



Registration Decision

Application name Annette Williams & Ors on behalf of the Wiluna People
(Wiluna #5) and State of Western Australia

Name of applicant Annette Williams, Yvonne Ashwin, Nicole Jackman

Federal Court of Australia No. WAD198/2024

NNTT No. WC2024/004

Date of Decision 26 September 2024

Claim accepted for registration

I have decided that the claim in the *Annette Williams & Ors on behalf of the Wiluna People (Wiluna #5) and State of Western Australia* application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth) ('Act').¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

¹ A section reference is to the *Native Title Act 1993* (Cth) ('Act'), unless otherwise specified.

Reasons for Decision

Cases cited

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215; (2012) 297 ALR 660 ('Anderson')

Corunna v Native Title Registrar [2013] FCA 372 ('Corunna')

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177; (2019) 273 FCR 350 ('Warrie')

Griffiths v Northern Territory of Australia [2007] FCAFC 178; (2007) 165 FCR 391 ('Griffiths')

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 ('Gudjala 2007')

Gudjala People # 2 v Native Title Registrar [2008] FCAFC 157; (2008) 171 FCR 317 ('Gudjala FC')

Gudjala People #2 v Native Title Registrar [2009] FCA 1572; (2009) 182 FCR 63 ('Gudjala 2009')

Martin v Native Title Registrar [2001] FCA 16 ('Martin')

McLennan v Queensland [2019] FCA 1969 ('McLennan')

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; (2002) 214 CLR 422 ('Yorta Yorta')

Northern Land Council v Quall [2020] HCA 33; (2020) 271 CLR 394 ('Quall HC')

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442 ('Alyawarr')

Northern Territory of Australia v Doepel [2003] FCA 1384; (2003) 133 FCR 112 ('Doepel')

Sampi v Western Australia [2005] FCA 777 ('Sampi')

Strickland v Native Title Registrar [1999] FCA 1530; (1999) 168 ALR 242 ('Strickland')

Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198; (2006) 155 FCR 107 ('Wakaman')

Western Australia v Native Title Registrar [1999] FCA 1591; (1999) 95 FCR 93 ('WA v NTR')

Western Australia v Strickland [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1 ('Ward HC')

WF (Deceased) on behalf of the Wiluna People v Western Australia [2013] FCA 755 ('Wiluna Determination')

Background

- [1] This decision relates to an application filed on behalf of the Wiluna #5 native title claim group for a determination of native title ('Wiluna #5 Claim'). It covers land and waters of approximately 3017 square kilometres over an area south of the Goldfields Highway, approximately 30 kilometres west of the township of Wiluna in the Central Desert region of Western Australia.
- [2] The Wiluna People have had their native title rights and interests recognised over a large area adjacent to the eastern boundary of the Wiluna #5 Claim, including in a determination made on 29 July 2013 in the first and third Wiluna claims ('Wiluna Determination'),² and a determination in the second Wiluna claim on 3 September 2013.³ On 5 August 2024, a fourth Wiluna Claim was accepted for registration on the Register of Native Title Claims ('Register') over an area adjacent to the southern border of the Wiluna Determination.
- [3] The Wiluna #5 Claim was filed on 22 July 2024. The Registrar of the Federal Court of Australia ('Court') gave a copy of the application and accompanying affidavits to the Native Title Registrar ('Registrar') on 23 July 2024 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.⁴

Preliminary considerations

Registration conditions

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which the Act refers to as dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [5] Given that the application was made on 22 July 2024 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [6] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Procedural fairness

- [7] The following steps were taken to ensure that procedural fairness was afforded:
- on 1 August 2024 a Senior Officer of the NNTT wrote to both the applicant and the State of Western Australia ('State') and invited any additional material or

² *Wiluna Determination*.

³ Orders of Jagot J in *BP (deceased) v Western Australia* (Federal Court of Australia, WAD241/2004, 3 September 2013), Attachment A Determination ('Wiluna #2 Determination').

⁴ Section 190A(1).

submissions in relation to the application of the registration test, with any material to be provided by 23 August 2024;

- on 12 August 2024, the applicant provided submissions and an anthropological report for the purpose of the registration test to the NNTT and to the State; and
- on 13 August 2024, a Senior Officer of the Tribunal wrote to the State to refer to this material and advise that any comment should be provided to the NNTT by 23 August 2024.

[8] As the State did not provide submissions or material in relation to either the application or the applicant's additional material provided on 12 August 2024, this concluded the procedural fairness process.

Information considered

[9] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

[10] In accordance with s 190A(3)(a), I have had regard to the information in the application and accompanying documents and the following material provided by the applicant on 12 August 2024:

- applicant's submissions on the application of the registration test ('Applicant's Submissions'); and
- an anthropological report titled 'A Report for Consideration in the Application of the Registration Test in the Matter of Wiluna #5 Native Title Claim' dated August 2024 ('Registration Report').

[11] There is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers under s 190A(3)(b).

[12] The State has not provided any submissions or information in relation to the application of the registration test that I must have regard to in accordance with s 190A(3)(c).⁵

[13] Section 190A(3) provides that I may also have regard to such other information as I consider appropriate. I have also considered it appropriate to have regard to a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 6 August 2024 ('Geospatial Assessment'). Given that the Wiluna #5 Claim is made on behalf of the same native title claim group, and claims the same native title rights and interests, as in the Wiluna #4 Claim, I have also had regard to my reasons for accepting the Wiluna #4 claim for registration on the Register, dated 5 August 2024 ('Wiluna #4 Registration Decision').

⁵ Section 190A(3)(c).

Section 190C: conditions about procedural and other matters — conditions met

Sections 190C(2) and ss 61 and 62: registration conditions about procedural and other matters – condition met

- [14] I have examined the application and for the reasons set out below, I am satisfied that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.
- [15] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek ‘...to ensure that the application contains “all details” required by s 61...’.⁶ As such, in my view s 190C(2) requires consideration of whether the application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.⁷

Section 61 – native title applications

- [16] **Section 61(1)** provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed. The application is made by the three persons named in the application as comprising the applicant. Attachment A contains a description of the native title claim group. Each of the persons comprising the applicant have deposed an affidavit for the purposes of s 62 and these have been filed in the Court and were provided under s 64 as documents accompanying the application (‘Applicant Affidavits’). The Applicant Affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.⁸ Having regard to this, I am satisfied that the application has been made in accordance with s 61(1).
- [17] **Section 61(2)** provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. In my view, nothing in the application or other material that I have considered suggests otherwise.
- [18] **Section 61(3)** requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the application and Part B states that the applicant is represented by Central Desert Native Title Services Ltd (‘CDNTS’) and includes the relevant address for service. As such, I am satisfied that the application contains the information required by s 61(3).

