National Native Title Tribunal

Registration test decision

Application name	Kariyarra Pipingarra
Name of applicant	Teddy Roberts (Wammarranya), Cyril Gordon (Kurlanunya), Donny Wilson (Mirawarna) and Kerry Robinson (Marapikurrinya)
State/territory/region	Western Australia
NNTT file no.	WC09/3
Federal Court of Australia file no.	WAD 232/2009
Date application made	18 December 2009

Name of delegate Liam Harding

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 am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 6 May 2010

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Liam Harding

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 16 November 2009 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the 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) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Kariyarra Pipingarra claimant application to the Native Title Registrar (the Registrar) on 23 December 2009 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 18 December 2009 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsection 190A(6) I must 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 be accepted for registration because it does 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 am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

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' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

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. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

On 7 April 2010 the applicant provided the Registrar with the following material:

- Declaration of [name deleted], declared 6 April 2010 (3 pages).
- Annexure RM1, Excerpt from A. R. Brown 'Three Tribes of Western Australia' – The Journal of the Royal Anthropological Institute of Great Britain and Ireland 1913, Vol 43. Pp 143-170 (28pages)
- Annexure RM2 – Affidavit of [name deleted], affirmed 6 April 2010 (3 pages)
- Annexure RM3 – Unnamed genealogical family tree (1 page)
- Annexure RM4 - Unnamed genealogical family tree (1 page)

A copy of this material was duly provided to the State of Western Australia under cover of letter dated 21 April 2010. The letter advised the State that comments on the material were to be made before 28 April 2010. At the date of the making of this decision no such comment had been received by the Registrar.

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 only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Northern Territory of Australia v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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.

Turning to 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:

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).

I have considered whether the application sets out the native title claim group in the terms required by s. 61(1). I note that if the description of the group in the application indicated that not all persons in the native title claim group were included, or that it was in fact a subgroup of the native title claim group, then the requirements of s. 61(1) under s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

Schedule A of the claim provides a description of the native title claim group. Having regard to this description and the other information in the application, there is nothing on the face of it that causes me to conclude that the requirements of this section are not met, bearing in mind that my consideration of it is limited by the task set in 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 names of the persons who jointly comprise the applicant and their address for service are provided in the application.

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 does not name all of the persons in the native title claim group; it contains a list of names of some members of the group but it also contains a description of other persons who are said to be part of the group.

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 affidavits required by s. 62(1)(a).

The affidavits are in the prescribed form and are from each of the persons who jointly comprise the applicant. Each of the affidavits addresses the matters required by s. 62(1)(a)(i)–(v).

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).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

> 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).

Schedule B of the application refers to Attachment B, which contains a description of the 'external boundary'. The 'external boundary' is also marked on a map found at Attachment C.

Schedule B also provides information about any areas within that boundary that are not covered by the application.

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).

A map is included at Attachment C.

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).

The information in the application suggests that no such searches have been carried out by or on behalf of the native title claim group.

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

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

The application contains all details and other information required by. 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).

Her Honour in *Queensland v Hutchinson* (2001) 108 FCR 575 at [25] notes that it is not enough to merely recite the general or the three particular assertions in s. 62(2)(e); what is required is a 'general description' of the factual basis and for the three particular assertions.

The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s. 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

> 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 to be 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.

Schedule F provides a description that does more than recite the particular assertions and in my view meets the requirements of a general description of the factual basis for the assertions identified in this 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 contains details of activities carried out by the native title claim group in the application area.

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 sets out details of the Njamal People (WAD6028/98) application which previously claimed part of the area claimed in this application but notes that the boundaries of the Njamal People's claim were amended in 2006 such that they withdrew their claim from all of the areas which are now the subject of the Kariyarra Pipingarra application.

I accept that the application contains details required for the purposes of this section.

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).

Information of this type is provided in Attachment HA to the application.

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).

Information of this type is provided in Attachment I to the application.

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 **satisfies** the condition of s. 190C(3).

I have been provided with an overlap analysis of the application area produced by the Tribunal's Geospatial Services unit, dated 13 January 2010 (the geospatial assessment). On 6 April 2010 I conducted an overlap analysis of the application area via the Tribunal's Geospatial (iSpatialView) database and a search of the Register of Native Title Claims. The result of these analyses shows that there are no applications that overlap this application on the Register and as such, I do not need to consider this condition further.

