rise to the claimed native title rights and interests. The gap in information which confronted the Delegate has been addressed by Dr. Sackett, and for the purposes of the reconsideration, I am satisfied that both the persons self identifying as *Ngalia* and the *Tjupan* people formed part of the WDCB.

[216] The other issue of concern to the Delegate, namely the relationship between the Tjiwarl claim group to the WDCB society, has been dealt with previously. The relevant society is the WDCB, and I accept that the persons comprising the Tjiwarl claim group adhere to the traditional laws and customs of that society, and that those laws and customs are those which were adhered to by the ancestors and predecessors of the claim group.

[217] Based on the material as a whole, and subject to my comments in relation to s. 190B(6), I also accept, prima facie, that those traditional laws and customs of the WDCB, observed by the claimants, include laws and customs which give rise to some of the claimed native title rights and interests.

[218] I find that the factual basis is **sufficient** to support the assertion in s. 190B(5)(b).

Subparagraph 190B(5)(c)

[219] The final paragraph of s. 190B(5) requires a consideration of whether there is a factual basis that the native title claim group have continued to hold the asserted native title in accordance with their traditional laws and customs.

[220] There is a clear linkage between this paragraph and s. 190B(5)(b). If a delegate was not satisfied that the factual basis supported the assertion in s. 190B(5)(b), then a delegate could not be satisfied pursuant to s. 190B(5)(c) - *Martin v Native Title Registrar* [2001] FCA 16 at [29].

[221] In order for a delegate to be satisfied that there is a factual basis for s. 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [63], [65] and [66].

[222] As previously highlighted in the discussion of s. 190B(5)(a) and (b), I have formed the view that the material before me does provide a sufficient factual basis to be satisfied that the native title claim group and its predecessors had and have an association with the claimed area and there exists traditional laws and customs that continue to be acknowledged and observed by the claim group and which give rise to the claimed native title rights and interests.

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

Combined result for s. 190B(5)

[224] The application does **satisfy** the condition of s. 190B(5) because the factual basis provided is sufficient to support the assertions in s. 190B(5)(a) – (c) as set out in my reasons above.

Subsection 190B(6)

[225] This subsection requires that the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. The implications of this requirement are explained in the Note to the subsection which states that if the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. It is only those registered rights and interests that can be taken into account in a “right to negotiate” process or by the arbitral body pursuant to s. 39.

[226] “Native title rights and interests” are defined by s. 223. There is, of course, a difference between those rights and interests that are claimable, and those which can be established.

[227] Of assistance when making an assessment pursuant to this subsection is the following explanation by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 145/[126] – [127]):

“126 Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and

interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.

127 On the other hand, s. 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interest are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s. 190B(6)..."

[228] It will be seen from the above quote that there is a logical nexus between s. 190B(5) and s. 190B(6). It follows, as a matter of course, that if the factual basis for the claimed native title cannot be satisfied pursuant to s. 190B(5), then a Delegate would not be able to be satisfied that, prima facie, at least some of the native title rights and interests can be established – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [87].

[229] As was highlighted by Mansfield J in *Doepel*, s. 190B(6) requires the Delegate, or Member on reconsideration, to engage in an exercise of weighing the factual assertions. I must be satisfied, prima facie, that each of the claimed native title rights and interests can be established.

[230] The claimed native title rights and interests are contained in Schedule E of Form 1 and have previously been set out in the context of the discussion of s. 190B(4).

Exclusive Rights and Interests

[231] It will be noted that exclusive rights and interests are claimed over all areas of land and water where native title has not been partially extinguished. Of assistance in this regard are the findings of the Full Federal Court in *Griffiths v Northern Territory* (2007) 165 FCR 391, where French, Branson and Sundberg JJ said (428/429/[127]):

"It is not a necessary condition of the exclusivity of native title rights and interests in land or waters that the native title holders should, in their testimony, frame their claim to exclusivity as some sort of analogue of a proprietary right. In this connection we are concerned that his Honour's reference to usufructuary and proprietary rights, discussed earlier, may have held him to require some taxonomical threshold to be crossed before a finding of exclusivity could be made. It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is 'their country'. If control of access to country flows from spiritual necessity because of the harm that 'the country' will inflict upon unauthorized entry, that control will nevertheless support a characterization of the native title rights and interests as exclusive. The relationship to country is essentially a 'spiritual affair'. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends on the ability of the appellants effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorized entry and if they are the

gatekeepers for the purpose of preventing such harm and avoiding injury to country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation."