⁶ Doepele [35].

⁷ See also s 190D(3)(b).

⁸ Affidavits of Annette Williams affirmed 1 May 2024, Yvonne Ashwin affirmed 8 May 2024 and Nicole Jackman affirmed 8 May 2024 (‘Applicant Affidavits’), [1], [5].

[19] **Section 61(4)** requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons. In *Gudjala 2007*, Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).⁹ In my view, the description of the native title claim group contained at Attachment A of the application is sufficiently clear to confirm whether any particular person is a member of the claim group.¹⁰ As such, I am satisfied that the application contains the information required by s 61(4).

[20] **Section 61(5)** provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the application is made in the prescribed form and was accepted for filing by the Court on 23 July 2024.

Section 62(1), (1A) and (2): information etc. in relation to certain applications; claimant applications

[21] **Section 62(1)(a)** requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in subsection (1A). The application is accompanied by affidavits deposited by the three persons comprising the applicant. These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is an applicant in the application and a member of the native title claim group;
- the deponent believes that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application;
- the deponent believes that none of the area covered by the application is also covered by an approved determination of native title;
- the deponent believes that all of the statements made in the application are true;
- the deponent believes that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, because;
 - the description of the claim group includes all persons who hold the common or group rights according to traditional laws and customs;
 - as a senior knowledge holder, the deponent understands the process of decision-making required under traditional laws and customs;
 - the traditional decision-making process involves meeting to discuss who should be the applicant and agreement by consensus; and

⁹ *Gudjala 2007* [31]–[32].

¹⁰ Section 61(4)(b).

- a meeting was held in Wiluna, facilitated by CDNTS, at which the deponent was appointed as a member of the applicant in accordance with that process; and
 - no conditions were imposed on the authority of the applicant.
- [22] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1A)(a)–(f) and that as no conditions were imposed, s 62(1A)(g) is not applicable. I am therefore satisfied that the application is accompanied by the documents required by s 62(1)(a).
- [23] **Section 62(1)(d)** applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. Schedule L of the application indicates that there is no agreement under s 47C in relation to the application. As such, the requirement at s 62(1)(d) is not applicable.
- [24] **Section 62(2)(a)** requires that the application contains information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified. Schedule B of the application refers to Attachment B, which contains a written description of the external boundaries of the claim area and confirms that the claim area excludes the areas covered by three existing determinations of native title. Part C of Schedule B provides a description of those areas within the external boundaries that are not covered by the application. As such, I am satisfied that the application contains the information required by s 62(2)(a).
- [25] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Attachment C of the application contains a map showing the external boundaries of the claim area. As such, I am satisfied that the application contains the information required by s 62(2)(b).
- [26] **Section 62(2)(c)** requires that the application include details and results of searches of any non-native title rights and interests covered by the application. Schedule D of the application refers to Attachment D, which refers to ‘limited’ searches being undertaken by the applicant which have identified one local government area (the Shire of Wiluna) and two pastoral leases (Youno Downs (PL N04934) and Ullula (PL N049866)) within the external boundary of the claim area. Attachment D also refers to Attachment I, which contains the details of notices given under ss 24 and 29. Because Attachments D and I contain the details and results of the searches conducted on behalf of the claim group, I am satisfied that the application contains the information required by s 62(2)(c).
- [27] **Section 62(2)(d)** requires an application to contain a description of the native title rights claimed in relation to particular land or waters. This description must not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished. Schedule E of the application contains a description of the claimed native title rights and interests. In my view the description of the claimed rights and interests at Schedule E meets the requirements of s 62(2)(d) and so I am satisfied that the application contains the required information.

- [28] **Section 62(2)(e)** requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F of the application refers to Attachment F, which provides a general description of the relevant factual basis. As such, I am satisfied that the application contains the information required by s 62(2)(e).
- [29] **Section 62(2)(f)** requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application. Schedule G of the application refers to Attachment G, which lists the activities undertaken by members of the claim group in the claim area. As such, I am satisfied that the application contains the information required by s 62(2)(f).
- [30] **Section 62(2)(g)** requires an application to include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H of the application states that as at the date of filing there are no other applications or determinations of native title made in relation to the area covered by the application, and also refers to two previous applications in relation to the area that have been dismissed. As such, I am satisfied that the application contains the information required by s 62(2)(g).
- [31] **Section 62(2)(ga)** requires the application to include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the application refers to Attachment I, which contains a list including the relevant notices. As such, I am satisfied that the application contains the information required by s 62(2)(g).
- [32] **Section 62(2)(h)** requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. The list at Attachment I of the application includes the relevant notices, and as such I am satisfied that the application contains the information required by s 62(2)(h).
- [33] **Section 62(2)(i)** requires the application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it. Schedule IA of the application and the Applicant Affidavits indicate that no conditions were imposed on the authority of the applicant for the purposes of s 251BA. As such, the requirement at s 62(2)(i) is not applicable.

Conclusion on s 190C(2)

- [34] I am satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62, as set out above. As such, the condition at s 190C(2) is met.

Section 190C(3): no previous overlapping claim group – condition met

- [35] The condition at s 190C(3) requires that ‘no person included in the native title claim group for the application ... was a member of the native title claim group for any previous application’.

- [36] Although s 190C(3) is expressed in the past tense, the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision indicates that its purpose is served if it is interpreted in the present tense, such 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’.¹¹ Having regard to this, I understand that the purpose of s 190C(3) is to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. This purpose is achieved by preventing a claim from being registered if it includes members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that taking this approach more accurately reflects the intention of the legislature, rather than a more literal reading of s 190C(3).
- [37] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.¹²
- [38] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in subsections (a) to (c).¹³ These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and is on the Register.
- [39] Having regard to the Geospatial Assessment and my own searches of the NNTT’s databases, I am satisfied that there is no previous claim within the meaning of s 190C(3) that overlaps any of the area covered by the application.
- [40] As there is no previous overlapping application within the meaning of ss 190C(3)(a)–(c), this requirement need not be further assessed.