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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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 satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

The applicant states, at Schedule R, that the application has been certified under s. 203BE of the Act by the Yamatji Marlpa Aboriginal Corporation (YMAC) and a copy of a certificate from YMAC, which is signed and dated as at 18 December 2009, is provided at Attachment R.

I note that the geospatial assessment indicates that the YMAC is the only representative Aboriginal/Torres Strait Islander Body that covers this area and I am satisfied that this is the case.

As required by s. 203BE(4)(a) the certificate contains statements to the effect that YMAC is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicants to make the application and to deal with all matters arising in relation to it under the NTA; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all other persons in the native title claim group.

As required by s. 203BE(4)(b) the certificate also sets out briefly the reasons for the YMAC being of that opinion—see paragraphs [1] to [6]. Having considered this information I am satisfied that this requirement under the Act is satisfied.

Therefore I am satisfied that this certification complies with the requirements for a valid certification under s. 203BE(4) of the Act.

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).

Section 190B(2) requires that the information in the application describing the areas covered by the application is 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 information required to be contained in the application is that described in ss. 62(2)(a) and (b), as set out earlier in my reasons. Section 190B(2) has requirements that do not appear to go beyond consideration of the terms of the application—*Doepel* at [16].

I note that in this application Schedule B and Attachments B and C are the sources of information in the application which are required by ss. 62(2)(a) and (b).

Firstly, Schedule B refers to Attachment B for the written description and Attachment C for the depiction on a map, of the 'external boundary'.

Secondly, Schedule B contains information that seeks to provide a description of the areas within the 'external boundary' which are excluded from the claim.

The 'external boundary'

Attachment B is a metes and bounds description referencing geographic coordinates, current native title determinations and determination application boundaries and the lowest astronomical tide.

Attachment C is a monochromatic copy of a map entitled 'Native Title Determination Application: Kariyarra – Pipingarra' produced by the Tribunal's Geospatial Services, dated 7 December 2009, and includes:

- The external boundary of the application area depicted as a bold outline;
- Surrounding native title determination and determination application areas shown and labelled;
- Non freehold tenure background;
- Selected localities shown and labelled;
- Scalebar, northpoint, coordinate grid, locality diagram and legend; and
- Notes relating to the source, currency and datum of data used to prepare the map.

I note that Geospatial Services assessed the map and written description and concluded in its assessment dated 13 January 2009, that 'the description and map are consistent and identify the application area with reasonable certainty'.

Considering the identification of the external boundary location in Attachment B and the clarity of the mapping of this external boundary on the map in Attachment C, I am satisfied that the external boundaries of the application area have been described comprehensively, so that the location of it on the earth's surface can be identified with reasonable certainty.

Areas within the 'external boundary location' that are not covered by the application

Areas within the external boundaries not covered by the application are described in Schedule B.

The description in Schedule B uses references to areas where, for example, various categories of past or intermediate period acts (as those terms are defined in the Act) have occurred, or areas where native title has been extinguished.[1] The effect of the use of these references is to create a formula for identifying areas which are not covered by the application. The certainty of this approach relies on the fact that while the tenure information may not be known by the applicant at the time the application is made, it is a source of information which when known can be applied to definitively identify the area. I note that the use of such an approach may be considered sufficient for the purposes of s. 190B(2) in circumstances where the applicant does not have the tenure information required to otherwise describe areas to be excluded—see *Daniel v Western Australia* [1999] FCA 686. On the basis of the information in Schedule B, I am satisfied that it is appropriate to consider the general description as sufficient.

To conclude and for these reasons, I am satisfied that the application complies with s. 190B(2) as the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters.

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).

Subsection 190B(3) sets out two ways in which a claim group may be described for the purposes of registration. They are set out above.

The application names some but not all of the native title claim group members individually and therefore I have considered whether the description in the application meets the requirement in s. 190B(3)(b).

[1] The applicant has however sought the benefit of the provisions in ss. 47, 47A and 47B of the Act, where those sections can apply— Schedule B, paragraph 5.

As Justice Mansfield said: '[t]he focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group'—*Doepel* at [51]. This requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Doepel is also authority for the proposition that s. 190B(3) has 'requirements which do not appear to go beyond consideration of the terms of the application'—at [16]. Accordingly, I have confined my consideration to the information contained in the application itself.

