National Native Title Tribunal

Registration test decision

Application name	Tjiwarl #2
Name of applicant	Edwin John Beaman, Keith Narrier, Brett Andrew Lewis, Henry Ashwin
NNTT file no.	WC2015/002
Federal Court of Australia file no.	WAD302/2015
Date application made	22 June 2015

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

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

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

Date of decision: 21 August 2015

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 4 May 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to not accept the native title determination application (the application) for registration pursuant to s 190A of the Act.

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

Application overview

[3] The application was filed with the Federal Court of Australia (the Court) on 22 June 2015 and the Registrar of the Court gave a copy of the application to the Registrar on 24 June 2015 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 22 June 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[5] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s 190A(6B), I must not accept the claim for registration. This is commonly referred to as the registration test.

Background

[6] A notice has been issued in relation to the grant of a tenement (EL53/1823) in accordance with s 29 of the Act with a notification date of 22 April 2015. The application was filed within the three month timeframe over the area affected by the future act notice and this has required me to use my best endeavours to finish considering the claim by the end of four months after the notification day, that is 22 August 2015 — see s 190A(2).

Requirements of s 190A

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

[8] As discussed in my reasons below, I consider that the claim in the application does not satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must not

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

Information considered when making the decision

[9] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2015/1109) prepared by the Tribunal's Geospatial Services on 7 July 2015 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

[10] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act. Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any claimant application.

Procedural fairness steps

[11] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication — *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 29 June 2015, the case manager for this matter sent a letter to the State of Western Australia (the State) enclosing a copy of the application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 17 July 2015 and that the delegate anticipates making the registration test decision by 21 August 2015. The State has not provided any submissions.
- The case manager, also on 29 June 2015, wrote to inform the applicant that any additional information should be provided by 17 July 2015 and that the delegate anticipates making the registration test decision by 21 August 2015. No additional information has been provided.

Procedural and other conditions: s 190C

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

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

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

[13] In coming to this conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2) — see observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) at [37] and [39]; see also [16], [35] and [36]. Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

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

[15] I now turn to each of the particular parts of ss 61 and 62:

Native title claim group: s 61(1)

[16] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant at [1]. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[18] Part B of the application contains the name and address for service of the applicant's representative.

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

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

[20] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[22] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant — at [2] – [9].

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

Details required by s 62(1)(b)

[24] Subsection 62(2)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[25] Schedule B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B also contains information of areas within those boundaries that are not covered by the application.

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

[26] Attachment C contains seven maps showing the external boundary of the application area.

Searches: s 62(2)(c)

[27] Attachment D provides that the applicant has not carried out any searches to determine the existence of non-native title rights and interests in relation to the land or waters in the area covered by the application.

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

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

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

[29] Schedule F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[30] Schedule G states that the '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'.

Other applications: s 62(2)(g)

[31] Schedule H contains details of an application to the Federal Court, namely the Tjiwarl (WAD228/2011; WC2011/007) native title determination application (Tjiwarl application).

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

[32] Attachment HA states that the applicant is not aware of any notifications given under s 24MD(6B)(c).

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

[33] Attachment I contains details of notices issued under s 29 of which the applicant is aware.

Conclusion

[34] The application **contains** the details specified in ss 62(2)(a) to (h), and therefore **contains** all details and other information required by s 62(1)(b).

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

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

[35] In my view, the requirement that the Registrar be satisfied that there are no common claimants arises where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[36] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be

contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[37] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register of Native Title Claims (the Register) at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[38] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[39] The geospatial assessment identifies that the Tjiwarl application wholly overlaps the area covered by the current application. My search of the Register revealed that the Tjiwarl application was accepted for registration and added to the Register on 13 January 2012. This application has not been removed from the Register since that date. In my view, the Tjiwarl application meets the conditions specified under subsections (a) and (b).