Section 190C(4): Identity of claimed native title holders – condition met

- [41] Under s 190C(4) the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body (‘RATSIB’),¹⁴ or the requirements in subsection (4AA) are met.¹⁵ Schedule R of the application states that the application has been certified by CDNTS, and refers to Attachment R which contains the certification under s 203BE. As such, I must consider whether the requirements of s 190C(4)(a) have been met.
- [42] Section 190C(4)(a) requires the Registrar to be ‘satisfied about the fact of certification by an appropriate representative body’, but is not to ‘go beyond that point’ and ‘revisit’ or ‘consider the correctness of the certification’.¹⁶ As such, I understand that my task is to identify the

¹¹ Explanatory Memorandum, *Native Title Amendment Bill 1997* (Cth) 303 [29.25], emphasis added.

¹² *Doepel* [16].

¹³ *Strickland FC* [9].

¹⁴ Section 190C(4)(a).

¹⁵ Section 190C(4)(b).

¹⁶ *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

appropriate representative body and be satisfied that the application is certified under s 203BE.

Does the certifying body have power to certify?

- [43] The Geospatial Assessment indicates that CDNTS is the relevant native title service provider responsible for the land and waters covered by the Wiluna #5 Claim. Paragraph 8 of the certification at Attachment R indicates that CDNTS have certified the application ‘pursuant to its certification functions’, and the Applicant’s Submissions state that CDNTS is the only RATSIB that could certify the Wiluna #5 Claim.¹⁷ The certificate is signed by the Chief Executive Officer of CDNTS under delegation from the board of CDNTS. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.¹⁸
- [44] Having regard to the above and for the same reasons as set out in the Wiluna #4 Registration Decision,¹⁹ I am satisfied that CDNTS is the appropriate certifying body and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

- [45] To meet the requirements of s 190C(4)(a), the certification must comply with the provisions of s 203BE(4)(a) to (c).
- [46] **Section 203BE(4)(a)** requires a certification to contain a statement of the representative body’s opinion as per s 203BE(2), that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, any conditions under s 251BA on the authority that relate to the making of the application have been satisfied, and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group. I am satisfied that the certification complies with this requirement because paragraph 2 contains the required statements of opinion under s 203BE(2).
- [47] **Section 203BE(4)(b)** requires a certification to include brief reasons for the representative body’s opinion. I am satisfied that the certification at Attachment R meets this requirement because the brief reasons are set out at paragraphs 3 to 6 of the certification, including the following information:
- CDNTS staff have provided legal and anthropological services in relation to the area covered by the application since 2007 and that the ‘core composition of the traditional owner group has largely remained the same throughout that period’;
 - CDNTS staff and anthropologists have attended previous meetings with the native title claim group and observed their traditional decision-making process;

¹⁷ Applicant’s Submissions provided on 12 August 2024 (‘Applicant’s Submissions’) [52].

¹⁸ *Quall HC* [48], [63] and [93].

¹⁹ Wiluna #4 WC2024/001 (registration test decision dated 5 August 2024) (‘Wiluna #4 Registration Decision’), page 9–10 [45]–[49].

- all reasonable efforts have been made by CDNTS staff to identify members of the claim group and provide every reasonable opportunity for them to participate in the decision-making process; and
- the decision to authorise the applicant in the Wiluna #5 Claim was made in accordance with the traditional decision-making processes of the claim group.

[48] **Section 203BE(4)(c)** applies where the application area is covered by an overlapping application for determination of native title. Paragraph 7 of the certification indicates that there are no other overlapping applications that cover the application area. This is confirmed in the Geospatial Assessment. As such, I am satisfied that s 203BE(4)(c) is not applicable to the certification.

Conclusion on s 190C(4)

[49] For the above reasons, I am satisfied that the certification at Attachment R meets the requirements of s 203BE(4) of the Act. I am therefore satisfied that the condition at s 190C(4)(a) is met because the application has been properly certified under Part 11 by each relevant RATSIB.

[50] I note that once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.²⁰

Section 190B: conditions about merits of the claim – conditions met

Section 190B(2): identification of area subject to native title – condition met

[51] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.

[52] Attachment B of the application describes the application area by a metes and bounds description referencing the boundaries Youno Downs Pastoral Lease, native title determinations and the Goldfields Highway. Attachment B notes for the avoidance of doubt that the application area excludes areas subject to three native title determinations. Part B of Schedule B indicates that the applicant seeks to apply ss 61A(4), 47, 47A and 47B, where these provisions are able to be applied, and Part C sets out general exclusions.

[53] Attachment C of the application comprises a map prepared by Geospatial Services, titled 'Wiluna #5' dated 30 November 2023. The map shows the boundary of the claim area depicted by a bold blue outline, labelled commencement point, land tenure labelled by reserve and lease identifiers, a labelled road, legend, scalebar, locality map, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map.

[54] The Geospatial Assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty. I agree with the conclusion of the Geospatial

²⁰ Doepel [80].

Assessment and am therefore satisfied that the written description and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters. As such, the application meets the requirements of s 190B(2).

Section 190B(3): identification of the native title claim group – condition met

[55] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,²¹ or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.²²

[56] When assessing the requirements under s 190B(3), I understand that:

- I am required to address only the content of the application;²³
- ‘only ... the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;²⁴
- where a claim group description contains a number of paragraphs, 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’;²⁵ and
- to determine whether the conditions or rules specified in the application have 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’.²⁶

[57] The description of the native title claim group is identical to that contained in the Wiluna #4 Claim. The description is contained at Attachment A and is as follows:

1. The native title claim group are persons who:
 - (a) have rights in part or all of the application area through descent (whether from a parent or grandparent from the area or who died and is buried in the area), conception and/or birth within the area, long-term residence within the area, high ritual knowledge within the area or responsibility for sites within the area; and
 - (b) who are recognised under the traditional laws and customs by other native title holders as having rights in the application area.
2. At the date of this application, this includes the descendants of the following persons who assert and are recognised under the relevant traditional laws and customs by the other native title claimants as having rights in the application area:

²¹ Section 190B(3)(a).

²² Section 190B(3)(b).

²³ *Doepel* [51]; *Gudjala 2007* [30].

²⁴ *Gudjala 2007* [33].

²⁵ *Ibid* [34].

²⁶ *WA v NTR* [67].

