National Native Title Tribunal

Registration test decision

Application name	Ngadjuri Nation Native Title Claim
Name of applicant	Vincent Copley, Ella Harradine and Vincent Branson
State/territory/region	South Australia
NNTT file no.	SC10/2
Federal Court of Australia file no.	SAD147/2010
Date application made	12 October 2010
Name of delegate	Carissa Kok

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

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

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

Date of decision: 6 December 2010

____

Carissa Kok

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

Reasons for decision

Table of contents

Introduction 4
Application overview 4
Registration test 4
Information considered when making the decision 4
Procedural fairness steps 5
Procedural and other conditions: s. 190C 7
Subsection 190C(2) Information etc. required by ss. 61 and 62 7
Native title claim group: s. 61(1) 7
Name and address for service: s. 61(3) 8
Native title claim group named/described: s. 61(4) 8
Affidavits in prescribed form: s. 62(1)(a) 9
Application contains details required by s. 62(2): s. 62(1)(b) 9
Information about the boundaries of the area: s. 62(2)(a) 10
Map of external boundaries of the area: s. 62(2)(b) 10
Searches: s. 62(2)(c) 10
Description of native title rights and interests: s. 62(2)(d) 10
Description of factual basis: s. 62(2)(e) 11
Activities: s. 62(2)(f) 11
Other applications: s. 62(2)(g) 11
Section 24MD(6B)(c) notices: s. 62(2)(ga) 11
Section 29 notices: s. 62(2)(h) 12
Subsection 190C(3) No common claimants in previous overlapping applications 12
Subsection 190C(4) Authorisation/certification 14
Merit conditions: s. 190B 17
Subsection 190B(2) Identification of area subject to native title 17
Subsection 190B(3) Identification of the native title claim group 19
Subsection 190B(4) Native title rights and interests identifiable 20
Subsection 190B(5) Factual basis for claimed native title 23
Reasons for s. 190B(5)(a) 26
Reasons for s. 190B(5)(b) 29
Reasons for s. 190B(5)(c) 31
Subsection 190B(6) Prima facie case 32
Subsection 190B(7) Traditional physical connection 33
Subsection 190B(8) No failure to comply with s. 61A 34
Reasons for s. 61A(1) 35
Subsection 190B(9) No extinguishment etc. of claimed native title 36

Reasons for s. 190B(9)(a) 36
Reasons for s. 190B(9)(b) 36
Attachment A Summary of registration test result 38

Introduction

This document sets out my reasons, as a delegate of the Native Title Registrar (the Registrar), for the decision to not accept the Ngadjuri Nation Native Title Claim application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Ngadjuri Nation Native Title Claim claimant application (the application) to the Registrar on 13 October 2010 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 12 October 2010 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsections 190A(6) and (6B), I may only accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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

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

Information considered when making the decision

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

I have had regard to the information contained in the following documents:

- SC10/2 Form 1 application and accompanying affidavits filed 12 October 2010; and

- An overlap analysis and geospatial assessment of the application area undertaken by the Tribunal's Geospatial Services on 19 October 2010 (the geospatial assessment).

I have also had regard to the documents contained in the SC10/2 case management/delegates files (reference 2010/02908, volume 1). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 *(Doepel)* at [16].

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

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'. Further, mediation is private as between the parties and is also generally confidential (see ss. 94K and 94L of the Act).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 14 October 2010, the Tribunal wrote to South Australian Native Title Services (SANTS), the native title representative body for the application area (and also the legal representative for the applicant) to advise that the Registrar had received a copy of the application from the Court in accordance with s. 63, and to provide a copy of the application and accompanying documents pursuant to s. 66(2A). SANTS was informed that a delegate of the Registrar would now proceed to apply the registration test to the application.

- On 14 October 2010, the Tribunal wrote to the State of South Australia (the State) to advise that the Registrar had received a copy of the application from the Court in accordance with s. 63, and enclosed a copy of the application and accompanying documents pursuant to s. 66(2). The State was informed that a delegate of the Registrar would now proceed to apply the registration test to the application, and that should the State wish to provide a submission in relation to the registration of the application, this should be provided to the Registrar by 11 November 2010.

- On 26 October 2010, the Tribunal wrote to SANTS as the legal representative for the applicant, setting out the general steps involved in the registration test process and that it was anticipated the registration test would be applied by 6 December 2010.

As no adverse or additional material has been submitted in relation to this application, neither I, nor other officers of the Tribunal have been required to undertake any further steps in relation to procedural fairness obligations.

Procedural and other conditions: s. 190C

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural 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)—*Doepel* at [16] and also at [35] to [39]. It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. Thus, I have confined my assessment of this requirement to the details and information contained in the application itself. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [35], [37] and [39].

That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group', and does not 'indicate that not all the persons in the native title claim group were included', or, that the claim group is 'in fact a sub-group of the native title claim group'. In my view, and as guided by *Doepel,* in such circumstances the requirements of s. 190C(2) under this subsection would not be met—at [35] and [36].

Part A of the application contains the information and details pertaining to the applicant being authorised to make this application.

Schedule A of the application describes the persons in the native title claim group (an extract of which can be seen in my reasons below at s. 190B(3)). There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a subgroup of the native title claim group.

In my view, the application sets out the native title claim group in the terms required by s. 61(1). I am therefore satisfied that the application contains all the details and other information required by s. 61(1) for the purpose of s. 190C(2).

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

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

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

The name of the each of the persons who comprise the applicant is stated on page 2 of the application, and Part B contains the address for service of the applicant.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

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

The application at Schedule A does not name the persons in the native title claim group but contains a description of the persons in the group (an extract of which can be seen in my reasons below at s. 190B(3)).