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3). In *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591, Carr J considered a claim group described as follows—at [64]:

1. the biological descendants of the unions between certain named people;

2. persons adopted by the named people and by the biological descendants of the named people; and

3. the biological descendants of the adopted people referred to in paragraph 2 above.

His Honour referred to this method of identification as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. **It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently.** It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in Strickland at para 55…in relation to definition of areas, apply equally to the issue of sufficient description of the native title group–at [67]. (emphasis added)

The claim group is described in Schedule A to the application as follows:

> The claim is brought on behalf of the Kariyarra People who are the people who are:
> The descendants of the following Kariyarra apical ancestors:
> (i) Jinapi;
> (ii) Wirtinpangu (Jimmy);
> (iii) Dougal Robinson;
> (iv) Puyukapu (Toby); and
> (v) Jalyingarli (Johnny); and
> The following individuals incorporated into the Kariyarra community in accordance with traditional law and custom:
> (i) Nelly Walley;
> (ii) Archie Captain;
> (iii) Sharon Captain;

(iv) Stanley Captain;
(v) Alfred Barker.

Schedule A provides a description of the criterion for membership of the group (descent from a named apical ancestor) and additionally, it identifies by name five persons who have been incorporated into the native title claim group in accordance with traditional law and custom.

The description of members of the group by reference to descent from an apical ancestor will necessitate a further factual inquiry to establish if any particular person is in the group, however, it is my view that the description is clearly within the bounds of the 'Three Rules' test discussed above by Carr J—I am provided with a starting point, that is, the name of the forebears of the group's members, and from there it is possible, with a further factual inquiry, to work out who is descended from those forebears.

I am therefore satisfied that the claim group has been described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

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).

Section 190B(4) requires me to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition only the description contained in the application can be considered—*Doepel* at [16].

The description referred to in s. 190B(4) must be:

> [A] description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law: s. 62(2)(d).

For a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be established prima facie as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act. For my consideration of the claim against s. 190B(4), I am focusing only on whether the rights and interests as claimed are 'readily identifiable' in the sense of being intelligible and able to be understood.

The claimed native title rights and interests are set out in Schedule E of the application.

It is my view that the description of the claimed native title rights and interests is clear, understandable and makes sense. I am therefore satisfied that the requirements of this section are met.

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 **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

The task under s. 190B(5)

The nature of the Registrar's task under s. 190B(5) was discussed by his Honour Justice Mansfield in *Doepel*:

> 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 agreed with and adopted in the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*)—at [83]. Their Honours, in considering the interaction between s. 62 and s. 190A of the Act, state that:

> [T]he statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a): *Gudjala #2 FC*—at [90].

The Full Court in *Gudjala FC* allowed an appeal against the decision of Dowsett J in *Gudjala 2007* that the application did not satisfy the requirements of s. 190B(5) on the basis that Dowsett J 'applied to his consideration of the application a more onerous standard than the NTA requires'—at [7]. The matter was remitted back to Dowsett J who reconsidered the application

against the conditions in ss. 190B(5), (6) and (7) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 on 23 December 2009 (*Gudjala 2009*).

The Full Court in *Gudjala FC* also said that a general description of the factual basis under s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and [is] something more than assertions at a high level of generality' could, when read with the applicant's affidavit swearing to the truth of the matters in the application, satisfy the Registrar in relation to the corresponding merit condition in s. 190B(5)—at [92].

I refer also to the following comments by the Full Court in *Gudjala FC*:

- Providing a sufficient factual basis does not require the applicant 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'—at [92].
- The applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92]. The Full Court indicated that if the Registrar were to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim', that would be erroneous—at [93].

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the factual basis materials that are before me as if they are evidence furnished in support of the claim, nor do I refuse to accept what is stated in the application and the additional information in relation to the factual basis, apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

The particular assertions of the section

According to *Doepel*, s. 190B(5):

> [R]equires the factual basis for the claimed native title rights and interests to be asserted ... [It] identifies the particular assertions which must be supported by the factual basis set out. It follows … that the general requirement [found in the chapeau to s. 190B(5)] beyond the particular [found in paras (a) to (c)] is not intended to involve a parallel or equally onerous obligation in relation to each of the claimed native title rights and interests separately … — at [131] and [132].
>
> Consequently, in my view, the Registrar did not err in focussing primarily upon the particular requirements of s 190B(5). That is the way in which the NT Act directs his attention. If any of the particular requirements were not met, then the general requirement would not be met.