- (a) descendants of the union of the following people:
[17 named couples]
- (b) the descendants of the following people:
[33 named individuals]
- (c) the following people and the descendants of their unions with the listed deceased partner:
[4 named couples]
- (d) the following people and their descendants:
[8 named individuals]

[58] I refer to my reasons in the Wiluna #4 Registration Decision in relation to this condition.²⁷ I have reviewed the description of the claim group in the Wiluna #5 Claim afresh, and for the same reasons as set out in the Wiluna #4 Registration Decision, I am satisfied that the description of the claim group in the Wiluna #5 Claim meets the requirements of s 190B(3).

Section 190B(4): identification of claimed native title – condition met

[59] Section 190B(4) requires the Registrar to 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. I understand that in considering this condition, I am confined to the material contained in the application itself.²⁸

[60] I understand that my task pursuant to s 190B(4) is to identify whether the rights and interests claimed are ‘readily identifiable’. In *Doepel*, Mansfield J noted that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.²⁹ I note that a description of a native title right or interest that is broadly asserted ‘does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)’.³⁰

[61] The description of the claimed native title rights and interests at Schedule E of the application is identical to that contained in the Wiluna #4 Claim, and is as follows:

1. In those areas where native title has not previously been extinguished, or where any previous extinguishment may be disregarded by operation of sections 61A(4), 47, 47A or 47B of the *Native Title Act 1993* (Cth), the nature and extent of the native title rights and interests claimed in the application are the right to possession, occupation, use and enjoyment of those areas to the exclusion of all others.
2. In all other areas, the native title rights and interests claimed in the application are the right to:
 - (a) access, remain in and use the application area;
 - (b) access, take and use the resources of the application area for any purpose;

²⁷ Wiluna #4 Registration Decision, pages 13–14 [65]–[72].

²⁸ *Doepel* [16].

²⁹ *Ibid* [99], [123].

³⁰ *Strickland* [60]. See also *Strickland FC* [85]–[87].

- (c) engage in spiritual and cultural activities in the application area; and
- (d) maintain and protect areas, sites and places of significance on the application area, insofar as those rights and interests do not confer possession, occupation, use and enjoyment of the lands and waters covered by the application to the exclusion of all others.

[62] I refer to my reasons in the Wiluna #4 Registration Decision in relation to this condition.³¹ I have reviewed the claimed rights and interests in the Wiluna #5 Claim afresh, and for the same reasons as set out in the Wiluna #4 Registration Decision, I am satisfied that the requirements of s 190B(4) are met.

[63] I note that I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under s 190B(6).

Section 190B(5): factual basis for claimed native title – condition met

[64] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to 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 interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[65] In *Doepel*, Mansfield J stated that the task under s 190B(5):

requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests... The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.³²

[66] As such, when assessing the requirements of this condition, I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

[67] Relevant to the task under s 190B(5) is the guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) ‘general description of the factual basis on which it is asserted that the native title rights and interests claimed exist...’:

The fact that the detail specified by s 62(2)(e) is described as “a general description of the factual basis” is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related

³¹ Wiluna #4 Registration Decision, pages 14–15 [73]–[76].

³² *Doepel* [17]; *Gudjala FC* [57], [83].

sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.³³

[68] Justice Dowsett further clarified the task under s 190B(5) in *Gudjala 2009*, as follows:

In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.³⁴

[69] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a 'genuine assessment' of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide 'an outline of the facts of the case'.³⁵

[70] The relevant factual basis material is set out in Attachment F and the Registration Report. I have also had regard to the Applicant's Submissions. Given that the material in Attachment F is largely the same as that in the Wiluna #4 Claim and that this claim is made on behalf of the same claim group and claims the same native title rights and interests, I have also had regard to the Wiluna #4 Registration Decision. The Applicant's Submissions note that the Wiluna #5 Claim seeks to extend the western boundary of the determined Wiluna area, and the Registration Report notes that 'the Wiluna #5 claim is geographically, socially, and culturally affiliated with the Wiluna townsite and Wiluna Determination area'.³⁶ As such, I have also had regard to the previous Wiluna determinations,³⁷ as set out below.

[71] I have set out my consideration under each of the assertions at s 190B(5)(a) to (c) in turn below.

Section 190B(5)(a): the association of the native title claim group and their predecessors with the area

[72] Section 190B(5)(a) was recently considered by Reeves J in *McLennan*. His Honour set out the relevant principles as follows:

³³ *Gudjala FC* [92].

³⁴ *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

³⁵ *Gudjala 2009* [29].

³⁶ Registration Report, page 9 [31].

³⁷ *Wiluna Determination*; Orders of Jagot J in *BP (deceased) v Western Australia* (Federal Court of Australia, WAD241/2004, 3 September 2013) ('Wiluna #2 Determination').

To satisfy the condition in s 190B(5)(a) of the [Act], it will be sufficient if the applicant demonstrates that:

- (a) “the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since sovereignty or European settlement” [*Gudjala 2007* [52]];
- (b) “there is an association between the whole group and the area, although not all members must have such association at all times” [*Gudjala 2007* [52]]; and
- (c) “there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’” [*Martin* [26] and *Corunna* [39]].³⁸

[73] In addition, I note the comments of Dowsett J in *Gudjala 2007* that s 190B(5)(a) requires sufficient factual material to support the assertion that the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).³⁹

[74] The Registration Report states that ‘effective sovereignty’ occurred in the area in around the early 1900s.⁴⁰ European exploration, the discovery of resources and settlement occurred in the Wiluna townsite and Wiluna Determination area, such as through the Elder expedition and the discovery of gold in the area in 1892, although the records do not specifically refer to Aboriginal people in the area.⁴¹ Following this, the Aboriginal population would have been impacted by the influx of more than three-thousand prospectors per month.⁴² From 1906, the establishment of the Canning Stock Route near the township of Wiluna resulted in the capture of Aboriginal people to exploit their traditional knowledge of the area and in violence between Aboriginal and non-Aboriginal people in the area.⁴³ By the 1940s, many Aboriginal People, including the predecessors of the claim group, were employed as drovers or assisted to survey and build the Canning Stock Route.⁴⁴ As such, the Registration Report concludes that ‘by 1906, Europeans were having a significant impact on the lives of the First Nations people from this area’.⁴⁵

[75] The Wiluna #5 Claim lies on the western edge of the regional society known as the Western Desert Cultural Bloc.⁴⁶ The Registration Report sets out the material relating to the western expansion of the Western Desert Cultural Bloc,⁴⁷ indicating that as a result of this expansion the Western Desert Cultural Bloc encompasses the whole of the Wiluna #5 Claim area.⁴⁸ The Registration Report concludes that the traditional laws and customs of the claim group are

³⁸ *McLennan* [28], citations incorporated from original.