[232] In support of the asserted exclusive rights and interests the Applicant (AS para 67) drew my attention to the following evidence which, it was said, establishes, prima facie, that existence of such exclusive rights and interests:

(a) the affidavit of [name removed] sworn on 8 August 2011:

- (i) at [38] – [39] where he discusses how he and his mother have been looking after Tjukurrpa in the claim area by keeping “*miners from destroying everything*”;
- (ii) at [61] where he states that if someone visits his country, they must call upon the elders and ask where they can go; and
- (iii) at [32] – [33] where he relates protocols on the use of resources for a specified area where people must ask for permission to gather in that area.

(b) the evidence of [name removed]:

- (ii) at page 298 where she relates a discussion she had with a “*mining mob*” at which she told them that they were barred from conducting activity in a certain area; and
- (iii) at page 288 where she discussed protocols on access to a hill whereby [name removed] must first go to the hill before others can access it.

[233] These statements are consistent with the assertions contained in Schedule F of Form 1. Paragraph 19 deals with the asserted spiritual connection of the claim group to the claimed area, and refers to the beliefs of the WDCB that *Tjukurrpa* are responsible for the existence and form of the landscape and continue to influence the area and at places associated with the area. It is further asserted (para 19(b)) that it is the responsibility of members of the claim group to protect places associated with the *Tjukurrpa*. Later in Schedule F it is asserted (para 31(b)) that the laws and customs of members of the claim group provide that strangers and visitors may be refused access to or have conditions imposed on access to sites in an area or be accompanied by persons recognised as having authority in respect of an area. Further (para 31(c)), that if strangers wish to visit an area, they should ask persons who are recognised as having authority in relation to it.

[234] It is neither the role of a Delegate, or Member on reconsideration, to engage in a forensic analysis of the asserted factual basis relating to the existence of asserted native title rights and interests. Nor is there any role or scope for attempting to resolve disputed questions of law. All that is required of me as part of this reconsideration is to ascertain if I have before me factual material that would prima facie establish that the claimed rights and interests can be entered on the register pursuant to s. 186(1)(g).

[235] The material before me is not extensive. Nonetheless it is sufficient, in my opinion, to allow me to form the view that under the traditional laws and customs of the Tjiwarl claim group as part of the CDCB that certain people have the right and responsibility to act as “gatekeepers” for the purpose of preventing harm and avoiding injury both to country and to the persons that enter upon it.

[236] Result: exclusive rights and interests established where capable of recognition.

Non-exclusive rights and interests

[237] Paragraph 14 of Schedule E lists eight categories (one is repeated) of non-exclusive rights and interests. I will deal with each of these claimed rights and interests, and, where appropriate, group them.

(a) Right to access, to remain in and to use that part for any purpose

[238] The right to access, be present on, move about and enjoy the claimed area has been recognised by the Federal Court in numerous determinations; for example, *Thudgari People v Western Australia* [2009] FCA 1334 (access land and waters), *Kowanyma People v Queensland* [2009] FCA 1192 (to be present on, including by accessing, traversing and camping) and *Riley v Queensland* [2006] FCA 72 (to be present on, use and enjoy the determination area).

[239] This right, subject to one caveat, is dealt with extensively in the affidavit of [name removed] and the direct evidence of [name removed]. [name removed] deposed (paras 16, 18, 22) that as a child he was taught about country as he travelled with his mother and father around Yakabindie, Albion Downs, Mount Keith, Leinster Downs, Jones Creek, Depot Springs, then travelled over a period of a year between Wiluna and Leonora. He recounted (paras 41 – 43) knowledge of the camping and ceremonial meeting grounds at Inkgatala (Mount Sir Samuel), Wiluna and Logan Spring.