[40] The condition at subsection (c) is met when an entry was made, or not removed, as a result of the previous application being considered for registration under s 190A. I have accessed the Register and find that the entry for the Tjiwarl application has not been removed from the Register. I am satisfied that this application was entered on the Register as a result of it being considered for registration pursuant to s 190A.

[41] As the Tjiwarl application meets all of the criteria for a 'previous application' stipulated by s 190C(3), I am therefore required to consider whether there are any members of the claim group for the previous application in common with the claim group for the current application.

[42] Schedule O of the current application states the following:

> All persons included in the native title claim group for this application are members of the native title claim group for the Tjiwarl native title claim, being:
>
> (a) *Keith Narrier & others on behalf of the Tjiwarl Native Title Claim Group v State of Western Australia & others* WAD 228 of 2011.

[43] I have accessed from the Register a description of the native title claim group for the Tjiwarl application. That description is essentially the same as that contained in the current application.

[44] Given the above information, I am not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application for the purposes of s 190C(3).

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

Subsection 190C(4) Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

[47] Schedule R states that the applicant has been authorised to make the application. I must therefore consider whether the requirements of s 190C(4)(b) are met.

[48] For the reasons set out below, I am not satisfied that the requirements set out in s 190C(4)(b) are met.

The application must contain the information specified in s 190C(5)

[49] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that:

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

[50] I note that the following statement is made in Schedule R of the application:

> [t]he 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 of the other persons in the native title claim group.

[51] In my view, the above constitutes a statement to the effect that the requirement in s 190C(4)(b) has been met.

[52] As to the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met, Schedule R provides the following relevant details:

- the applicant was selected by the native title claim group in accordance with the traditional laws and customs of the native title claim group at a claim group meeting held on 21 May 2015;
- at the meeting, the applicant was authorised to make the application and deal with matters arising in relation to it as evidenced in the s 62 affidavits of the persons comprising the applicant (affidavits).

[53] Attachment R and the affidavits provide further details, which I discuss below, as to the grounds on which the Registrar should consider the requirements of this provision have been met.

[54] I am satisfied that the above information contains a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

The application must address the requirements of s 190C(4)(b)

The requirements of s 190C(4)(b)

[55] Justice Mansfield, in *Doepel*, commented that s 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which 'clearly … involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — at [78].

[56] Justice Collier, in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*), noted that s 190C(4) requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group — at [21], [29] and [35]; see also *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60].

[57] In *Strickland*, French J stated that the authorisation condition at s 190C(4)(b) is not 'to be met by formulaic statements in or in support of applications' — at [57].

[58] In addition, I understand that a claim group must use one of the two processes described in s 251B, namely authorisation in accordance with a process required under the traditional laws and customs of the native title claim group (s 251B(a)) or a process of decision making agreed to and adopted by the persons in the native title claim group (s 251B(b)). If there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group — see *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 at [1229] and [1230] and *Evans v Native Title Registrar* [2004] FCA 1070 at [7].

The applicant's authorisation material

[59] Attachment R provides the following information about the authorisation meeting:

- the authorisation meeting was held at Leinster on 21 May 2015 where the applicant was authorised by the native title claim group to file the application;
- the authorisation was made in accordance with the decision making process of the native title claim group that is derived from traditional law and custom whereby decisions are made by consensus of the native title claim group.

[60] The affidavits of the persons comprising the applicant are identical and provide the following additional information:

- the persons comprising the applicant believe that the process of decision making required under the system of traditional laws and customs recognised and observed by the native title claim group in relation to the authorisation of matters of this kind has been complied with — at [7];
- the meeting was held to authorise the lodging of an application and appointment of an applicant — at [8];
- at the meeting, the details of the claim were discussed and consensus was reached on the claim boundary, the claim group description, the native title rights and interests being claimed, and the appointment of the applicant — at [8];
- 'the process of decision making undertaken in authorising … the applicant follows the way that people in the native title claim group have traditionally made decisions', which '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' — at [9].