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

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

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

In *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*), Dowsett J observed that the particular assertion in s. 190B(5)(a) may require the following kinds of information:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times— at [12] to [21].
- that there has been an association between the predecessors of the whole group over the period since sovereignty—at [52][2].

Schedule F of the application contains the following information in relation the group's past and present association:

- The ethnohistorical record (such as: Radcliffe-Brown, A.R. (1913) 'Three tribes of Western Australia' in Journal of the Royal Anthropological Institute of Great Britain and Ireland, 10(3), 143-194) demonstrates that the Kariyarra People have a longstanding association with the area subject to application, and indicates that that association is based on traditional laws and customs which have remained largely intact and unchanged since prior to the assertion of British sovereignty in Western Australia—at [1].
- The Kariyarra People possess a body of songs, stories and rituals which relate to the area being claimed and which they assert have been passed down to them from ancestors who lived in the area long before the assertion of British sovereignty. These songs, stories and rituals underpin the traditional laws and customs which the Kariyarra People hold in relation to the claimed area, and are a key means for transference of those laws and customs from generation to generation—at [3].
- The Kariyarra People possess extensive knowledge of, and law and custom in relation to, the area subject to application, including in relation to sites, plants, animals and resources of the land. The extent of the knowledge, and the complexity of the law and custom, is consistent with a long term association with the area—at [4].

An excerpt from the Radcliffe-Brown 1913 journal article (referred to in Schedule F) has been provided by the applicant as additional material for the Registrar to consider. I note from the excerpt of this report that Radcliffe-Brown makes the following observations:

- The Kariera tribe occupies the coast of Western Australia from a point to the east of Sherlock River to a point east of Port Hedland, extending inland for about 50 miles
- The tribe is distinguished from its neighbours by the possession of a name, a language and a defined territory.
- The tribe is divided into a number of local groups, each with their own defined territory.

I note that the excerpt of the Radcliffe-Brown report also contains a map prepared in 1913 which shows the existence of two Kariera clan estate areas, labelled VII and VIII, within the area of the present Kariyarra Pipingarra claim. On the basis of the information recorded by Radcliffe-Brown in 1913 I accept that it is therefore reasonable to infer that there were Kariyarra estate groups within the vicinity of the Kariyarra Pipingarra claim area at the date of sovereignty.

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[2] I note that this approach was not criticised by the Full Court in *Gudjala FC*.

I note that [name deleted], in his affidavit dated 6 April 2010, affirms that he is an applicant in both the Kariyarra People WAD6169/98 and Kariyarra Pipingarra WAD232/09 applications. From an examination of the map provided in Attachment C to the present claim I have observed that the application area of Kariyarra People WAD6169/98 is immediately adjacent to the western side of the application area of Kariyarra Pipingarra WAD232/09. I note that the applicant's material reveals that the Kariyarra People presently organise themselves into clan estate groups and that each group has an association with and speaks for a particular area or tract of country. I also note that this explanation about the operation of a system of clan estate groups is consistent with the information provided about the system in operation in 1910 as described in the Radcliffe-Brown report—at page 145. I accept that is reasonable to infer from this that the system in operation in 1910 was in operation at the date of sovereignty in Western Australia.

[name deleted]also affirms that he is a Kariyarra man and describes both his own association and the association other members of the native claim group have with the application area. [name deleted]describes some of his ancestry, noting that his father, [name deleted]was a Kariyarra man born in 1917 at Yandeyarra, a place which is proximate to the area of the current application and within what is described in the material as Kariyarra Country. In the genealogy prepared by Norman Tindale in 1953 and annexed to a 6 April 2010 declaration by the applicant's lawyer, [name deleted], [name deleted] father is shown as the [name deleted], whose parents are shown as a Kariyarra man and a Kariyarra woman. Further, in the genealogy prepared by Radcliffe–Brown in 1910 (also annexed to [name deleted]Declaration) [name deleted] is shown as the great-grandson of Kariyarra man [name deleted]. On the basis of this information it appears that [name deleted]is a direct descendant of a Kariyarra man who it is reasonable to assume was alive at or around the date of sovereignty in Western Australia. It is the applicants' case that research conducted by the YMAC similarly links all of the apical ancestors referred to in Schedule A of the application to the genealogies of Tindale and Radcliffe-Brown, and thereby back to ancestors, who it can be inferred, were alive at or around the date of sovereignty.