[240] [Name removed] also deposed (para 47) to places where people still go to obtain bush tucker. He referred to the Yakabindie claypan where *kurumin* or grain is collected. Further, he deposed (para 49) that children are still taken to the claim area to be introduced to country.

[241] [Name removed] stated in evidence (p. 305) that as a child, and continuing until the present, she goes out to the area around Leinster, walking, visiting sites and collecting and catching bush tucker.

[242] The caveat I have is that the words “*for any purpose*” are potentially of wide import. For a native title right to be registered it must be capable of being understood and be given effect to.

When a s. 38 determination is made, the arbitral body is required to take into account, pursuant to s. 39(1)(a)(i), the effect of the proposed future act on the enjoyment of a native title party's registered native title rights and interests. In order for an arbitral body to carry out its statutory responsibilities the registered rights and interests must be capable of sensible identification and quantification. Words such as "*for any purpose*" lack precision, are vague and are potentially open-ended. It is undesirable and potentially counter-productive for phrases of this type to be used. Far from expanding the potential rights and interests of a claim group, the result in many instances will be that a Delegate will find that the words are vague and that the claimed right lacks meaning and cannot be registered.

[243] In this matter, the Applicant has drawn to my attention (AS 68(a)(i)) in support of this asserted right and interest, the evidence I have outlined above. I am prepared, in this instance, but not without some hesitation, to proceed on the basis that the asserted right, despite the unhelpful use of the phrase "*for any purpose*" is an asserted right to access, remain in and use the claim area for the traditional purposes outlined above, as distinct from any broader and speculative purposes.

[244] I am therefore satisfied that the factual material before me supports the existence of the claimed right to access, remain in and use the land and waters claimed.

(b) Right to access resources and to take for any purpose resources in that part

[245] The right to access resources and to take such resources has been recognised by the Federal Court, see, for example, *Akiba v Queensland (No 2)* [2010] FCA 643.

[246] There is also ample evidence of members of the claim group accessing the claim area to use and enjoy the natural resources therein. [Name removed] deposed that claim group members go to the Boolygoo Range to harvest wild potatoes (paras 31 – 33) and the Yakabindie claypan for *kurumin* (paras 47 – 48).

[247] [Name removed] gave evidence (pp. 329 – 332) of going out on country in the claim area and accessing bush tucker including goanna, rabbit, kangaroo, *quandong*, *kalkurla*, *ngurturl*, *ingleba* and emu fat.

[248] I am satisfied there is sufficient material in the application, additional material and the affidavit of [name removed] to establish, prima facie, that this right exists until the native title claim group's laws and customs.

[249] Again in this instance the unhelpful phrase "*for any purpose*" has been used. There are two problems with the use of this phrase in this context. First, it is vague and open-ended. Second,

it could be interpreted as asserting a right which is contrary to the law. For example, it could be said that it is being asserted that there is a right to access water for other than communal and non-commercial purposes – *Western Australia v Ward* (2002) 213 CLR 1 at 152/[263] – [265], or a right to take minerals – 186/[384] – [385].

The right to take and use resources is registered to the extent that it does not include a right to take or use minerals, is for the purposes allowed for under the traditional laws and customs of the WDCB and does not confer any rights to control the conduct of others – see Finn J *Akiba v Queensland (No 2)* [2010] FCA 643 at [540].

(c) and (d) *the right to engage in spiritual and cultural activities*

(e) *the right to maintain and protect places and objects of significance*

[250] The asserted right to engage in spiritual and cultural activities has been recognised by the Federal Court in a number of Western Australian cases, for example, *Sampi v Western Australia (No 3)* [2005] FCA 1716, *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 and *Sebastian v Western Australia* [2008] FCA 926. In addition, the asserted right to maintain and protect places has been recognised in numerous cases particularly over the past twelve months in Northern Territory matters; see, for example, *Wilson v Northern Territory* [2009] FCA 800, *King v Northern Territory* [2011] FCA 582 and *Young v Northern Territory* [2011] FCA 585.