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

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

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

The application is accompanied by three affidavits from the three persons who comprise the applicant. In my view, the affidavits contain the requisite statements under ss. 62(1)(a)(i) to (iv).

For the requirements of s. 62(1)(a)(v), the deponents state in subparagraph (e) of their affidavits that:

> I was authorised by the Native Title claim group to make this application and to deal with matters arising in relation to it by resolution made under an agreed and adopted decision making process for these types of matters at a Ngadjuri Community Meeting held at Rowland Flat on the Seventeenth day of June 2010.

To my mind, this statement satisfies the requirement at subsection 62(1)(a)(v). In this regard, I note Mansfield J's view in *Doepel* that in the context of s. 190C(2) and s. 62(1)(a), material deposed to in the affidavit may be relatively short and 'laconic'—at [87].

The statement provided in each of the affidavits at subparagraph (e) sets out that the applicant is authorised by the claim group, by an agreed and adopted decision-making process at a community meeting of the Ngadjuri held at Rowland Flat on 17 June 2010. This indicates that the claim group complied with a decision-making process in accordance with s. 251B(b). In my view, the reference to a decision–making process identified in s. 251B and the provision of details of the meeting at which the decision is said to have taken place, is sufficient compliance with this procedural condition.

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application contains all details and other information required by s. 62(1)(b), as the application does contain the details specified in ss. 62(2)(a) to (h). This is identified in the reasons below.

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

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

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

Attachment B to the application (as referred to in Schedule B) provides an external boundary description of the application area.

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

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

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

Attachment C to the application (as referred to in Schedule C) contains a map showing the external boundaries of the application area.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

Schedule D of the application contains a statement that the applicant has not undertaken any searches to determine the existence of any non-native title rights and interests in relation to the land and waters covered by the application.

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

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

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

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

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

Attachment F contains information going to the factual basis on which it is asserted that the native title rights and interests claimed exist, and also for the particular assertions in the section.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

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

Schedule G of the application contains a list of activities currently being carried out by the native title claim group.

Other applications: s. 62(2)(g)

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

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

Schedule H of the application provides information that the applicant is aware of an overlapping application being the 'Adnyamathanha #1 native title determination application SAD 6001 of 1998', stating that it was filed on 15 January 1999 and wholly covers the area subject to this application.

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

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(ga).
The applicant has inserted 'not applicable' at Schedule HA, which relates to details of any notifications subject to s. 24MD(6B)(c) of the Act. I take this to mean that the applicant is not aware of any relevant notices given.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

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

The application states at Schedule I that 'notices given are not known at this time'.

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

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

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

Section 190C(3) essentially relates to ensuring that there are no common native title claim group members between the application currently being considered for registration (the current application) and any relevant overlapping application, provided the overlapping application is a previous application in the sense discussed in subparagraphs 190C(3)(b) and (c).

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the criteria found in ss. 190C(3)(a), (b) and (c) are satisfied in relation to the overlapping application—*Western Australia v Strickland* (2000) 99 FCR 33 at [9]. The date at which the Registrar is to achieve this state of satisfaction is the date when the application is being considered for the purpose of the registration test—*Risk v National Native Title Tribunal* [2000] FCA 1589 at [27].

Subparagraph 190C(3)(a)—are there any previous applications overlapping the area of the current application?

The Tribunal's geospatial assessment and my searches of the area against the Tribunal's mapping database and the Register of Native Title Claims (Register), identify that there is one application that overlaps the Ngadjuri Nation Native Title Claim application:

Tribunal Number	Federal Court Number	Name	Date Registered
SC99/1	SAD6001/98	Adnyamathanha No. 1	31/03/1999

I shall refer to this overlapping application as the 'Adnyamathanha No.1 application'. My examination shows that the area covered by the current application is wholly overlapped by the Adnyamathanha No. 1 application.

Subparagraph 190C(3)(b)—was the previous application entered on the Register when the current application was made?

The current application was made when it was filed in the Court on 12 October 2010. The Adnyamathanha No. 1 application was first entered onto the Register on 31 March 1999 and therefore was on the Register when the current application was made.

The Adnyamathanha No. 1 application thus satisfies the criterion in subparagraph 190C(3)(b).

Subparagraph 190C(3)(c)—was the entry for the application on the Register made, or not removed, as a result of a consideration under s. 190A?

The Adnyamathanha No. 1 application has remained on the Register as a result of its consideration for registration in accordance with s. 190A since 31 March 1999, thereby satisfying the criterion in subparagraph 190C(3)(c).

For these reasons I find that the Adnyamathanha No. 1 application is a previous application which overlaps the area covered by the current application in the sense discussed in ss. 190C(3)(a) to (c). I therefore need to be satisfied that there are no common claim group members between these two applications.

Am I satisfied that there are no persons in common between the native title claim groups for the previous and current applications?

Schedule H of the application provides information that the applicant is aware of an overlapping application being the 'Adnyamathanha #1 native title determination application SAD 6001 of 1998' (as set out above under s. 190C(2) at s. 62(2)(g)). At Schedule O of the current application, the applicant also states:

> The applicant is aware that some members of the native title claim group are members of the application SAD 6001 of 1998.

I am also informed by the Tribunal case manager for both applications that he has knowledge of the Adnyamathanha genealogy attached to the previous application, and that there are many families identified in the Adnyamathanha genealogy who are also identified as belonging to the Ngadjuri Nation native title claim group in the current application.

Having regard to the admission by the applicant that they are aware that some members of the native title claim group are members of the overlapping Adnyamathanha No. 1 application, together with my own inquiry into whether common members exist between both applications, it follows that I cannot be 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 the previous Adnyamathanha No. 1 application.