I note that there are also examples of current association of the claim group with the application area described in Schedule G of the application.

On the basis of the information before me, particularly information in the affidavit of [name deleted], I accept that the current association of the native title claim group is a contemporary expression of the association of Kariera estate groups observed by Radcliffe-Brown in 1913. I am satisfied that there that there has been an association between the predecessors of the whole group over the period since sovereignty and that the factual basis provided in the applicant's material is sufficient to support the assertion described by s. 190B(5)(a).

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

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

The usage in ss. 190B(5)(b) and (c) of terminology similar to that found in s. 223(1)(a) in turn requires a consideration of the decision by the High Court in *Yorta Yorta* of what is meant by the term 'traditional' in the context of s. 223(1)(a). The High Court held that:

> "[T]raditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court also had this to say about the meaning of the term 'traditional laws and customs' in s. 223(1)(a):

> First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title—at [46] and [47] [Emphasis in original].

That the factual basis for the assertion in s. 190B(5)(b) must be sufficient to identify the society that is asserted to have existed at least at the time of European settlement, and from which the group's current traditional laws and customs are derived, is supported by *Gudjala FC*—at [96]. The Full Court commented that there was material in the Gudjala # *2* application which 'contained several statements which, together, would have provided material upon which a decision–maker could be satisfied that there was, in 1850–1860, an indigenous society in the claim area observing identifiable laws and customs'. The Full Court held that 'this question and others' are ones 'that s. 190B requires must be addressed'—at [96].

Schedule F of the application describes some of the information which is said to support the assertion of the existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests. It states that the Kariyarra People's association with the area 'is based on traditional laws and customs which have remained largely intact and unchanged since prior to the assertion of British sovereignty in Western Australia' and it asserts that according to Kariyarra religious belief their ownership of, and rights to the area subject to the application extend back under traditional law and custom to the beginning of time. It is said that 'according to this belief Kariyarra People, Kariyarra language and Kariyarra country were created together and are inseparable.' The schedule refers to the Kariyarra People's possession of a body of songs, stories and rituals which relate to the area, which they assert have been passed down to them from ancestors who lived in the area long before the assertion of British sovereignty. It is the applicant's assertion that these songs, stories and rituals underpin the traditional laws and customs which Kariyarra People hold in relation to the claimed area, and are a key means for transference of those laws and customs from generation to generation.

The excerpt from Radcliffe-Brown's report provides a comprehensive description of the normative society in existence in the region in 1910, and as set out in my reasons for s.190B(5)(a), I accept that it is reasonable to assume that the society in existence at that time was therefore in operation at the date of sovereignty of Western Australia. Radcliffe-Brown's report contains among other things a detailed account of the Kariyarra People's laws and customs, including their observance of relationship and marriage rules, the practice of ceremonies relating to birth, initiation and death, and the adherence to a system of rules regulating Aboriginal people's access to the land and resources.

In his affidavit, [name deleted]provides information about the current practice of laws and customs relating to access to Kariyarra country for hunting and other purposes, the responsibility members of the claim group have for Kariyarra country and sites of significance, and the identification of members of the claim group according to skin groups[3].

The applicant's lawyer, [name deleted], provides information and details about the current observance of laws and customs by the Kariyarra People and notes that he has witnessed that many of the laws and customs outlined by Radcliffe-Brown are still being practised and observed by the Kariyarra People today. I note that practices described by [name deleted] are consistent with the description of practices which were observed in 1910 when the Radcliffe-Brown report was prepared. In [name deleted]declaration, dated 6 April 2010, he notes he has observed that the Kariyarra People:

- organise themselves into clan estates and that each group has an association with and speaks for a particular area or tract of country — [3]
- still possess knowledge of the Kariyarra language recorded by Radcliffe–Brown as being spoken in the area in 1910— [6]
- continue to organise themselves into skin groups and practice rules regarding avoidance relationships between a Kariyarra man and his mother-in-law—[6]
- demonstrate extensive knowledge of talu sites [ceremonial sites or totemic centres] on their country and continue to practice male initiation ceremonies and 'wororu' relationships— [6]