Consideration

[61] I note that the first limb of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

[62] In each of their affidavits, the persons who jointly comprise the applicant swear to being members of the native title claim group — at [1]. The affidavits, Schedule R and Attachment R provide that at the authorisation meeting members of the native title claim group decided by consensus who should comprise the applicant. It follows that I can be satisfied that the persons who comprise the applicant are all members of the claim group.

[63] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified — *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

[64] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. If there is a traditionally mandated process, then that process must be followed to authorise the applicant. Schedule R and the affidavits of the applicant appear to indicate that the decision making process that was used during the authorisation meeting was one that was required under the traditional laws and customs of the native title claim group, namely a process contemplated by s 251B(a).

[65] I note that Attachment R provides that the process of decision making of the native title claim group requires that there is consensus of the native title claim group and the affidavits state that this process follows the way that people in the claim group have traditionally made decisions, namely involving those people who are members of the claim group meeting. I understand that this means that all of the members of the native title claim group, or at least a good representation of that group, was required to participate in the decision making process. I

therefore consider that I may have regard to the principles distilled in relation to s 251B(b), such as those necessary to consider that all the persons were given a reasonable opportunity to participate in the decision making process, in being satisfied whether the applicant has been authorised by all members of the native title claim group.

[66] In the context of s 66B, the requirements of s 251B(b) were discussed by Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*). Her Honour observed that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' — at [25]. Her Honour held that:

> 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 may 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 — at [25].

[67] Justice Stone cited with approval the decision of *Ward v Northern Territory* [2002] FCA 171 (*Ward*), where O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance, were required to be addressed before his Honour would consider making an order pursuant to s 66B:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? — *Ward* at [24], cited in *Lawson* at [26].

[68] O'Loughlin J noted that it was not necessary that these questions be answered in any formal way but held that 'the substance of those questions must be addressed' — at [25].

[69] The information available to me does reveal the date, location, reasons for the authorisation meeting and some of the outcomes of the meeting. The material provided, however, does not reveal who convened the meeting and what steps were taken to advise members of the native title claim group about the authorisation meeting such as by public notice, letters and/or by word of mouth. The information provided does not indicate who attended the meeting and whether those present were representative of the native title claim group. I am therefore unable to be satisfied that the members of the claim group were given a reasonable opportunity to participate in the decision making process.

[70] For the reasons set out above, I am not satisfied that the requirements of s 190C(4)(b) are met.

[71] The application **does not satisfy** the condition of s 190C(4).

Merit conditions: s 190B

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

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

[72] Schedule B contains a written description prepared by the Tribunal's geospatial services on 17 June 2015 and describes the application area by cadastral parcels, part parcels described by Lot on Plan and geographic coordinates. Schedule B also lists general exclusions.

[73] Attachment C is a colour copy of seven maps titled 'Tjiwarl #2' prepared by the Tribunal's geospatial services on 17 June 2015. The maps include:

- the application area depicted by a bold outline;
- cadastral background;
- scalebar, coordinate grid, legend and locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the maps.

Consideration

[74] The geospatial assessment concludes that the description and maps of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[75] I note that Schedule B contains some general exclusions to categories of land and waters, which in my view provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] – [38].

[76] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

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

The Registrar must be satisfied that:

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

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

[78] Schedule A contains the following description of the native title claim group:

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:

   (a) 5(a)(i) include [name deleted]; and

   (b) 5(a)(ii) are the descendants of:

      (i) Alfie Ashwin;

      (ii) Piman/Charlie Beaman;

      (iii) Tjampula/Jumbo Harris;

      (iv) Nampu/Scotty Lewis;

      (v) Nimpurru/Spider Narrier;

      (vi) Tjulyitjutu/Rosie Jones;

      (vii) Kathleen Bingham;

      (viii) Kurril/Scotty/Ted/Packhorse Rennie Tullock;

      (ix) Pukungka/Dolly Walker;

      (x) Manyila/Trilby; and

      (xi) Dempsey James.