The requirements of this section are therefore not met.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word ***authorise*** is defined in section 251B.

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.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied. For the reasons set out below, I am **not satisfied** that the requirements set out in either ss. 190C(4)(a) or (b) are met.

As the application is not certified by the representative body for the area, I find that the requirements of s. 190C(4)(a) are not met. I must therefore consider whether the application meets the requirements of ss. 190C(4)(b) and 190C(5).

The only information in the application about the applicant's asserted authority from the rest of the native title claim group is found in:

- Part A (at item 2) which states that 'the applicant was authorised to make this application for a determination of native title by resolution at a Ngadjuri community meeting held on the seventeenth day of June 2010 at Rowland Flat'.

- Schedule R (the section of the Form 1 which requires details about the asserted authorisation) which does not contain any information, and in fact makes the statement that this part of the Form 1 is 'not applicable'.

- The s. 62(1)(a) affidavits by the three persons comprising the applicant, which all contain the following statements:

> I am authorised by all the persons in the native title claim group to make this application and deal with matters arising in relation to it; and—at subparagraph (d)
>
> I was authorised by the Native Title claim group to make this application and to deal with matters arising in relation to it by resolution made under an agreed and adopted decision making process for these types of matters at a Ngadjuri Community Meeting held at Rowland Flat on the Seventeenth day of June 2010—at subparagraph (e).

Pursuant to s. 190C(5), I cannot be satisfied that the condition in s. 190C(4)(b) has been met, unless the application includes a statement to the effect that the requirement of s. 190C(4)(b) has been met and briefly sets out the grounds on which I should consider that it has been met.

I am satisfied that the application contains a statement at Part A and in each of the three affidavits, to the effect that each of the persons who comprise the applicant is authorised to make the application and deal with matters arising in relation to it.

Subsection 190C(5)(b) also requires that the applicant briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met. The application provides details about the date and location of an authorisation meeting, at which a resolution was made under an agreed and adopted decision-making process, to authorise the applicant to make the application and deal with matters arising in relation to it. However in my view, no further substantive details are provided to address the requirement in s. 190C(4)(b). That is, there is no information before me which sets out:

- how the native title claim group agreed to, and adopted the decision-making process used to authorise the applicant; and
- what the decision-making process was.

Furthermore, the application provides no indication of which/how many claim group members attended the Ngadjuri Community Meeting on 17 June 2010, at which the applicant claims to have been authorised. The affidavits which accompany the application only provide a broad statement that the applicant was authorised by all the persons in the native title claim group. In my view, the only information before me which relates to s. 190C(4)(b) are the broad statements set out above. As observed by French J in *Strickland v Native Title Registrar* [1999] FCA 1530, the

authorisation requirement 'is not a condition to be met by formulaic statements in or in support of applications'—at [57].

From the material before me I am unable to find that the applicant is a member of the native title claim group and is authorised to make the application, and to deal with all matters arising in relation to it, by the rest of the native title claim group. It follows that I am not satisfied that requirements of s. 190(4)(b) have been met.

Merit conditions: s. 190B

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

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

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

Schedule B of the application refers to Attachment B, which is a written description of the external boundary of the application area.

The written description was prepared by the Tribunal's Geospatial Services (Geospatial), dated 30 April 2010, and describes the application area as all the land and waters within an external boundary. The external boundary is described by metes and bounds referencing abutting native title applications, roads, coordinate points and land parcels (pastoral leases). The description includes notes relating to the source, currency and datum of information used to prepare the description. No information relating to areas excluded from the application is provided.

Schedule C refers to Attachment C, which is a colour copy of a map prepared by Geospatial on 1 May 2010, and includes:

- the application area depicted by a dark blue outline;
- abutting native title applications and shared boundaries (identified in colour);
- background tenure with pastoral leases labelled with reference to the Crown Lease numbers;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the areas covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters, as held by Mansfield J in his discussion of s. 190B(2):

> The focus is upon the information and map contained in the application, as required by s 62(2)(a) and (b). It is whether that material enables, with reasonable certainty, the assessment of whether the native title rights and interests are claimed in relation to particular land or waters—*Doepel* at [122].

I have had regard to the written description at Attachment B, and the map at Attachment C. In my view, the written description contains three minor errors. That is, from my assessment of the

description against the map, there are three parts in the description that do not read consistently with the map. I set these errors out below.

- The second last line at paragraph 1 reads 'westerly along that native title determination application boundary to the eastern boundary of then generally easterly passing through the following coordinate points'. To my mind, should this part of the description instead read 'westerly along that native title determination application boundary passing through the following coordinate points', then the description consistently identifies that part of the external boundary, as shown on the map. In any event, in reading the entire description together with the map, it is clear to me the direction in which the external boundary is intended to travel. It appears to me that the reference to an easterly direction is clearly a mistake of a typographical or editorial nature. When I look at the map, I can see that this section of the boundary clearly travels in a westerly direction. The identification of coordinate points in the written description, together with the depiction of this section of the boundary on the map, enables me to identify this section of the boundary on the surface of the earth with reasonable clarity, despite the erroneous reference to an easterly direction within the written description.

- The last set of coordinate points (longitude 138.617221 and latitude 32.692713) within the second table of coordinates in the description (page 2), are incorrectly inserted, and are in fact, the same coordinates used (correctly) to describe the point on the external boundary referenced at the second set of coordinates at the beginning of that same table. When I look at the map however, I can see where the boundary is meant to be on the surface of the earth, despite this erroneous insertion of coordinate points within the written description.