As I have noted above, the task required by s. 190B(5) as espoused in *Doepel* is to assess the quality of the factual basis upon which it is asserted that native title rights and interests are claimed so that the question that must be answered is: if the statements are true could they support the claim? I am of the view that the asserted facts are sufficient to support the assertion at s.190B(5)(b), that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

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

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

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[3] a detailed explanation of the operation of this system and the interrelations between members of Kariyarra society is provided in the Radcliffe–Brown report on pages 147-159

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the claim group continues to hold native title in accordance with their traditional laws and customs.

In keeping with the law guiding my decision under s. 190B(5)(b), I must again have in mind the meaning of 'traditional' but also be satisfied that a sufficient factual basis is provided for the assertion that native title has continued to be held in accordance with these traditional laws and customs. In *Yorta Yorta* it was said that 'acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty'— at [87].

It is asserted in Schedule F that the Kariyarra People possess extensive knowledge of, and law and custom in relation to, the area subject to application. This is said to include knowledge of law and custom in relation to sites, plants, animals and resources of the land, and the extent of the knowledge, and the complexity of the law and custom, is consistent with a long term association with the area. It is also asserted that the Kariyarra People have continued to hold native title rights in the claimed area in accordance with traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of:

- descent from Kariyarra ancestors connected with the area;
- traditional religious knowledge of the area;
- traditional knowledge of the creation and cultural geography of the area;
- traditional knowledge of the resources of the area, including but not limited to knowledge of sources of water in the claim area; and
- knowledge of, and participation in, traditional ceremonies and rituals associated with the area.

In the reasons for my decision relating to s. 190B(5)(b) I have referred to the examples of information found in [name deleted]affidavit and in the other material before me that describe how the native title claim group draws on traditional laws and customs to support their claim that they continue to hold native title. There is information which speaks to the way the group has continued to organise themselves into skin groups and observe complex relationship rules, uphold traditional methods of hunting and preserve their language. The material describes a rich and enduring system of law and custom which governs the lives of members of the group. For these reasons I am satisfied that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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 **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

To meet the requirements of s. 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s. 186(1)(g) and the note to s. 190B(6). Where I have found that a particular claimed right cannot

be established prima facie, I refer the applicant to the provisions of s. 190(3A) which allow the applicant to provide additional information in support of a further consideration by the Registrar of the ability of the right to be registered.

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
>
> [Section] 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

I elaborate on these three points as follows:

Right exists under traditional law and custom in relation to any of the land or waters under claim

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group (my emphasis).

As mentioned above in relation to the requirements of s. 190B(5), the registration test is an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is also not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, prima facie. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of the section will be met.

Right is a native title right and interest in relation to land or waters

As noted in my reasons under s. 190B(4) above, I have taken the view that it is under this condition that I must consider whether the claimed rights and interests have been found by the courts to be 'native title rights and interests' within s. 223. If a claimed right and interest has been

found by the courts to fall outside the scope of s. 223, then it will not be capable of being 'prima facie established' for the purposes of s. 190B(6).

Right has not been extinguished over the whole of the application area

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Western Australia v Ward* (2002) 191 ALR 1 (*Ward HC).*

In my consideration of the rights claimed in the application, I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

I now consider whether each of the native title rights and interests claimed in Schedule E can be prima facie established:

Schedule E

Schedule E of the application categorises two types of areas within the area covered by the application. These areas are referred to as Areas A and B and are defined in the application as follows:

> **Area A** means lands within the application area that is landward of the high water mark and which comprises:
>
> 1) areas of unallocated Crown land (including islands) that have not been previously subject to any grants by the Crown;
> 2) areas to which section 47 of the Act applies;
> 3) areas to which section 47A of the Act applies;
> 4) areas to which section 47B of the Act applies; and
> 5) other areas to which the non-extinguishment principle, set out in section 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.
>
> **Area B** means land or waters within the application area that is not included in Area A.

Rights in Area A

1. The right to possess, occupy, use and enjoy the area as against the whole world.

Not established

The right relating to Area A is expressed in the manner of a right to exclusive possession. *Ward HC* is authority that the 'exclusive' rights are potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Native Title Act. The concluding words of schedule E attempt to take account of this authority.

