National Native Title Tribunal

# Registration test decision

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| 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 |
| Date application last amended | 4 September 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:** 16 October 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 amended 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[3] The application was originally made on 22 June 2015 when it was filed in the Federal Court of Australia (the Court). I decided, on 21 August 2015, that it should not be accepted for registration because the application did not satisfy all of the conditions set out in ss 190B and 190C.

[4] On 27 July 2015, Mortimer J granted leave to amend the application.

[5] On 4 September 2015, the application was filed with the Court. The amendments to the application include changes to the description of the application area in Schedule B and the replacement of maps at Attachment C.

[6] On 4 September 2015, the Deputy Registrar of the Court gave a copy of this application to the Registrar pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

### Information considered when making the decision

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

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

[9] I understand s 190A(3) 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. I am also of the view that it is appropriate that I consider information found within or accompanying the original application filed on 22 June 2015. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the original application and accompanying documents filed on 22 June 2015;

- the information contained in the application and accompanying documents filed on 4 September 2015;
- the geospatial assessment and overlap analysis (GeoTrack: 2015/1769) prepared by the Tribunal's Geospatial Services on 15 September 2015 (geospatial assessment); and
- the results of my own searches using the Tribunal's 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, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

[11] 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 other claimant application, without the prior written consent of the person who provided the Tribunal with that information.

## Procedural fairness steps

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

- On 9 September 2015, the case manager for this matter sent a letter to the State of Western Australia (the State) enclosing a copy of the Extract from Schedule of Native Title Applications which shows details of the application. That letter informed the State that any submission in relation to the registration of this claim should be provided by 24 September 2015. The State has not provided any submission.
- The case manager, also on 9 September 2015, wrote to inform the applicant that any additional information should be provided by 24 September 2015. The applicant has not provided any additional information.

## Requirements of s 190A

[13] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C. This is known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A). I must therefore consider if the circumstances described in ss 190A(1A) or (6A) apply to the amended application, such that I need not consider it again for registration. I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim for the following reasons:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s 87A by the Court; and
- subsection 190A(6A) does not apply because the earlier claim was not accepted for registration under s 190A(6).

[14] I must therefore apply the full registration test to this amended application. 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.

[15] 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.

[16] In making this decision in relation to the application, it has been useful to consider the statement of reasons that I prepared for my decision dated 21 August 2015 in relation to the original application. I understand I must consider the entirety of the current application afresh against each registration test condition. However, in the interests of brevity, where there has been no change to the application and/or there is no new information before me to indicate any change to the circumstances which prevailed when I made my earlier decision, I have simply stated that the application satisfies the particular condition for the same reasons I provided when making my decision dated 21 August 2015. Further, where it is my view that the law in relation to a particular condition has not changed, I refer to and rely on my statement of that law within the reasons for my earlier decision.

[17] As discussed in my reasons below, I consider 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.

# 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.

[18] 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.

[19] 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 undertake any merit or qualitative assessment of the material for the purposes of s 190C(2). As explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*):

> 37 [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material …
> 39 [F]or the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — see also [16], [35] and [36].

[20] Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[21] 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.

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

**Native title claim group: s 61(1)**

[23] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group — Part A of the application at [3]. 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.

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

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

[25] Part B of the application contains the name and address for service of the applicant.

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

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

[27] 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.

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

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

[29] On 27 July 2015, the Court made orders granting leave to file an amended application. The applicant has not changed and no affidavits addressing the requirements of s 62(1)(a) from either of the persons comprising the applicant were filed with the amended application on 4 September 2015.

[30] In *Doepel*, Mansfield J stated that the s 62 affidavits were to accompany the application — at [16] and [88]. In *Drury v Western Australia* [2000] FCA 132, whilst dealing with an amendment of geographical contraction of a claim area, French J held that not all amendments of applications required the filing of new s 62 affidavits with an amended application — at [10]. However, the Court may 'direct affidavit evidence in support of amendments to be filed in an appropriate case' — at [14]. I therefore understand that the requirement to file new affidavits with an amended application is at the discretion of the Court.

[31] In this instance, the applicant has not changed. The amendments to the application predominantly make changes to the written description and map. The Court order granted leave to amend the application, but there is no reference in that order for the need to file fresh affidavits.

[32] In my view, the amendments do no seek to alter the claim in the application and given that the Court has not required the filing of fresh affidavits, I consider it appropriate to have regard to the affidavits filed with the original application. As the court in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 commented at [73], the Act is remedial in character and should be construed beneficially.

[33] I consider that the affidavits filed with the original application, from each of the persons jointly comprising the applicant, contain all 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.

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

**Details required by s 62(1)(b)**

[35] 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)*

[36] 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)*

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

*Searches: s 62(2)(c)*

[38] 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)*

[39] 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)*

[40] 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)*

[41] 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)*

[42] 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)*

[43] 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)*

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

*Conclusion*

[45] 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.

[46] The information before me that is relevant to this condition is essentially the same. The geospatial assessment completed for the amended application also indicates that the Tjiwarl application wholly overlaps the area covered by the current application. The remaining material remains unchanged.

[47] I have considered the material afresh and have decided, in light of the information described above and for the reasons outlined in my decision dated 21 August 2015, that 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).

[48] 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.

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

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to

authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

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

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

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[49] The information before me that is relevant to this condition is unchanged from that considered when making my decision dated 21 August 2015. There is no new information before me which would cause me to change that decision. I have considered the material afresh and have decided, for the reasons outlined in my earlier decision, that I am not satisfied that the requirements of s 190C(4)(b) are met.

[50] 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.

[51] The information that is relevant to this condition has been amended and I will therefore consider it in full.