[251] [Name removed] affidavit contains much material of relevance to the spiritual life and cultural activities of the claim group. He deposed (para 26) that he is an initiated man and was told stories about the Barr Smith Range area. Both [name removed] and his mother are responsible for looking after the carpet snake and dragon fly stories (para 38), and this has included not only passing those stories on to younger generations but also protecting the dreaming sites from mining activities (para 39). He specifically deposed how his mother and father stopped mining activities around Lake Miranda. He further deposed to named law grounds (para 43) where [name removed] used to stay, as well (para 44) to the special importance of the Montague Range. Additionally, he deposed to special rites, including introducing children to country (para 49) and the use of water in ceremonies for children. As an initiated man he visits places and learns secret knowledge. The process of learning is a continuous one and carries with it special responsibilities (paras 56 and 57). Having been through “*the law*”, [name removed] is a *wati* which requires him (para 58) to care for and look after country and sites “*and make sure that those sacred places are respected and taken care of*”.

[252] [Name removed] gave evidence (p. 288) about her “*Dream Hill*” as well as avoidance sites (p. 284). As previously recounted, she also gave evidence (p. 298) of her attempts to stop mining of Lake Miranda because of its spiritual significance.

[253] Subsequently, I am of the view that the material set out above sufficiently constitutes a factual basis for the existence, prima facie, of the asserted rights set out in paragraphs (c) – (e).

(f) the right to protect resources and habitat of living resources

[254] In support of this asserted right, the Applicant (AS Para 68(a)(f)) drew to my attention extracts from both the affidavit of [name removed] and the evidence of [name removed]. So far as [name removed] affidavit, he deposed (para 33) that before you can dig for *madja* you need to both seek the approval/consent of the “boss”, or if you are a local camp out the night before and dig straight away. He also deposed (para 34) about how one gets responsibility for country and implications that flow therefrom.

[255] I am not satisfied that the wording of this asserted right either comports with the material before me, or is in accordance with the law. It will be noted that the right asserted is a very broad one. It is a right to “protect”; in addition, the asserted right to protect is not limited, but is worded in an expansive fashion. It is an asserted right to protect “resources” which term is itself very open-ended.

[256] The Federal Court has, in a number of cases, accepted that there can be a non-exclusive right to “protect”, particularly in relation to sites of significance. One earlier example of this was in the Full Court decision of *Attorney General (NT) v Ward* (2003) 134 FCR 16 where Wilcox, North and Weinberg JJ made the following finding on the right to protect sites (24/[24] – [25]):

“24 Subclause (d) of cl 5 refers to the holders’ ‘right to have access to, maintain and protect sites of significance on the land’. Counsel for the Commonwealth argues for the omission of the word ‘protect’. He says this word would give the holders an entitlement to exclude others from the land.

25 We do not agree. The notion of protection of significant Aboriginal sites is well understood. It may involve physical activities on the site to prevent its destruction, but it also extends to control of ceremonial activities. Particularly having regard to the existence of subcl (e), we do not think the words would be read as implying a general control of access.”

[257] Other examples are *Neowarra v Western Australia* [2004] FCA 1092 (right to visit places of importance and protect them from physical harm) and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (right to have access to, maintain and protect places and areas of importance) and *Daniel v Western Australia* [2005] FCA 536 (right to protect and care for sites and objects of significance).

[258] However, the Court has rejected broad and vague assertions of a right to protect land and waters. In *Sampi v Western Australia* [2005] FCA 777 the Bardi and Jawi people claimed a right to care for, maintain and protect the land or sea. This was rejected by the primary judge as follows ([1073]): “I do not consider the claimed right to ‘care for, maintain and protect the land...’

defines with any useful precision the nature of the entitlement which it confers or the activities which it will authorise."

[259] Of further assistance are the findings of Finn J in *Akiba v Queensland (No 2)* 2010 FCA 643. The claimed rights include the rights "to protect resources" to "protect the habitat of resources" and "to protect places of importance". The claimed protection rights are not dissimilar from those claimed in this matter. His Honour had before him evidence of Islanders engaging in resource conservation measures and lawful remonstrance against outsiders and Islanders from more distant places engaging in practices considered to harming habitat and depleting resources. In rejecting the protection rights asserted, Finn J made the following observations ([534] – [537]):

"[534] I have difficulty in understanding what the "protect" rights actually comprehend in the marine context of Torres Strait. The uninformative generality of the language of the rights exaggerates the difficulty: compare Neowarra, at [484]. I do not understand, for example, what actually are "places of importance" for present purposes. The applicant' submission, I would note, though referring to conserving resources, is directed primarily at responding to perceived threats in, or to, marine areas. As I indicated in considering "Territorial Control", much could have been said by way of illumination of how the historic right Islanders asserted positively to defend (and manage their areas) evolved after annexation and was manifest in modern practices in a way which might explain the traditional rights they now are claiming. This course was not taken.