- The first line of the description at page 2 refers to Pastoral Lease CL 1629/99 (Florina). However it is clear to me, when I examine the map for this part of the description, that the correct reference at this point is Pastoral Lease CL 1438/9 (Wilcowie). It seems that this is another typographical or editorial mistake, however, the map does contain the correct pastoral lease identifier and allows this section of the boundary to be identified with reasonable clarity.

It is not ideal that the written description contains these kinds of errors. However, it is fortunate that the map is very comprehensively labelled with the correct data, such that I can ignore these relatively minor mistakes within the written description and determine the location of the boundary on the earth's surface with reasonable clarity. In my view, the written description at Attachment B and the map at Attachment C are otherwise very comprehensive and provide adequate detail so that I am able to identify the location of the area covered by the application with reasonable certainty.

As guided by *Doepel* (see above at [122]), I conclude that I can be satisfied that the information and map required by paragraphs 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.

I note that the application does not include a description of areas within the external boundary that are not covered by the application. Section 62(2)(a)(ii) requires that the application contain information, whether by physical description or otherwise, that enables the boundaries of any areas within the external boundaries that are not covered by the application to be identified. The omission of this information is not fatal to the application under this registration test condition; it is an issue for me at s. 190B(8) and so I consider it there.

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

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

Mansfield J stated in *Doepel* that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

Mansfield J also noted that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained'—*Doepel* at [37].

Section 190B(3) has 'requirements which do not appear to go beyond consideration of the terms of the application'—*Doepel* at [16]. In accordance with these comments, I have confined my consideration to the information contained in the application itself.

Schedule A of the application describes the native title claim group as follows:

> The Native Title Claimants are those Aboriginal people who:
>
> (a) are the biological descendants of the following people:
>
> (1) Fanny, who was born at Winnininnie and her spouse Gudjari.
> (2) Richard (Dick) Warrior
> (3) The un-named mother of Ned Edwards, who was born at Booyoolee, near Gladstone.
> (4) The un-named mother of the Armstrong siblings who was born at Canowie.
> (5) The un-named mother of Alice Morris, who was born at Canowie.

(6) The un-named mother of William John Miller and Amelia Miller
(7) Eliza McGrath, antecedent of the McGrath family

As Schedule A does not name the persons in the native title claim group for the purposes of s. 190B(3)(a), I must therefore be satisfied that the requirements of s. 190B(3)(b) are met. That is, I must be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. In accordance with *Doepel*, that description must appear in the application itself.

In my view, s. 190B(3)(b) requires that an objective method of determining who is in the claim group be described in the application. The point that a factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group has not been sufficiently described—*Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67].

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732, Carr J stated that the test under s. 190B(3)(b) is whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group, i.e. by a set of rules or principles—at [25] to [27]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or her delegate to determine whether or not the description is sufficiently clear and the matter is largely one of degree with a substantial factual element.

Schedule A states that membership of the native title claim group comprises those Aboriginal people who are the biological descendants of eight apical ancestors (two of whom were a couple). In my view, these ancestors are clearly identified by reference to their full name, children's names, place of birth and/or spouse's name. It is therefore also my view, that any reader of the claim group description could objectively determine whether a particular person is in the native title claim group by applying the 'rule' of whether that person is a biological descendent of any of the eight apical ancestors listed in Schedule A.

For the reasons set out above, I find that the information at Schedule A sufficiently describes persons in the native title claim group so that it can be ascertained whether any particular person is in that group. The requirement in this condition is therefore met.

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

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

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

My understanding is this section requires the description of the claimed native title rights and interests to be expressed in a clear and easily understandable manner, that the rights and interests can be understood as 'native title rights and interests' as defined by s. 223 and for the claimed rights and interests to have meaning—*Doepel* at [91], [92], [95], [98] to [101], and [123]:

> The Registrar referred to s 223(1) and to the decision in Ward. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

For the purposes of this condition, in line with *Doepel,* I have only had regard to the description contained in the application itself—at [16].

Schedule E of the application contains a description of the native title rights and interests claimed, being:

1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

2) Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

   a) the right to access and move about the Determination Area;

   b) the right to hunt and fish on the land and waters of the Determination Area;

   c) the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timer, resin, ochre and feathers;

   d) the right to share and exchange the subsistence and other traditional resources of the Determination Area;

   e) the right to use and trade the natural resources of the Determination Area;

   f) the right to live, to camp and, for the purposes of exercising the native title rights and interests, to erect shelters on the Determination Area;

   g) the right to cook on the Determination Area and to light fires for domestic purposes but not for the clearance of vegetation;

   h) the right to engage and participate in cultural activities on the Determination Area;

i) the right to conduct ceremonies and hold meetings on the Determination Area;

j) the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;

k) the right to visit, maintain and protect sites and places of cultural and religious significance of Native Title Holders under their traditional laws and customs on the Determination Area; and,

l) the right to be accompanied on the Determination Area by those people who, though not native title holders, are:

    i) spouses of native title holders; or

    ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or

    iii) people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by the native title holders; or

    iv) people required by native title holders to assist in, observe, or record traditional activities on the Determination Area.

3) The rights described in paragraphs 2(b), (c), (d), and (e) are traditional rights exercised in order to satisfy personal, domestic, or communal needs.

4) The native rights and interests are subject to:

a) the valid laws of the State of South Australia and the Commonwealth of Australia; and

b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia

I have considered the description contained in Schedule E, and am satisfied that the native title rights and interests claimed can be readily identified for the purposes of s. 190B(4). In my view, all the native title rights and interests claimed at Schedule E are expressed in a clear and easily understandable manner. I undertake an assessment of whether the claimed rights and interests meet the definition of 'native title rights and interests' under s. 223, under the condition of s. 190B(6), where I consider whether the native title rights and interests claimed can be established prima facie.