³⁹ *Gudjala 2007* [39].

⁴⁰ Registration Report, page 10 [37].

⁴¹ *Ibid*, page 9 [31]–[32], page 10 [37].

⁴² *Ibid*, page 9 [32].

⁴³ *Ibid*, page 9 [33]–[34].

⁴⁴ *Ibid*, page 9–10 [35]–[36].

⁴⁵ *Ibid*, page 10 [37].

⁴⁶ *Ibid*, page 5 [13].

⁴⁷ *Ibid*, pages 11–15 [43]–[48].

⁴⁸ *Ibid*, page 13 [46].

embedded into the unified society of the Western Desert Cultural Bloc.⁴⁹ This is important because, as noted in the Wiluna #4 Registration Decision and the Wiluna Determination, although there may be limited direct ancestral links,⁵⁰ in accordance with the traditional laws and customs of the Western Desert People, the claim group have acquired native title rights and interests as their predecessors have migrated into the area.⁵¹ The Applicant's Submissions also refer to the material in the Registration Report that details the methods by which native title rights and interests in relation to the claim area are acquired,⁵² as reflected in the claim group description, and that '[t]hese pathways of connection do not require those who currently hold native title to be biologically descended from those who occupied the Claim Area at sovereignty'.⁵³ The Registration Report also refers to anthropological material recognising that looking after Country in accordance with Western Desert law and custom has become ownership through the generations.⁵⁴ As a result, the claim group refer to the area as 'Wiluna Martu Country', noting that Martu Wangka is a language widely spoken in the Western Desert region.⁵⁵

- [76] This is demonstrated in the Registration Report, including by reference to evidence of warta / jarra putarl (trees) with markings from having shields or traditional tools cut out, indicating 'that predecessors of the claimants have been interacting with this Country and making use of the natural resources it has to offer in order to practice their traditional laws and customs'.⁵⁶ Further examples include statements from members of the claim group that they have been in the claim area 'back a long way, for many generations. Martu people always been going through that country'.⁵⁷ Members of the claim group also describe how they have been 'entrusted to protect, maintain and pass on the Tjukurrpa and sacred sites in the claim area by the "original people"'.⁵⁸
- [77] Attachment F refers to the association of the claim group to the area through shared belief, as part of the Western Desert Cultural Bloc, in the Tjukurrpa to explain the existence and form of the landscape.⁵⁹ The Registration Report refers to multiple Tjukurrpa in the claim area, including gender restricted stories, and states that natural features in the claim area, 'such as the yapu (rocks) and gnamma (rockholes), reflect the beings of the Tjukurrpa and their movements across the country'.⁶⁰ The Registration report provides further information in relation to this, as follows:

this Tjukurrpa connects multiple sacred sites, within the Wiluna #5 claim area, to the west of Ullula, which are now gender restricted locations that only women of the claim group are allowed to visit, maintain, and practice culture at.

⁴⁹ Ibid, page 15 [51].

⁵⁰ Wiluna #4 Registration Decision, page 17 [88]; *Wiluna Determination* [14(j)].

⁵¹ Registration Report, page 25 [104].

⁵² Ibid, pages 19–20 [73]–[76].

⁵³ Applicant's Submissions, page 6 [28].

⁵⁴ Registration Report, page 24 [96].

⁵⁵ Ibid, pages 28–29 [111]–[112].

⁵⁶ Ibid, page 32 [123].

⁵⁷ Ibid, page 21 [83].

⁵⁸ Ibid, page 23 [91].

⁵⁹ Form 1, Attachment F [2(a)].

⁶⁰ Registration Report, page 17 [62]–[64].

Women continue to visit these specific locations with young girls to ensure the intergenerational transfer of Tjukurrpa and the associated laws and customs. The act of visiting these sites, passing on the related history and narratives, maintaining them and practicing rituals, demonstrates claimants' ongoing connection to, and ownership of, the Wiluna #5 claim area, in accordance with the Western Desert traditional laws and customs.⁶¹

- [78] The material also refers to descriptions by members of the claim group of other Dreamings that cross the claim area, such as the Karlaya Tjukurrpa (Emu Dreaming).⁶² Although the claim area is generally unoccupied, with some members of the claim group instead residing nearby at the township of Wiluna,⁶³ the Registration Report provides information in relation to the current association of the claim group with the area, as follows:

Youno Downs and Noibla remain popular locations for claimant families to visit for hunting and camping trips. These two pastoral leases and associated outstations have remained largely unrestricted for claimants and thus frequented for practicing traditional law and custom ...⁶⁴

- [79] In addition, members of the claim group describe their association with the claim area, for example member of the applicant Ms Annette Williams shares traditional knowledge 'with younger claimants during on-Country trips and with non-Aboriginal people in cultural awareness training presentations and activities'.⁶⁵ The Registration Report states that all of the claimants spoke of visiting the claim area with their extended families for hunting and camping trips.⁶⁶ One member of the claim group described being out on the Wiluna #5 claim area recently with her family.⁶⁷

- [80] I also refer to the general information contained in Attachment F in relation to this condition, which is in largely identical terms in the Wiluna #4 Claim and set out in the Wiluna #4 Registration Decision.⁶⁸ The Wiluna Determination also indicates that the Wiluna People are Western Desert People with rights, responsibilities and associations with the adjoining determination area.⁶⁹

- [81] From the above, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertion that members of the claim group and their predecessors have an association with the claim area. For similar reasons to those set out in the Wiluna #4 Registration decision,⁷⁰ I consider that although there is little detail relating to particular apical ancestors of the claim group, the material indicates that the association of the claim group is derived from the traditional laws and customs of the Wiluna People as members of the wider Western Desert society. The Registration Report demonstrates that the Wiluna #5 Claim area contains important Tjukurrpa and that members of the claim group have rights and

⁶¹ Ibid, page 16 [59]–[60].

⁶² Ibid, page 15 [49].

⁶³ Ibid, page 6 [19]–[21], page 30 [118].

⁶⁴ Ibid, pages 6–7 [21]. Noibla is roughly in the centre of the claim area, as depicted in the map at page 8 (Figure 2: The Wiluna #5 proposed claim area) of the Registration Report.

⁶⁵ Ibid, page 24 [94].