[79] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Nature of the task at s 190B(3)(b)

[80] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[81] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[82] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t 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. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

[83] I understand that there are two elements of the native title claim group description. The first is set out in paragraph (5)(a), being those persons who have a connection to the application area by their own birth or long association with the area covered by the application and those persons who have a connection to the application area by birth or long association with the application area of their ancestors by which they claim country. The second element is set out in paragraph (5)(b) which identifies those persons who are recognised as having that connection to the application area in accordance with traditional laws and customs. I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[84] I understand that the first element contains a number of conditions as detailed under paragraphs (5)(a)(i) and (ii), namely own birth in or long association with the application area and by descent of a named ancestor, which I need to be satisfied enables the ascertainment of whether any particular person is in the claim group. The criterion under paragraph (5)(a)(i) is supplemented by (6)(a) which includes the name of a person referred to in (5)(a)(i). In respect of the criterion under (5)(a)(ii), I understand paragraph (6)(b) to contain a list of the ancestors that the persons described in paragraph (5)(a)(ii) are descended from.

[85] I will discuss each criterion contained in both elements below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Own birth or long association

[86] This criterion includes those persons who have been born within the application area or has had a long association with the area.

[87] I understand that a person who meets these requirements has been identified in paragraph (6)(a), but that others may also meet this part of the claim group description.

[88] I note that describing a claim group in reference to birth is another method that has been accepted by the Courts — *De Rose v State of South Australia* [2002] FCA 1342 (*De Rose*) at [926].

[89] I consider that requiring a member to demonstrate that they were born in the application area provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[90] In relation to the role of long association in the traditions of the native title claim group, I have been informed by the factual basis material contained in Schedule F. In particular, I note the following:

35. The members of the claim group are, biologically and socially recognised descendants of people of the Western Desert at sovereignty.

36. The people of the Western Desert were at sovereignty and are today, a body of persons united in and by their acknowledgement and observance of laws and customs …, which at all such times have been continuously and are acknowledged and observed in their application to the area covered by the application, subject to adaptive change.

37. Adaptive change to the laws and customs as referred to in paragraph 36, has occurred over time principally to take account of the increasing number of births in communities and hospitals. This adaptation has led to a greater emphasis being placed on parental and grandparental connections to country and on long association with an area.

38. The native title claim group members, under indigenous laws acknowledged and customs observed by them …, possess the rights and interests … and by those laws and customs have a connection with the area covered by the application …

[91] I understand that a person who is not included in the native title claim group by birth, can be a member if they have been connected to the land for a long period. This connection involves spiritual, physical, historical, legal (customary), economic and social elements in accordance with the traditional laws and customs of the claim group — at [18] – [25].

[92] I find the following comments of O'Loughlin J in *De Rose*, albeit in obiter, of assistance in reaching a view about this criterion:

> [i]n their principal submissions, the claimants identified the native title claim group in the following terms:
>
> > *"The application is made by the named individuals on their own behalf and on behalf of other individuals who fulfil the criteria of nguraritja according to traditional law and custom."*
>
> 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 the other *Nguraritja*. I am satisfied that these factors are the major criteria by which people may be *Nguraritja* for De Rose Hill …
>
> Some other methods were put forward by the different witnesses [which were] not … traditional [but] by which an Aborigine could become *Nguraritja*.
>
> By an 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 be personally named, although they do need to be identified by a set of appropriate criteria: see *Risk v National Native Title Tribunal* [2000] FCA 1589 at [43]; *Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at [53]; *Russell v Bissett-Ridgeway* [2001] FCA 848 at [18-19] … 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 — at [926] to [928].

[93] Having regard to the comments of O'Loughlin J in *De Rose* and the facts relevant to this particular matter outlined above, I am of the view that with some factual inquiry it would be possible to determine the persons who have had a long association with the application area.