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

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

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

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

This approach to s. 190B(5) was adopted by the Full Court in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 *(Gudjala FC)*—at [83] to [85].

In considering the interaction between s. 62 and s. 190A of the Act, the Full Court in *Gudjala FC* stated:

> Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that

general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92].

As guided by French, Moore and Lindgren JJ in *Gudjala FC*, I am of the view that s. 190B(5) requires a general description of the factual basis for native title, which must be in sufficient detail to enable a genuine assessment of the application, and which must amount to something more than assertions at a high level of generality.

While the Full Court in *Gudjala FC* defined the general nature of the task and outlined the fundamental principles applicable to the test at s. 190B(5)—at [82] to [85] and [90] to [96], the decisions of Dowsett J in *Gudjala 2007* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also set out each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*, including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5)—*Gudjala FC* at [90] to [96]. It is my view that Dowsett J took a consonant approach in *Gudjala 2009*.

The test at s. 190B(5) requires the applicant to describe the basis upon which it is asserted the claimed native title rights and interests exist. According to Dowsett J:

> This is clearly a reference to the existence of rights vested in the claim group. Thus, it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—*Gudjala 2007* at [39].

I understand, however, that it is not my function to adjudicate whether native title exists in relation to the application area or to require evidence from the native title claim group that 'proves directly or by inference the facts necessary to establish the claim'—*Gudjala FC* at [92].

To my mind, the application contains some general information which relates to the requirements of this section. I set this out below:

Attachment F

The application at Attachment F provides a general description of the factual basis in support of the particular assertions in ss. 190B(5)(a) to (c). Attachment F (at items 3 to 9) provides details of the ancestral connections relevant to the application area and the native title claim group by describing the history of the seven apical ancestral lines identified in Schedule A. These details generally relate to:

- family names associated with the identified ancestors;
- place and year of births and deaths of the ancestors and their children/grandchildren;
- children/grandchildren of the ancestors (number and/or names of children/grandchildren);
- marriages of children of the ancestors; and
- records that the ancestors and/or their children were Ngadjuri people.

Attachment F also contains the following statements:

> 1. The Ngadjuri Nation native title determination application is made on behalf of those Aboriginal peoples with connection to the application area. Ngadjuri people assert that there is in existence a body of traditional laws and customs under which they hold the rights and interests within the area covered by this application.
>
> 2. The native title claimants identify as Ngadjuri. They are a clearly defined group of people who are the direct descendants of those Aboriginal persons (Ngadjuri ancestors) who were in occupation of the application area, and areas surrounding the application area at the time of sovereignty. The particulars of this ancestral connection are set out in points 3-11.
>
> Particulars of Ancestral Connection:
>
> [Paragraphs 3 to 9, as set out in Attachment F under the subheading 'Particulars of Ancestral Connection'.]
>
> Particulars of traditional laws and customs giving rise to rights and interests
>
> 10. The members of the native title claim group share:
>
>   a. a belief in and connection to spiritual and religious narratives relating to the application area. They acknowledge and observe traditional laws and customs (including those giving rise to rights and interests in relation to land and waters) arising from those beliefs;
>
>   b. ceremonial and marriage ties;
>
>   c. traditional laws and customs under which they possess rights and interests in the application area, including but not limited to those rights arising from:
>   i. descent from ancestors connected within the application area; and
>   ii. birth in the application area;
>   iii. possession of knowledge relating to the application area, and asserting responsibility for the application area.
>
> 11. From the time of sovereignty until present, claim group members and their ancestors have known and recounted narratives that connect them with the land and waters of the application area. This knowledge has been passed down from generation and connects the claimants to the application area.
>
> 12. The traditional laws and customs associated with these narratives continue to be acknowledged and observed by the members of the native title claim group, and form the foundation for the native title rights and interests possessed by them.

Affidavits sworn by each of the persons comprising the applicant—Mr Copley, Mr Branson and Ms Harradine

As set out above under s. 62(1)(a), the application is accompanied by three affidavits, executed by each of the persons who comprise the applicant. At subparagraph (c) in each of the affidavits, Mr Copley, Mr Branson and Ms Harradine state that 'all of the statements made in the application are true', which I accept to be where the applicant swears to the truth of Attachment F—*Gudjala FC* at [92].

Schedule G

The application at Schedule G provides general details of some activities currently being carried out by the native title claim group in relation to the application area, being:

- accessing, moving about and camping in the claim area;
- hunting, fishing, gathering, preparing and cooking bush food, medicinal and other resources in the claim area;
- maintaining and protecting the natural environment in the area including rockholes and other natural water sources and fauna;
- making decisions with respect to the use and management of the claim area;
- taking care of Aboriginal sites in the claim area, and protecting them from damage (i.e. art sites, ochre pits and other significant places);
- conducting meetings and other gatherings in the claim area;
- visiting the claim area with their children and grandchildren and teaching them about the traditional laws and customs relating to the land and waters; and
- educating others in the culture, heritage and language associated with the area and otherwise protecting and preserving such culture and heritage.

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

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

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the application area. Whilst it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala* 2007 at [51] and [52]. As noted above, this approach was not criticised by the Full Court—*Gudjala FC* at [90] to [96].