⁶⁶ Ibid, page 34 [127].

⁶⁷ Ibid, page 34 [129].

⁶⁸ Wiluna #4 Registration Decision, pages 18–19 [89]–[90].

⁶⁹ Wiluna Determination [14(e)].

⁷⁰ Wiluna #4 Registration Decision, page 20 [97].

responsibilities relating to the claim area. As such, I am satisfied that the factual basis material is sufficient to support the assertion of an association between the whole group and the claim area within the meaning of s 190B(5)(a).

Section 190B(5)(b): traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests

[82] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. The definition of ‘native title rights and interests’ in s 223(1)(a) provides that those rights and interests must be ‘possessed under the traditional laws acknowledged by, and traditional customs observed’ by the native title holders.

[83] In *Yorta Yorta*, the High Court observed that laws and customs are ‘traditional’ where:

- ‘the origins and content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to the assertion of British sovereignty,⁷¹ where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;⁷²
- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;⁷³
- the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;⁷⁴
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.⁷⁵

[84] In *Gudjala 2009*, Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis, including that:

- it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;⁷⁶
- where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;⁷⁷ and

⁷¹ *Yorta Yorta* [46].

⁷² *Ibid* [49].

⁷³ *Ibid* [47].

⁷⁴ *Ibid* [46], [79].

⁷⁵ *Ibid* [87].

⁷⁶ *Gudjala 2009* [37], [52].

⁷⁷ *Ibid* [40].

- the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.⁷⁸

[85] I also note the observations of the Full Court in *Warrie*, that although

a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character', the Act does not 'require establishment of some overarching "society" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.'⁷⁹

[86] I refer to my consideration of this condition in the Wiluna #4 Registration Decision, in particular noting that the relevant material at Attachment F is largely identical.⁸⁰ As noted in those reasons, the belief in the Tjukurrpa is a central feature of the traditional laws and customs of the Wiluna People. This is also reflected in the Registration Report,⁸¹ which states that

Wiluna #5 claimants continue to observe and adhere to the traditional laws and customs which emanate from the Tjukurrpa. Examples of this can be seen in everyday life from the maintenance and care of animals and significant sites on Country and relationships within their community.⁸²

[87] The Registration Report details several Tjukurrpa that travel through and are associated with the Wiluna #5 Claim area, including the Karlaya Tjukurrpa (Emu Dreaming), Wati Kutjarra Tjukurrpa (Two Men Dreaming) and restricted women's Tjukurrpa.⁸³

[88] The material also refers to specific laws and customs, for example members of the claim group refer to having the right to undertake traditional burns on the claim area:

Traditional burning, also referred to as 'cultural', 'mosaic' or 'cool' burning, is a common practice for claimants to perform on their Country. [A member of the claim group] explained that "Burning is very important for Country. Very important." as it encourages the regrowth of native plants, attracting wildlife to the area thus creating hunting opportunities for people... [Another member of the claim group] reiterated, "we (Wiluna #5 claimants) can burn it (Country)...we been living on land all of our life and we know what to do" ... [and] asserts that her family's long-term connection and knowledge give them the right to burn Country "proper way".⁸⁴

[89] The traditional practices outlined in the Registration Report are said to have their origins in the pre-sovereignty Western Desert society and reflect the 'concern and care that claimants feel for their Country and the desire and responsibility they have to carry out their law and custom'.⁸⁵

⁷⁸ Ibid [29], [54].

⁷⁹ *Warrie* [107]; see also *Alyawarr* [78].

⁸⁰ Wiluna #4 Registration Decision, pages 22–23 [102]–[106].

⁸¹ Registration Report, pages 15–16 [54].

⁸² Ibid, page 16 [55].

⁸³ Ibid, page 16 [56]–[59].

⁸⁴ Ibid, page 36 [130] (references removed).

⁸⁵ Ibid, page 36 [1312].

- [90] The factual basis material also sets out how language spoken by Wiluna People is aligned with the Western Desert Cultural Bloc, with the Martu Wangka language identified in relation to the Wiluna #5 Claim area, although language is not a direct indicator of Country.⁸⁶ Nevertheless, members of the claim group refer to themselves as ‘Mardu People’ or the claim area as ‘Wiluna Martu Country’.⁸⁷
- [91] I am satisfied that the factual basis material in relation to the Wiluna #5 Claim is sufficient to enable a ‘genuine assessment’ of whether there exist traditional laws acknowledged and customs observed by the Wiluna People that give rise to the claim to native title rights and interests. As noted above, much of the material set out in the Wiluna #4 Registration Decision and Wiluna Determination is also relevant to my assessment of this condition in the Wiluna #5 Claim. In my view, the material at Attachment F and the Registration Report, read together with the Wiluna Determination, demonstrates the existence of the traditional laws and customs of the Wiluna People in relation to the Wiluna #5 Claim. As such, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

Section 190B(5)(c): the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

- [92] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with traditional laws and customs. The traditional laws and customs referred to in s 190B(5)(c) are those referred to under s 190B(5)(b).⁸⁸
- [93] I understand that continuity may be inferred where there is ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs’.⁸⁹
- [94] I note that the material in Attachment F in relation to continuity of native title is the same in the Wiluna #5 Claim as it is in Wiluna #4, and I refer to my consideration of this, and in relation to the Wiluna Determination, in the Wiluna #4 Registration Decision.⁹⁰
- [95] In addition, the Registration Report includes examples of senior members of the claim group passing on their responsibilities for Country, for example
- Although [a senior member of the claim group] no longer resides within the claim area, her knowledge and responsibilities are being passed on to younger claimants to learn and practice the relevant law and custom of the claim area.⁹¹
- [96] Member of the applicant, Ms Yvonne Ashwin, describes knowing the claim area that ‘[t]he old people showed us. Then we tell the young people, their daughters and granddaughters’.⁹²

⁸⁶ Ibid, pages 28–29 [109]–[117].

⁸⁷ Ibid, pages 28–29 [111].

⁸⁸ *Martin* [29].

⁸⁹ *Gudjala* 2009 [33].

⁹⁰ Wiluna #4 Registration Decision, page 24 [112], page 25 [116].

⁹¹ Registration Report, page 23 [92].

⁹² Ibid, page 25 [101].