[94] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this part of the native title claim group description.

Descent

[95] This criterion involves those persons who are descended from an apical ancestor born or who had a long association with the application area. My understanding is that the descendants of the persons listed in paragraph (6)(b) of Schedule A will meet this part of the claim group description.

[96] I consider that requiring a member to show descent from the ancestors identified in paragraph (6)(b) provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[97] I note that describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — *WA v NTR* at [67].

[98] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Recognition

[99] I am of the view that the description of the native title claim group is to be read as a discrete whole and recognition as a member of the native title claim group is not meant to be a stand alone criterion. Rather, it is a qualifier to membership as detailed in the first element. I discuss below my reasons for coming to this view, including the relevant case law that has considered recognition as a criterion of itself.

[100] I note that a description of membership containing qualifiers of recognition is not one with an external and objective point of reference from which to commence an inquiry.

[101] While not addressing the requirements of s 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 (*Aplin*) considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among

other things, a request to change the native title claim group description to include a criterion of descent from another apical ancestor not identified in the application, stated that:

> for the purposes of the [Act], it is the claim group which must determine its own composition … The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs — at [256].

[102] Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v Western Australia* [2005] FCA 777 where French J, at [820], stated that identification as a member involved an internal perspective of the group — *Aplin* at [258]. The decision of French J was appealed and the Full Court stated that:

> [a] relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v Western Australia* [2010] FCAFC 26 at [45].

[103] I understand that members of the native title claim group are united by a common ancestry, both biologically and socially recognised, and by their acknowledgement and observance of a body of laws and customs — Schedule F at [35] – [36]. The members of the claim group continue to hold native title rights in the area in accordance with their traditional laws and customs, including rules for recognition of a person holding those rights and interests — at [29] and [34]. The claim group also have, and their predecessors had, a connection to country involving spiritual, historical, legal (customary), economic and social elements under the traditional laws and customs of the claim group under their traditional laws and customs — at [18] – [25].

[104] Having regard to the preceding information, it is my view that recognition as a member of the native title claim group is linked to their connection to the land. It is through this connection that individuals are recognised as being a member of the claim group.

Conclusion

[105] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

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

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

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

[107] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[108] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

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

[109] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[110] Schedule E provides the following description of the claimed native title rights and interests:

> 14. In this Schedule E, 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; and
>
> "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 maintain and protect places and objects of significance in or on that part;
>
> (e) the right to make decisions about the use and enjoyment of land and waters; and
>
> (f) the right to receive a portion of any resources taken by others from the land and waters,
>
> and do not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others.

Native title where it is wholly recognisable

15. In relation to the lands and waters of the area covered by the application, except for the areas where native title has been partially extinguished, the native title rights and interests is the exclusive right.

Native title where it is partially recognisable

16. In relation to the lands and waters of the area covered by the application, except for areas where native title is wholly recognisable, the native title rights and interests are the non-exclusive rights.

Consideration

[111] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[112] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s 190B(4).

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

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[114] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

The requirements of s 190B(5) generally

[115] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[116] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

[117] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[118] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[119] The factual basis material is contained in Schedules F, G and M.

[120] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

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

[121] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- that the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- that there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

Information provided in support of the assertion at s 190B(5)(a)

[122] The factual basis contains the following information about the association of the native title claim group with the application area:

- Current members of the native title claim group have, and their predecessors had, a connection to the area covered by the application, involving spiritual, physical, historical, legal (customary), economic and social elements — Schedule F at [18].
- The spiritual element comprises of:
  - the belief that Tjukurrpa (dreamings) are responsible for the existence and form of the landscape, and continue to be a presence or influence in the area, and places associated with the area;
  - the responsibility of claim group members to protect places on the area associated with the Tjukurrpa; and
  - the responsibility to prevent improper disclosure of beliefs and practices that related to places associated with the area — at [19].