The native title claim group's predecessors' association with the application area

Attachment F makes reference to the ancestors of the native title claim group and provides some details relevant to this subsection (see paragraphs 3 to 9 under the subheading 'Particulars of Ancestral Connection'). To my mind, these historical accounts[1] only provide general information;

[1] Attachment F of the application contains references which include citations from Tindale Genealogy Sheets, cemetery records and various Registers of Births, Deaths and Marriages.

namely, that the apical ancestors identified in Schedule A, and some of their children have been recorded as Ngadjuri people. To this end, I set out below extracted details from the 'Particulars of Ancestral Connection' as examples from Attachment F:

- *Fanny, who was born at Winnininnie, and her spouse Gudjari*
  Tindale recorded an unnamed 'FB' ('full blood') Ngadjuri woman 'of Winnininnie' as the mother of Emily Lamb. It is likely that she was buried at Orroroo under the name 'Fanny Winnininnie'. Records indicate that Fanny's spouse was a Ngadjuri man named Gudjari who died around 1900. Fanny's daughter, Emily Lamb was born at either Winnininnie Station or Yonggala Station out from Jamestown and Terowie. Emily had five children, including her son, Barney Warrior who was born at Orroroo in Ngadjuri country in 1873. He was a 'fully initiated man' having undergone the ceremonies in the Blinman area—at [3].

- *Richard (Dick) Warrior*
  Richard (Dick) Warrior's son, Edgar Philip Warrior, married Alice Thompson who was born about 1890 at Wirrabara. It is asserted that Alice Thompson was 'either Nukunu or Ngadjuri', however a citation from Attachment F references further information which indicates Alice Thompson was Nukunu, but married a Ngadjuri man—at [4].

- *The un-named mother of Ned Edwards, who was born at Booyoolee, near Gladstone*
  Tindale recorded an un-named full blood Ngadjuri woman 'of Bowley near Gladstone' as the mother of Ned Edwards. Ned Edwards was the first partner of Emily Lamb (asserted descendant of 'Fanny Winnininnie'—see first example above), and was possibly the father of her children—at [5].

- *The un-named mother of the Armstrong siblings who was born at Canowie*
  An un-named Ngadjuri woman was born around 1840 in Canowie—at [6].

- *The un-named mother of Alice Morris, who was born at Canowie*
  An un-named woman gave birth to Alice Morris between 1860-1870. Alice Morris was recorded as Ngadjuri—at [7].

- *The un-named mother of William John Miller and Amelia Miller*
  William Miller was born about 1874 and was noted as being a 'fully initiated' member of the Ngadjuri tribe. He was recorded at Hawker in 1910. Amelia Miller, her husband, their children and grandchildren have been placed in the Hawker region circa 1910 by Government records—at [8].

- *Eliza McGrath, antecedent of the McGrath family*
  Eliza McGrath's son, Fred McGrath, was born around 1869 at Port Germ[e]in and died in 1931 at Port Augusta. He was either Ngadjuri, or Ngadjuri and Nukunu—at [9].

While I accept the information provided to be true *(Gudjala FC* at [94] to [96]), the assertions in these seven examples do not include any comprehensive factual detail, aside from placing the identified persons at certain locations during particular years, and stating that they were

Ngadjuri. In my view, the details provided in the 'Particulars of Ancestral Connection' at Attachment F could be classified as 'assertions at a high level of generality'—*Gudjala FC* at [92].

Furthermore, having searched on the Tribunal's mapping database, each of the 20 localities identified in the 'Particulars of Ancestral Connection' as being places (or nearby places) where Ngadjuri ancestors were born, died, buried or initiated, I have found only two of them (Winnininnie and Orroroo) to be located within the application area. The remainder of the localities, such as those referenced in the examples above (Blinman, Jamestown, Terowie, Wirrabara, Gladstone, Canowie, Hawker, Port Germein and Port Augusta), fall outside the application area. I note also that my searches indicate that (at least) these nine localities fall within areas claimed by abutting native title applications, namely Adnyamathanha People Native Title Claim No. 3 (SAD69/10) and Nukunu Native Title Claim (SAD6012/98).

From my assessment of Attachment F, the material indicates to me that of all the ancestors referenced (identified apicals and/or their children/grandchildren), only 'Fanny Winnininnie' (one of the identified apical ancestors), her daughter and grandson, (Emily Lamb and Barney Warrior) and a child (Ned Edwards) of one of the other identified apical ancestors, appear to be linked to localities which fall within the area claimed (Orroroo and/or Winnininnie).

As discussed above, the majority of the localities identified in the 'Particulars of Ancestral Connection' fall outside the application area. To that end, the material indicates to me that ancestors of the native title claim group were linked to areas largely outside the area claimed. I note that paragraph 2 of Attachment F states that the native title claimants identify as Ngadjuri, being the direct descendants of Ngadjuri ancestors 'who were in occupation of the application area, and surrounding areas at the time of sovereignty'. In my view, while the native title claim group's predecessors may not have required a physical presence to connect them to the area claimed, there is, in any event, no further factual information to describe any association, physical or spiritual, with the whole application area.

The native title claim group's association with the application area

From my assessment of the information available, I am also not satisfied that there is sufficient factual detail to particularise the current association of the whole native title claim group with the whole application area—*Gudjala 2007* at [51] and [52]. To my mind, the activities listed in Schedule G and the assertions in paragraphs 1, 2 and 10 of Attachment F, as relevant to this subsection, lack the sufficient detail and linkage to the specific claim area, as required by s. 190B(5)(a). For instance, no details are provided in the asserted factual basis to demonstrate that any member of the group has a current association to any specific geographical locations within the application area.

In my view, the information at Schedule G and Attachment F provided in support of the claim group's current association with the area is not in 'sufficient detail to enable a genuine assessment', and does not appear to be 'something more than assertions at a high level of generality'—*Gudjala FC* at [92].

To conclude, I am not satisfied that the application meets the requirements of this subcondition.