Another member of the claim group describes teaching his son to hunt just like his own father's generation had taught him, and that his son now teaches the next generation about traditional cooking methods.⁹³

- [97] The Applicant's Submissions also refer to the Tjukurrpa, and state that members of the claim group feel a responsibility to pass on knowledge of the Tjukurrpa to younger generations.⁹⁴ The submissions refer to the following material from the Registration Report:

[a member of the claim group] explains "there is song, dance, story with every Tjukurrpa" which should be learnt, practiced, and imparted to the younger generation. This responsibility to inherit and pass on cultural knowledge and practices to the next generation is crucial to foster the continuation of the Western Desert culture and custom. [The claim group member]'s statement demonstrates how Wiluna #5 claimants follow laws and customs which have derived from the Tjukurrpa and been shared between generations.⁹⁵

- [98] In my view, the factual basis material contains sufficient detail to enable a 'genuine assessment' of the condition at s 190B(5)(c). The material in the Registration Report, including the statements of members of the claim group demonstrate the importance of maintaining responsibilities for the Tjukurrpa in the claim area by passing them on to the younger generations. The material shows that the Wiluna People have continued to hold the native title in accordance with the traditional laws and customs of the Western Desert Bloc through this transmission from generation to generation. In my view, the material demonstrates that the Wiluna People have maintained a connection to their traditional laws and customs that existed in the pre-sovereignty society and continue to this day. I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

Section 190B(6): prima facie case – condition met

- [99] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.⁹⁶
- [100] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.⁹⁷ As a 'more onerous test [is] to be applied to the individual rights and interests claimed' than under s 190B(5),⁹⁸ I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.⁹⁹

⁹³ Ibid, page 34 [128].

⁹⁴ Applicant's Submissions, page 7 [32].

⁹⁵ Registration Report, page 17 [61].

⁹⁶ Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

⁹⁷ *Doepel* [16].

⁹⁸ Ibid [127], [132].

⁹⁹ *Yorta Yorta* [86]; *Gudjala 2007* [86].

[101] In *Gudjala 2007*, Dowsett J indicated that s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).¹⁰⁰ As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[102] Justice Kirby observed in *Ward HC* that ‘for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest “in relation to” land or waters’.¹⁰¹ The term “in relation to” is here to be given a ‘wide import’.¹⁰²

[103] The claimed native title rights and interests are set out above at paragraph 61. I consider that each of these are in relation to land or waters. The claimed rights and interests are identical to those claimed in the Wiluna #4 Claim and are largely consistent with those recognised in the adjoining Wiluna Determination.¹⁰³ As such, I generally refer to my reasons in the Wiluna #4 Registration Test in relation to this condition. I have set out below the relevant material in the Registration Report that relates particularly to the claim area in Wiluna #5. I also refer to the above material in relation to the condition at s 190B(5).

Exclusive rights to possession, occupation, use and enjoyment of the lands and waters

[104] Paragraph 1 of Schedule E provides that over areas where native title has not previously been extinguished or where prior extinguishment can be regarded under the provisions of the Act, the claim group claims ‘the right to possession, occupation, use and enjoyment of those areas to the exclusion of all others’.

[105] I note the comments of the High Court in *Ward HC*, that exclusive rights are ‘the rights under traditional law and custom to be asked permission and to “speak for country” that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others’.¹⁰⁴

[106] The Full Court held in *Griffiths* that:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. If control of access to country flows from spiritual necessity because of the harm that ‘the country’ will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a ‘spiritual affair’. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of

¹⁰⁰ *Gudjala 2007* [85]–[87].

¹⁰¹ *Ward HC* [577].

¹⁰² *Alyawarr* [93].

¹⁰³ *Wiluna Determination*, Attachment A Determination, paragraphs 4 and 5; *Wiluna #2 Determination*, Attachment A, paragraph 3.

¹⁰⁴ *Ward HC* [88].

sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.¹⁰⁵

[107] In *Sampi*, French J (as his Honour then was) noted that:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.¹⁰⁶

[108] The Applicant's Submissions in relation to the claimed exclusive rights and interests state as follows:

the right to speak for and protect country is a fundamental aspect of the acknowledgment of land ownerships. The *Tjukurrpa*, which constitutes a system of Aboriginal law, customary land entitlements and pattern of life, was established by the ancestral beings of the claimants.¹⁰⁷

[109] The Registration Report provides further detail, including:

Entitlement to access Country across the Western Desert is a privilege that must be obtained by anyone who does not identify as a Traditional Owner or Custodian of the area. Asserting the right to exclude or permit someone to access your Country, is common across the Western Desert society and something that continues to be practiced in Wiluna #5 today.¹⁰⁸

[110] This is demonstrated in statements by members of the claim group, that 'no whitefellas' can stop Wiluna People accessing the claim area and that instead others should ask their permission otherwise they could 'get in trouble' or 'get sick'.¹⁰⁹ The Registration Report states that the rights to allow or deny outsiders access to the claim area is derived from the roles and responsibilities as Wiluna People,¹¹⁰ with elders, senior knowledge holders and wati (initiated men) being the only persons able to lead others through Country.¹¹¹ Harm and punishment can also follow where the protocols relating to gender restrictions are contravened.¹¹²

[111] As noted in the Wiluna #4 Registration Decision,¹¹³ the list of activities at Attachment G (which is identical in Wiluna #4 and Wiluna #5), also refers to making decisions about the use of the claim area and controlling access.

[112] Having regard to the material above, my reasons in the Wiluna #4 Registration Decision and the Wiluna Determination, I am satisfied that the factual basis material demonstrates that the

¹⁰⁵ *Griffiths* [127].

¹⁰⁶ *Sampi* [1072].

¹⁰⁷ Applicant's Submissions, page 8 [36].

¹⁰⁸ Registration Report, page 36 [132] (references removed).

¹⁰⁹ *Ibid*, page 36 [133].

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*, page 37 [135].

¹¹² *Ibid*.

¹¹³ Wiluna #4 Registration Decision, pages 28–29 [133].

claimed exclusive rights and interests can be prima facie established in relation to the Wiluna #5 Claim.

Non-exclusive rights and interests

[113] Paragraph 2 of Schedule E claims non-exclusive rights and interests to access and remain on the area, access, take and use the resources of the area, engage in spiritual and cultural activities and maintain and protect areas, sites and places of significance.

[114] I refer to my consideration of the condition at s 190B(5), in particular the material in the Registration Report set out above at paragraphs 77 to 79 in relation to accessing, hunting and camping on the claim area, and at paragraph 88 in relation to conducting cultural activities.