- The physical element includes the physical presence of current members and their predecessors on the application area, their use of the resources on the application area, and their actions to protect places on the application area — at [21].
- The historical element involves 'the considerable time depth of the spiritual, physical, legal, economic and social elements of connection maintained' by the current members and their predecessors with the area — at [22].
- The legal (customary) element is the status the claim group members have in respect of the application area 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 — at [23].
- The economic element involves 'members living on the area utilising the resources of the land and waters for sustenance and trade and otherwise to their benefit, in pursuance of their entitlements under the traditional laws acknowledge and customs observed' — at [24].
- The social element is 'the reflection under the traditional laws acknowledged and customs observed by the native title claim group and their predecessors, in the relationships between people and people, of the relationships between people and country, through intrinsic associations of both people and country with Tjukurrpa' — at [25].
- The native title claim group carry on, and their predecessors carried on, activities such as to fully exercise the rights and interests within the application area — Schedule G at [39].
- Some members of the native title claim group have lived for significant periods of time in the claim area — Schedule M at [50].

Consideration

[123] Having considered the information before me, I am of the view that the factual basis is not sufficient to support the assertion that the native title claim group has, and their predecessors had, an association with the area covered by the application.

[124] The factual basis relevant to this assertion primarily identifies the types of connection the members of the native title claim group have and their predecessors had with the application area. In particular, it describes what is meant by spiritual, historical, legal (customary), economic and social elements of the claim group's connection to the application area.

[125] The information contains very limited or no reference to actual places or details of the nature of the claimants' association or that of their predecessors. For instance, there are no asserted facts about any of the named ancestors that support the assertion that those persons were associated with the claim area. The factual basis also does not show the history of the association that members of the claim group have, and that their predecessors had, with the application area. There is also no information or asserted facts of any specificity that relate to the application area or its surrounds. I therefore consider that the factual basis does not provide geographical particularity such that it is sufficient to support the assertion that the group has an association with the entire application area.

[126] Although the applicant is not required to provide proof of the asserted facts, the factual basis must provide sufficient detail to enable a 'genuine assessment' which do not primarily rely on general or formulaic assertions — *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

[127] Given the information before me, I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

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

[128] Section 190B(5)(b) requires a factual basis which is sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

[129] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

[130] In *Gudjala 2007*, Dowsett J observed that to satisfy s 190B(5)(b):

> [t]here must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the Native Title claim. That factual basis must be capable of demonstrating that:
>
> - there are traditional laws and customs;
> - acknowledged or observed by the Native Title claim group; and
> - giving rise to the group's claim to Native Title rights and interests — at [62].

[131] His Honour was of the view that to be satisfied that there is a sufficient factual basis for this assertion, the facts must support the assertion of a traditional connection as explained by the High Court in *Yorta Yorta* — at [26].

[132] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];

- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[133] Dowsett J further commented that although 'apical ancestors are used only to define the claim group', the applicant 'at some point … must explain the link between the claim group and the claim area' and '[t]hat process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty' — *Gudjala 2007* at [66].

[134] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Information provided in support of the assertion at s 190B(5)(b)

[135] Schedule F provides the following relevant information:

- The members of the native title claim group are, biologically and socially recognised, descendants of people of the Western Desert at sovereignty — at [35]. The persons that comprise the Western Desert identify with varieties or dialects of the one language that is associated with the land and waters of the Western Desert — at [30]. The people of the Western Desert follow a particular kinship system, emphasise on generational moieties in ritual organisation and have a distinct approach to male initiation — at [31].
- The Tjukurrpa is a fundamental concept in the belief system of the people of the Western Desert. The Tjukurrpa explains the formation of the landscape, is evidenced by the particular features of the landscape, lays down the rules or principles by which people both relate to and conduct themselves in relation to the land and waters, and it lays down rules or principles by which people otherwise conduct themselves — at [26].
- Sacred sites associated with particular Tjukurrpa are located throughout country — at [28]. There are six Tjukurrpa that are relevant to the application area — at [20] and [28].
- The body of laws and customs acknowledged and observed by the people of the Western Desert, including the native title claim group, are given normative force by:
  - widespread commitment of the Tjukurrpa and high value of the sacred; and
  - fear of being ostracised or punished for breach of the laws and customs — at [27].