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

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

This subsection requires that I be satisfied that the material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged by, and customs observed by, the native title claim group that give rise to the claimed native title rights and interests.

In *Gudjala 2007*, Dowsett J acknowledged the importance of understanding the meaning attributed to 'native title' pursuant to s. 223(1) of the Act, in order to assess the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c)). That meaning, with its focus upon rights and interests in relation to land and waters, and the current possession of such rights and interests 'under traditional laws and customs by claimants who, pursuant to such laws and customs presently have a connection with the land or waters in question,' provides guidance to the Registrar or her delegate when examining the factual basis in support of this assertion—at [26].

Dowsett J's examination of the requirements of s. 190B(5)(b) draws from his Honour's comprehensive summary of the principles enunciated in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) (with particular regard to [46], [47], [79], [86] and [87])—at [26]. This approach was not criticised by the Full Court—*Gudjala FC* at [90] to [96].

It is in light of these *Yorta Yorta* principles as to what is meant by the term 'traditional laws and customs', that I am of the view that the factual basis must describe how the laws and customs currently acknowledged and observed by the native title claim group, are rooted in the traditional laws and customs of a society that existed at the time of European settlement of the application area, and, which has continued in a substantially uninterrupted way since that time.

As noted above, my understanding of the requirements of this subsection is guided also by Dowsett J's approach in *Gudjala 2007,* which was largely restated in *Gudjala 2009* and led his Honour to form the following views in relation to the test at s. 190B(5)(b):

- identification of an Indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognises and adheres to those laws and customs'—*Gudjala 2007* at [66] and *Gudjala 2009* at [36];
- there must be some link 'between the claim group and claim area'—*Gudjala 2007* at [66] and *Gudjala 2009* at [40];
- for laws and customs to be traditional 'they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society'—*Gudjala 2007* at [63] and *Gudjala 2009* at [37]; and
- such laws and customs that exist now may not be identical to those that existed prior to sovereignty but must 'have their roots in the pre-sovereignty laws and customs'—*Gudjala 2009* at [22].

Therefore, a necessary element of this factual basis is the identification of the relevant Indigenous society at the time of sovereignty or, at least, the time of contact with European settlers. Once identified, it follows that the factual basis must demonstrate the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary to provide a factual basis sufficient to support an assertion that the 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty' can be demonstrated—*Gudjala 2007* at [26], [66] and [81].

From my consideration of the material before me against the requirements of this subsection and the guidelines expressed above by Dowsett J in *Gudjala 2007* and *Gudjala 2009*, I am unable to be satisfied that the application contains sufficient factual detail about the asserted traditional laws and customs that give rise to the claimed native title rights and interests.

I turn firstly to the matter of whether the application contains 'sufficient detail to enable a genuine assessment'—*Gudjala FC* at [92]. It is my view that the information in Attachment F is lacking in sufficient factual detail for the assertion in s. 190B(5)(b). To my mind, Schedule G and Attachment F (see extracted details/summary above) contain only limited material, by way of generalised statements. In my view, the information provided does not describe in any detail how the native title claim group observe, practise and maintain 'traditional' laws and customs specific to their group in the *Yorta Yorta* sense:

> Yet again, however, it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].
>
> For exactly the same reasons, acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society—at [87].

The applicant, in my view, has only provided broad statements at paragraphs 1, 10, 11 and 12 of Attachment F, to assert that members of the native title claim group acknowledge and observe traditional laws and customs, under which they possess rights and interests in the application

area. It is also only very generally asserted that transmission of law and custom through the recounting of narratives, has been 'passed down from generation to generation and connects the claimants to the application area', and that traditional laws and customs 'continue to be acknowledged and observed' by the present day claim group—Attachment F at [11] and [12]. The applicant does not however, factually describe how the native title claim group observes and practices these traditional laws and customs.

Furthermore, I am unable to be satisfied that there is sufficient factual information in the application to identify either the current or pre-sovereignty societies in which the current traditional laws and customs are asserted to operate (see *Gudjala 2007* at [66] and *Gudjala 2009* at [36]). Although Attachment F provides general details about claim group's ancestors, no further factual material is provided to support the existence of laws and customs rooted in the traditional laws and customs of a pre-sovereignty society (see *Gudjala 2007* at [63] and *Gudjala 2009* at [22] and [37]). From the material before me and as noted above under s. 190B(5)(a), I also cannot find any factual basis to demonstrate the asserted society's link to the claim area, as discussed by Dowsett J in *Gudjala 2009* at [40] and *Gudjala 2007* at [66]:

> There can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived. The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860. The applicant criticizes [sic] the Delegate for seeking to find a society of which the three apical ancestors were members. It submits that it is not necessary to show that they were such members. That is correct. The apical ancestors are used only to define the claim group. However, as I have previously observed, at some point the applicant must explain the link between the claim group and the claim area. That process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage—*Gudjala 2007* at [66].

It does not appear to me that the application provides a sufficient factual basis to support the assertion that there are *traditional* laws and customs currently observed and acknowledged by the claim group as a whole. It follows, in my view, that I cannot be satisfied that the application contains a factual basis to support the particular assertion in s. 190B(5)(b).

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

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

This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group have continued to hold native title in accordance with their traditional laws and customs.

French J observed in *Martin v Native Title Registrar* [2001] FCA 16 that the assertion in s. 190B(5)(c) is 'plainly a reference to the traditional laws and customs which answer the description set out in para (b) of s 190B(5)'. His Honour held that if the factual basis does not support the assertion in

s. 190B(5)(b), it must follow that the Registrar cannot be satisfied that there is a factual basis for the assertion referred to s. 190B(5)(c)—at [29].

In considering this subsection, I am of the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*; that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—at [47] and [87].