[535] After making the unrevealing observation that "[t]he content of ancestral occupation based rights is territorial control" (my emphasis), the course taken has been to mould a set of "rights' to meet the circumstance that the applicant necessarily must accept that their right of control cannot be enforced against others. And so have emerged rights, having still a predominantly control rationale, which justify lawful remonstrance, the provision of information or discussion to as to dissuade another from engaging in particular conduct, report to, or invoking the aid of, civil authorities, etc. The rights, in short claim an unelaborated entitlement to do whatever is appropriate in the circumstances to protect but which falls short of controlling the access and conduct of others.

[536] I have noted on several occasions that the applicant has conceded that it did not seek the inclusion in the determination of a native title right or interest as "having a nature or an extent" that would authorise a member of the native title holding group to control access by, or the conduct of, any other: emphasis added. That concession does not entitle the applicant to emasculate and dismember a holistic traditional right (Gumana FC at [172]) so as to create a right or rights different from that which existed at sovereignty and which, unlike that traditional right, would secure common law recognition.

[537] As was said in Aylawarr FC at [1148]:

[1148] [P]articular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty.

This, in my view, is precisely what the applicant is seeking in this case. It disavows a right that has an "exclusive content" but is left with one that has an elusive content. What is propounded is, for example, far removed from the non-exclusive "maintain and protect" rights that have been accepted in other cases in respect of particular places of significance, be they a sea rock or a rock cave drawing: see Sampi FC at [121]-[125] or which have involved engaging in particular practices (for example smoking, visiting, checking for damage: Neowarra at [484])."

[260] The material before me is scant and general. The protection right asserted is broad and vague. The law is, from my reading, quite clear. There is ample authority for the registration, and determination, of asserted rights involving protection. However, there are two requirements. First the evidence must establish the factual basis for the assertion. Second, the protection right sought must be capable of being given proper effect to, and not be so vague and broad that it is incapable of being understood or its implications properly gleaned. I am not suggesting that the Court would not make a broad protection determination, or that such a right is not capable of registration. But the evidence must support it, and the wording, particularly if a broad right is asserted, must be clear, precise and capable of meaning and being given effect to, particularly in the context of ss. 38 and 39.

[261] Accordingly, the right to protect resources and the habitat of living resources is not, prima facie, established.

(g) *The right to make decisions about the use and enjoyment of land and waters*

[262] Again this asserted right is drafted in a very broad and vague fashion. In the context of non-exclusive rights, this formulation has previously been the subject of critical analysis by the Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442. In that case, the Full Court considered two asserted rights together. One (para 3 (e)) was a right to make decisions about access to land and waters, and the other (para 3 (f)) was a right to make decisions about the use and enjoyment of the land and waters. In rejecting these asserted rights, the Full Court said (485/[148]):

“There are dicta in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Ward HC which militate against the applicants’ contentions. Reference has already been made to what their Honours said at [192] and [194] of the joint judgment. Moreover their Honours said at [62] that without a right, as against the whole world, to possess the land ‘it may greatly be doubted that there is any right to control access to the land or make binding decisions about the use to which it is put’. Having regard to what was said in the High Court it seems that the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty. The rights set out in para 3(e) and (f) of the determination do not resemble the holistic right of exclusion which went to exclusive possession and occupation at the time of sovereignty. In this respect the appeal should be allowed and para 3(e) and (f) deleted from the determination area ...”

[263] I do note, that the material before me would have supported a more limited right of the type recognised in a number of recent Federal Court decisions. For example, in *Jungarrayi v Northern Territory* [2011] FCA 766 the Court determined a “right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.”