- The body of laws and customs acknowledged by the people of the Western Desert include rules for recognition of a person holding rights and interests in relation to an area, as described in Schedules A and E — at [29].
- Other laws and customs in relation to the land and waters or otherwise include:
    - for persons being recognised by others associated with sites in an area as having traditional authority in respect of the area and its related cultural information;
    - that persons such as 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 that area;
    - permission being sought by strangers from a person recognised as having authority if they wish to visit an area;
    - restriction to access some places, sites and areas on the basis of gender, age and ritual knowledge;
    - restriction to access and disclose knowledge of the spiritual significance of sites and rituals associated with places on the basis of gender, age and ritual knowledge;
    - imposition of sanctions for wrongful presence on or use of country by strangers and for wrongful presence on a site by any person breaching relevant cultural restrictions;
    - those related to the spiritual features of the landscape including respecting and caring for those spiritual features, such as by observance of place specific rituals and practices and by the appropriate transmission of and maintenance of appropriate restrictions on knowledge relating to those features;
    - requirements and restrictions relating to religious and ritual objects, designs, songs, knowledge and practice;
    - social organisation including rules relation to kinship, marriage as well as alternate generation levels, a section system and the absence of patrimoieties and matrimoieties;
    - respect for the authority of senior people;
    - those relating to ceremony and life stages of conception, birth, names and naming, puberty, marriage, death and avoidance of the name of a deceased person; and
    - foraging for and preparation and distribution of food, medicinal and other resources and the knowledge associated with those matters — at [32] – [33].
- The members of the native title claim group have continued to hold native title in accordance with traditional laws and customs — at [34].

[136] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

[137] In my view, in order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, the factual basis must include sufficient details of:

- the relevant pre-sovereignty society from which the claim group is descended and the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;
- the connection between the apical ancestors of the native title claim group and the pre-sovereignty society from which the laws and customs are derived; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and those of the current claim group.

[138] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[139] Schedule F sets out the laws and customs of the pre-sovereignty society being the Western Desert, which I understand the native title claim group to be a part of along with other neighbouring groups. The asserted facts provide that the people of the Western Desert observe and acknowledge a body of laws and customs and share common spiritual beliefs, a system of kinship and social organisation, and ceremony. Schedule F also outlines other laws and customs of the pre-sovereignty society including rules relating to land tenure and usage of the resources of the land and waters.

[140] In my view, the factual basis appears to indicate that within this society, the rights and interests in land that are asserted to be held by the native title claim group are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[141] In my view, however, the factual basis material does not provide information that supports the assertion of a link between the apical ancestors and the relevant pre-sovereignty society — see *Gudjala 2007* at [66]. For instance, the information provided does not elucidate when the apical ancestors were born or present within the application area or surrounds or how they were associated with those areas — see also my reasons at s 190B(5)(a) above.

[142] In addition, although it is asserted that the current claim group's laws and customs are derived from those of the relevant pre-sovereignty society, in my view these assertions are not at a sufficient level of detail to enable a genuine assessment of whether the factual basis supports the assertion — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29]. For instance, there are no examples of current observance and acknowledgement of the stated laws and customs of the pre-sovereignty society such that a comparison can be made or which support the assertion that the laws and customs now observed and acknowledged are those of the pre-sovereignty society.

[143] Section 190B(5)(b) requires a factual basis that is sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests. I consider that the factual

basis is lacking in specific examples or facts of how the traditional laws and customs have been acknowledged and observed by current claimants or their immediate predecessors in relation to the application area to support the assertion that those laws and customs give rise to the native title rights and interests claimed.