I am also guided by *Gudjala 2007*, where Dowsett J indicated that the factual basis provided to support this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* appears to agree that the factual basis must identify the existence of an Indigenous society at European settlement in the application area observing identifiable laws and customs—at [96].

As set out above under my reasons at s. 190B(5)(b), I have found that the material before me does not sufficiently demonstrate the assertion that traditional laws and customs exist, which give rise to the native title rights and interests claimed in the application. In my view, the material also does not identify a relevant pre-sovereignty society or normative system from which traditional laws and customs have been passed to the current native title claim group. It follows then that I cannot be satisfied that the factual basis is sufficient to support the particular assertion in s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

In the absence of a sufficient factual basis being provided to support the existence of traditional laws and customs giving rise to the claimed native title rights and interests as required by s. 190B(5), it follows that I do not consider that, prima facie, the native title rights and interests claimed in the application can be established. In support of this approach, I refer to the reasoning

of Dowsett J in *Gudjala 2007* at [85] to [87], which was not criticised by the Full Court in *Gudjala FC*.

In *Gudjala 2007* (at [85]), His Honour referred to s. 223(1), which provides that:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal Peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal Peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia

In light of my decision that the requirements of s. 190B(5) have not been met, it is my view that the application cannot satisfy the condition of this section.

Subsection 190B(7)
Traditional physical connection

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

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

In my view, the word 'traditional' as it is used for the purposes of this section must be understood as it was defined in *Yorta Yorta* (as discussed above under s. 190B(5)). That is, it is necessary to show that the traditional connection is in accordance with the laws and customs of a group or society which has its origins in the society that existed at sovereignty. This approach appears to be supported by Dowsett J in *Gudjala 2007*, where his Honour stated:

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

> inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7)—at [89].

In light of my findings above that the application fails to provide a sufficient factual basis in accordance with s. 190B(5), I am unable to be satisfied that the material before me demonstrates that any member of the claim group currently has, or previously had a traditional physical connection with the application area. In any event, there is nothing in the information available about any member of the group having the requisite connection with the area. I therefore find the condition of this requirement not met.

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 in relation to an area; 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 provision 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 in relation to an area; 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 provision 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 claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
>
> (4) However, subsection(2) or (3) does not apply to an application if:
>
> (a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

The application **does not satisfy** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and

accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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

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

Both the geospatial assessment and a search that I made of the Tribunal's geospatial databases on 6 December 2010 reveal that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

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

In my view the application **does** offend the provisions of s. 61A(2).

As noted above under s. 190B(2), the application does not provide any statements in relation to the exclusion of areas from the application, such as areas covered by a PEPA.

Having regard to the information provided to identify the application area, and noting that the application does not exclude any areas within its external boundary, it is my view that it appears highly likely that the application includes areas covered by a PEPA. In this regard, I refer to the map at Attachment C which shows that the application includes areas such as townships and their surrounding vicinities. While I am not aware as to the specific status of all the land claimed by the application, the map indicates to me that certain areas are very likely to include land over which there may be PEPAs. Given the information on the map and the absence of an express exclusion of PEPA areas from the application area, I cannot be satisfied that the requirements of this section are met.

Reasons for s. 61A(3)

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

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

Schedule E of the application states the following:

> (1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and

> 47B apply), members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

I understand this statement to mean that the application only claims exclusive native title rights and interests over areas where exclusive possession can be recognised, such as areas where a PNEPA has not been done.

In my view, the application does not disclose, and I am not otherwise aware, that any of the native title rights and interests claimed confer exclusive possession, occupation, use and enjoyment of any areas covered by a PNEPA.

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

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

The application **does not satisfy** the condition of s. 190B(9), because it **does not meet** all of the three subconditions, as set out in the reasons below.

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

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

The applicant states at Schedule Q of the application that the 'native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown'.

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

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

The applicant states at Schedule P of the application that the 'native title claim group does not claim exclusive possession over all or part of waters in an offshore place within the application area'. I note that in any event, the application does not cover any offshore places.

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

The application **does not satisfy** the subcondition of s. 190B(9)(c).

As set out above under s. 190B(8) in relation to s. 61A(2), it is my view that the application discloses that it is highly likely the area claimed includes areas covered by PEPAs, such as the granting of freehold estates. Pursuant to s. 23A(2) of the Act, PEPAs are acts which have completely extinguished native title.

I note the applicant claims the benefits of ss. 47, 47A and 47B as applicable to areas where the prior extinguishment of native title is to be disregarded. However, the application does not provide any statements to the effect that the application does not claim native title rights and interests over areas where any other kinds of extinguishing acts may have occurred, and which cannot be disregarded (such as the granting of freehold estates).

I therefore cannot be satisfied that the application does not disclose, and that I am not otherwise aware, that the native title rights and interests claimed have not been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Ngadjuri Nation Native Title Claim**
NNTT file no.	**SC10/2**
Federal Court of Australia file no.	**SAD147/10**
Date of registration test decision	**6 December 2010**

Section 190C conditions

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

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Not Met
s. 190C(4)			Overall result: Not Met
	s. 190C(4)(a)		NA
	s. 190C(4)(b)		Not Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	NA
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Not Met
	re s. 190B(5)(a)	Not Met
	re s. 190B(5)(b)	Not Met
	re s. 190B(5)(c)	Not Met
s. 190B(6)		Not Met
s. 190B(7)(a) or (b)		Not Met
s. 190B(8)		Aggregate result: Not Met
	re s. 61A(1)	Met

Test condition	Subcondition/requirement	Result
	re ss. 61A(2) and (4)	Not Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Aggregate result: Not Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Not Met