[264] Having regard to the current state of the law as expounded by the Full Federal Court in *Alyawarr* the proposed right to make decisions about the use and enjoyment of the land waters cannot be established.

(h) The right to receive a portion of any resources taken by others from the land and waters

[265] The Applicant submits (AS para 68(f)) in support of this asserted right two paragraphs from [name removed] affidavit. The two paragraphs in question (paras 38 and 39) deal with the responsibility [name removed] and his mother have for the carpet snake story, including the responsibility for “*stopping those miners from destroying everything.*”

[266] There is no mention in those paragraphs of any traditional law or custom about the sharing of resources. Moreover, even if there were some other scattered references in the evidence of [name removed] or [name removed] affidavit about the sharing of particular resources in particular areas, or dreaming tracks, there is no material that I have perused which would provide a substantive basis for the asserted general right to receive a portion of resources taken by others.

[267] Consequently I do not have to deal with the additional legal question, whether such a broad asserted right could be made out in the context of non-exclusive rights, and further in the context of its applicability to persons other than those who recognise themselves to be governed by the laws and customs of the claim group. If there had been further material supportive of this asserted right, the Applicant would have had to address the finding of Olney J in *Yarmirr v Northern Territory* (1998) 82 FCR 533. His Honour made the following finding (at 586):

“The ‘right of senior members of the yuwurrumu to receive a portion of major catches...if they are co-resident with the person making the catch’ (Peterson and Devitt) and ‘the right of clan members to receive a portion of a major catch taken from the waters or land of the clan’s estate’ (par (d)(viii) of the proposed determination) are not rights and interests in relation to land or waters and do not come within the ambit of the statutory definition of ‘native title rights and interests’.”

[268] Accordingly, the asserted right to receive a portion of any resources taken, has not been established.

[269] I consider, prima facie, some of the claimed native title rights and interests can be established, and, consequently, that the requirements of s. 190B(6) are **met**.

Subsection 190B(7)

[270] Subsection 190B(7) requires that the Registrar, or her Delegate, must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters claimed, or previously had and would reasonably be expected to have maintained a physical connection but for things done either by the Crown, a statutory authority of the Crown or a leaseholder or a person acting on behalf of the leaseholder.

[271] It will be noted that the statutory requirement is for a *traditional* physical connection. In *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 Dowsett J observed (at [84]): “As to s 190B(7), much may depend upon the meaning of the term ‘traditional physical connection’ must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs.”

[272] The nature of the task imposed on the Registrar by this subsection was explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 as follows (at 120/[18]):

“Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration.”

[273] Given the conclusions that the Delegate reached with respect to s. 190B(5) he was not satisfied (p. 43) that any member of the claim group either has or had a ‘traditional’ physical connection with any part of the claim area.

[274] Having regard to my findings in s. 190B(5), I have reached a different conclusion to that of the Delegate. The traditional physical connection required by s. 190B(7) is in accordance with the laws and customs rooted in the normative system of a pre-sovereignty society, from which the claim group is descended (AS para 72). The claim group, I have found, are descended from a pre-sovereignty society, namely the WDCB, and that the claim area formed part of the WDCB area of influence at sovereignty.

[275] The evidence of both [name removed] and [name removed] establishes a traditional physical connection to the land and waters of the claim area. The traditional connection has been set out at great length previously and does not require repetition here. Suffice it to say, both [name removed] and [name removed] and their parents and immediate relatives had and have a long and traditional physical association with the claim area.

[276] , I am **satisfied** that at least one member of the claim group has traditional physical connection with the land and waters covered by the application.

Conclusion

[277] I reaffirm that this is a fresh and original decision as to whether or not, in my view, the claim meets all of the conditions for registration specified in ss. 190B and 190C of the Act.

[278] I conducted a reconsideration of the claim made in this application against each of the conditions contained in ss. 190B and 190C in accordance with s. 190E of the *Native Title Act 1993*.

[279] For the reasons outlined above, I give notice that the Native Title Registrar should accept the claim for registration pursuant to s. 190E of the *Native Title Act 1993*.

[280] In particular, I have formed the view that the Native Title Registrar should accept the claim for registration as it satisfies all of the conditions in ss. 190B and 190C.

John Sosso
Deputy President