[52] Schedule B contains a written description prepared by the Tribunal's geospatial services on 17 June 2015 and Central Desert Native Title Services on 14 July 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.

[53] Attachment C contains a colour copy of three maps titled 'Tjiwarl #2' prepared by the Central Desert Native Title Services on 14 July 2015. The map includes:

- the application area depicted by a bold outline;
- Tjiwarl claim boundary depicted by a dashed 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**

[54] The geospatial assessment indicates that the area covered by the application has been amended and reduced and does not include any areas which have not previously been claimed in the original application. The 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.

[55] 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].

[56] 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.

[57] 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.

[58] The information before me that is relevant to this condition is unchanged and there is no new information before me which would cause me to change my decision dated 21 August 2015. I have considered the material afresh and have decided, for the reasons outlined in my earlier decision, that 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).

[59] 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.

[60] The description of the native title rights and interests claimed is found in Schedule E of the application and is unchanged from that considered when making my earlier decision. There is no new information before me which would cause me to change that decision. Having reconsidered the information afresh, for the same reasons that I provided for my decision dated 21 August 2015, I remain satisfied that the description in Schedule E is sufficient to allow the native title rights and interests claimed to be readily identified.

[61] 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.

[62] It is my view that the statement of the law relevant to this condition at pp 19 and 20 of my decision dated 21 August 2015 is still correct. I also agree with my statement of the law relating to the three particular assertions at pp 20, 22, 23, 25 and 26 of my decision. In the interests of brevity, I do not restate any of this analysis of the law and simply refer to and rely on it for this fresh consideration of the amended application against s 190B(5).

[63] The information within the application at Schedules F, G and M are relevant to the factual basis and appear to be unchanged. I reviewed this material in the statement of reasons I provided for my decision dated 21 August 2015. I have looked at this material and my reasons and believe that I accurately related the contents of the material in my decision — see my statement of reasons at pp 20 – 26. In the interests of brevity, I do not propose to again set out the contents of that material in this decision and simply refer to and rely on my earlier reasons in this fresh consideration of the assertions at s 190B(5).

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

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

[65] The factual basis in relation to this subcondition is unchanged from that considered when making my earlier decision. I have read the material again and have afresh decided, for the reasons there outlined, that in my view 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;
- does not show the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [51];
- does not provide geographical particularity such that it is sufficient to support the assertion that the group has an association with the application area; and
- is not sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52].

[66] 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)

[67] The factual basis in relation to paragraph (b) is unchanged from that considered when making my decision dated 21 August 2015. I have read the material again and have decided afresh, for the reasons there outlined, that in my view the factual basis identifies the relevant pre-sovereignty society from which the claim group is descended and the laws and customs are derived. However, in my view, the factual basis:

- is insufficient to show 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;

- is insufficient to enable a genuine assessment of whether the current claim group's laws and customs are derived from those of the relevant pre-sovereignty society;
- is insufficient to support the assertion that the laws and customs currently observed and acknowledged are 'traditional', in the sense observed by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422; HCA 58, as they derive from the pre-sovereignty society.

[68] In light of the above information, I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(b).

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

[69] There has been no relevant change to the factual basis material in relation to this subcondition that would cause me to change my earlier decision. I have considered the information and have decided afresh, for the reasons there outlined, that in my view the factual basis does not explain the transmission and continuity of the native title rights and interests held in the application area in accordance with traditional laws and customs.

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

[71] 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.

[72] The description of the native title rights and interests claimed set out in Schedule E of the application and the information in support of whether those rights and interests can be prima facie established have not changed. I have considered the reasons that I made in relation to this condition in my decision dated 21 August 2015 and am of the view that the statement of law relevant to this condition, as set out at p 27, is still correct. In the interests of brevity, I do not restate any analysis of the law and simply refer to and rely on it for this fresh consideration of the amended application against s 190B(6).

[73] Having considered this condition afresh, I remain of the view that the requirements of s 190B(6) are not met and therefore rely on my reasons in my earlier decision.

[74] 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.

[75] The original application did not satisfy this condition of the registration test. There has been no relevant change either to the application or to the information before me which would cause me to change my decision. I have considered the reasons that I made in relation to this condition in my decision dated 21 August 2015 and am of the view that the statement of law is still correct and that I accurately related the contents of the material in my decision — see my statement of reasons at p 28. In the interests of brevity, I do not restate any analysis of the law and simply refer to and rely on it for this fresh consideration of the amended application against s 190B(7).

[76] Having considered this condition afresh, for the same reasons as my earlier decision, 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.

[77] 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.

[78] The earlier application satisfied this condition of the registration test. There has been no relevant change either to the application or to the information before me which would cause me to change my decision. I have considered the reasons that I made in relation to this condition in my decision dated 21 August 2015. I rely on the reasons in that decision and remain satisfied, having considered the requirements of this condition afresh, that the application satisfies the requirements of s 190B(8).

[79] 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.

[80] The original application satisfied this condition of the registration test. The information in the application or any other information before me has not changed in relation to the requirements of this condition. I have considered the conclusions that I made in relation to this condition in my decision dated 21 August 2015 and as there is no new information before me to cause me to reach a different decision, I rely on those reasons and remain satisfied in this fresh consideration of this condition that the application meets the requirements of s 190B(9).

[81] The application **satisfies** the condition of s 190B(9).

*[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** | **16 October 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:<br>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:<br>met |
| | s 190B(3)(a) | n/a |
| | s 190B(3)(b) | met |
| s 190B(4) | | met |
| s 190B(5) | | Aggregate result:<br>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:<br>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:**<br>**met** |
| | **re s 190B(9)(a)** | **met** |
| | **re s 190B(9)(b)** | **met** |
| | **re s 190B(9)(c)** | **met** |

*[End of document]*