[144] In my view, the factual basis is insufficient in supporting the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense. In particular, the factual basis is insufficient in demonstrating the connection between the pre-sovereignty society and the claim group and the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and those acknowledged and observed by the claim group.

[145] I also refer to my conclusions in relation to s 190B(5)(a) that the factual basis is not sufficient to support the assertion of an association by the claim group and its predecessors with the application area. I consider the factual basis is not sufficient to support an assertion that there exists traditional laws and customs of the native title claim group in relation to the application area. In my view, the factual basis is insufficient in demonstrating the connection between the traditional laws and customs acknowledged and observed and the area covered by the application.

[146] Given the above, I am **not satisfied** that the factual basis provided is sufficient to support the assertion at s 190B(5)(b).

Reasons for s 190B(5)(c)

[147] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[148] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[149] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[150] As mentioned above, the applicant has not provided sufficient factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with traditional laws and customs. Accordingly, s 190B(5)(c) cannot be satisfied.

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

Conclusion

[152] The application **does not satisfy** the condition of s 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)
Prima facie case

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

[153] The requirements of this section are concerned with whether the native title rights and interests identified and claimed in this application can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[154] In *Gudjala 2007*, Dowsett J noted that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — at [85]. His Honour further noted the observations of the High Court in *Yorta Yorta* that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[155] Accordingly, the condition at s 190B(6) cannot be met in the absence of a sufficient factual basis to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group, which give rise to the claimed native title rights and interests. As noted above, my view is that the factual information supporting the assertions at s 190B(5) is insufficient.

[156] As I consider that the conditions in s 190B(5) have not been met, I cannot therefore be satisfied, prima facie, that at least some of the claimed native title rights and interests can be established.

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

Subsection 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[158] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[159] Whilst the test is not the same as would be applied in a determination of native title, 'it does require the Registrar to be satisfied of a particular fact', being that at least one member of the native title claim group has or had a traditional physical connection with part of the claim area — *Doepel* at [18].

[160] It follows, in my view, that there must be sufficient factual material to satisfy the conditions of s 190B(5) before the Registrar can be satisfied that the requirement of s 190B(7) is met.

[161] Given that the application and other information does not contain a sufficient factual basis supporting the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interests, I am unable to be satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any land or waters within the application area.

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

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss 47, 47A or 47B, as the case may be, applies to it.

[163] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s 61A(1)

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

[165] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Reasons for s 61A(2)

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

[168] Schedule B states that areas which are subject to previous exclusive possession acts are excluded from the application and that s 47B is claimed in relation to the application area.

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

Reasons for s 61A(3)

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

[171] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Schedules B and L.

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

Conclusion

[173] In my view the application **does not** offend any of the provisions of ss 61A(1), (2) and (3) and therefore the application **satisfies** the condition of s 190B(8).

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

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[174] I consider each of the subconditions of s 190B(9) in my reasons below.

Reasons for s 190B(9)(a)

[175] Schedule Q provides that the applicant makes no claim to any mineral, petroleum or gas wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[177] Schedule P indicates that no offshore places comprise part of the application area.

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

Reasons for s 190B(9)(c)

[179] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished. The application also claims the protections afforded by s 47B — see Schedules B and L.

Conclusion

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

[End of reasons]

Attachment A

Summary of registration test result

Application name	**Tjiwarl #2**
NNTT file no.	**WC2015/002**
Federal Court of Australia file no.	**WAD302/2015**
Date of registration test decision	**21 August 2015**

Section 190C conditions

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

Test condition	Subcondition/requirement		Result
		s 62(2)(h)	met
s 190C(3)			not met
s 190C(4)			Overall result: not met
	s 190C(4)(a)		n/a
	s 190C(4)(b)		not met

Section 190B conditions

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

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

[End of document]