[115] In addition, the Registration Report refers to the work of the Wiluna Martu Rangers to construct various facilities on the claim area that ‘support families that visit the claim area for camping, hunting, gathering and ceremonial activities’,¹¹⁴ as well as ‘recent and upcoming operations, such as on-Country workshops and training, surveying and tracking of wildlife and Tjukurrpa sites, and cultural prescribed burning practices’.¹¹⁵

[116] The Registration Report provides further information about the protection of sites in the Wiluna #5 Claim area, where members of the claim group

take part in programs which facilitate young women and girls to travel on-Country and participate in the cleaning of rockholes at women’s sacred sites throughout the claim area. Such programs ... are to “keep [the rockholes] clean for birds...to have water” and ensure young people are educated on how to look after their Country.¹¹⁶

[117] The material includes several examples of members of the claim group hunting, gathering natural resources, and cooking using traditional methods on the claim area, and many members of the claim group ‘expressed that they travel all over the Wiluna #5 claim area as bush food and medicine is abundant throughout’.¹¹⁷

[118] As noted in the Wiluna #4 Registration Decision, the list of activities at Attachment G also supports each of the claimed non-exclusive rights and interests.¹¹⁸

[119] Having regard to the above, as well as the material set out in the Wiluna #4 Registration Decision and the Wiluna Determination, in my view the material demonstrates that the Wiluna People exercise each of the claimed native title rights and interests in accordance with their traditional laws and customs. I consider that the material in the Registration Report sufficiently demonstrates that the exercise of these rights and interests extends throughout the Wiluna #5 Claim area. As such, I am satisfied that the requirements of s 190B(6) are met in respect of each of the claimed non-exclusive rights and interests. This condition is met.

¹¹⁴ Registration Report, page 30 [120].

¹¹⁵ Ibid, page 30 [122].

¹¹⁶ Ibid, page 34 [126] (references removed).

¹¹⁷ Ibid, pages 34–35 [128]–[129].

¹¹⁸ Wiluna #4 Registration Decision, pages 30 [137].

Section 190B(7): traditional physical connection – condition met

[120] Section 190B(7) requires the Registrar to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[121] Justice Dowsett observed in *Gudjala* 2009 that the traditional physical connection under s 190B(7) ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.¹¹⁹ ‘Traditional’ as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted 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.¹²⁰

[122] In *Doepel*, Mansfield J stated that the task of the Registrar under s 190B(7), requires ‘some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration’.¹²¹

[123] Having regard to this, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary ‘traditional’ physical association with the application area.

[124] The material in the Registration Report contains many examples of the traditional physical connection of members of the claim group with the Wiluna #5 Claim area, including one member of the claim group who describes that ‘I been there (the Wiluna #5 claim area) last weekend, four nights, me and my little family and aunty’.¹²²

[125] The Registration Report also states that:

All the claimants shared stories of their extended families visiting areas settled by non-Aboriginal people within the Wiluna #5 claim area such as Ullula Station, Noibla, and Youno Downs for hunting and camping trips.¹²³

[126] Having regard to the above, I am satisfied that the application establishes that at least one member of the claim group currently has a traditional physical connection with the lands and waters of the Wiluna #5 Claim area. As such, in my view the condition at s 190B(7) is met.

¹¹⁹ *Gudjala* 2009 [84].

¹²⁰ *Yorta Yorta* [86].

¹²¹ *Doepel* [18].

¹²² Registration Report, page 34 [129].

¹²³ *Ibid*, page 34 [127].

Section 190B(8): no failure to comply with s 61A – condition met

[127] Section 190B(8) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that the application should not have been made because it does not comply with s 61A.

[128] **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. Each of the members of the applicant depose that none of the area covered by the application is also covered by an approved determination of native title.¹²⁴ This is confirmed in the geospatial assessment and my own searches of the Tribunal's database. Paragraph 3 of Attachment B confirms that the claim area excludes three listed native title determinations.

[129] **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 s 61A(4) apply. Any areas where a previous exclusive possession act was done is specifically excluded from the area covered by the application.¹²⁵ Schedule B states that the applicant seeks to apply ss 61A(4), 47, 47A or 47B over any areas within the application area where they are able to be applied.¹²⁶

[130] **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. I consider that the terms of Schedules B and E confirm that the application does not claim exclusive rights and interests over areas where there has been a previous non-exclusive possession act.

[131] Having regard to the above, I am satisfied that there is no failure to comply with s 61A and therefore the application meets the requirements of s 190B(8).

Section 190B(9): no extinguishment etc. of claimed native title – condition met

[132] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that claimed native title rights and interests include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, exclusive rights to waters in an offshore place or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act).¹²⁷

[133] Schedule Q of the application indicates that the claimed right to take and use ochre applies to the extent that ochre is not a mineral under the *Mining Act 1978* (WA). Schedule Q otherwise confirms that the application does not claim any minerals, petroleum or gas wholly owned by the Crown. As such, I am satisfied that the application is not made contrary to s 190B(9)(a).

¹²⁴ Applicant Affidavits [3].

¹²⁵ Form 1, Schedule B, paragraphs 4(c) and (d).

¹²⁶ Ibid, Schedule B, paragraph 3.

¹²⁷ See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

[134] I am satisfied that the application is not made contrary to s 190B(9)(b) because Schedule P of the application confirms that no offshore places comprise part of the claim area.

[135] Paragraph 4(e) of Schedule B of the application confirms that the application does not cover any areas where native title rights and interests have otherwise been wholly extinguished. As such, I am satisfied that the application is not made contrary to s 190B(9)(c).

[136] Having regard to the above, I am satisfied that the condition at s 190B(9) is met.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Annette Williams & Ors on behalf of the Wiluna People (Wiluna #5) and State of Western Australia
NNTT No.	WC2024/004
Federal Court of Australia No.	WAD198/2024

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

22 July 2024

Date application entered on Register:

26 September 2024

Applicant:

Annette Williams, Yvonne Ashwin, Nicole Jackman

Applicant's address for service:

Malcolm O'Dell
Central Desert Native Title Services Ltd
76 Wittenoom Street
East Perth WA 6004

Email: reception@centraldesert.org.au

Phone: 08 9425 2000

Conditions on Applicant's authority

Not applicable

Area covered by application:

As per the Schedule

Persons claiming to hold native title:

As per the Schedule

Registered native title rights and interests:

As per the Schedule

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

26 September 2024