Bearing in mind my consideration of the factual basis of this claim at s. 190B(5), it is my view that the application and other documents do not furnish evidence that shows, prima facie, the strength of the control of access required by a claim to exclusive possession under the traditional law and custom that would have been derived from the customary landholding laws. I note that

while [name deleted]speaks of protocols which operate regarding asking permission for entry for hunting and other purposes, the possession, occupation and use of the area to the exclusion of all others, in the ways recognised by the courts, is not made out sufficiently strongly, prima facie, to establish this right.

Rights in Area B

1. A right to hunt in the area

2. A right to fish in the area

4. A right to take fauna

Established

Schedule G of the application refers to members of the claim group currently carrying out activities such as hunting, fishing and taking such as fauna from the application area.

The Radcliffe-Brown report speaks of the right to hunt and fish in Kariyarra country in the context of the laws that operate to prevent others from hunting in this area without permission being sought by members of the Kariyarra group, the author of the report stressing the importance attached to this law by noting that offences against it were very rare.

In his affidavit, [name deleted]makes direct references to his knowledge of the transmission of these rights by his forebears and the current practice of these rights by members of the claim group.

I am satisfied, on this basis, that there is sufficient information available to prima facie establish the claimed rights.

5. A right to occupy the area

6. A right to use the area

7. A right to enjoy the area

8. A right to be present on or within the area

13. A right of access to the area

17. A right to move about the area

18. A right to engage in cultural activities within the area

19. A right to conduct and participate in ceremonies and meetings within the area

30. A right to have access to water

Established

There is a general assertion in schedule G that the claim group currently exercise the right to move about and conduct ceremonies on the application area.

In my reasons for s.190B(5) I referred to the applicant's factual basis for the group's assertion of a continuous association with the application area and I noted that the applicant had enumerated the incidence of use of the area by members of the claim group to support this assertion. In the affidavit material from [name deleted]there is sufficient prima facie evidence of members of the claim group, both of the current and previous generations exercising non-exclusive rights of these kinds in relation to the application area.

Accordingly, I am satisfied that there is evidence to prima facie establish these rights.

9. A right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong

12. A right to control access to and use of the area by other Aboriginal people who seek access in accordance with traditional laws and customs

Established

In *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 (3 June 2004) 'a right to speak for the determination area' [para 3(b)] was considered. The right was accepted where the claim is, as in this case, non-exclusive.
While in *Neowarra v State of Western Australia* [2003] FCA 1402 Sundberg J was of the view that 'the right to speak for country involves a claim to ownership – at [494]', the claimed right in this application can be distinguished, as the wording only applies to the right to speak in the course of interaction with Aboriginal people, and not the world at large.
In his affidavit [name deleted], at paragraphs [7], [16], [17], [21] and [22], refers to laws that operate so as to give rise to these rights. I note the information he provides is expressed in terms of the applicability of these laws to members of the Aboriginal society y to which the native title group belong and to the wider aboriginal community.
Accordingly, I am satisfied that there is evidence to prima facie establish these rights.

21. A right to visit, care for and maintain places of importance and protect them from physical harm

36. A right to maintain, conserve and protect significant places and objects located within the area

Established

In Schedule G there is a general that the claim group currently exercise the right to maintain conserve and protect the significant sites and physical attributes of the application area and places, objects and works within that area.
The evidentiary affidavit by [name deleted]indicates that this right exists under traditional law and custom. The deponent describes a significant site known as [name deleted] which is situated on a hill at the Eastern-most point of the Kariyarra Pipingarra claim area and notes the group's responsibility to look after this site — at [22].
Accordingly, I am satisfied that there is evidence to prima facie establish these rights.

22. A right to transmit cultural heritage of the native title claim group related to the area including knowledge of significant sites and places

Established

The courts in several recent Queensland consent determinations have recognised this as a non-exclusive native title right.
The evidentiary affidavit by [name deleted]indicates that this right exists under traditional law and custom. Throughout the affidavit the deponent describes the inter–generational transmission of law and custom relating to knowledge of special sites on country.
Accordingly, I am satisfied that there is evidence to prima facie establish this right.

10. A right to invite and permit others to have access to and participate in or carry out activities in the area

Not Established

I note that the expression of this right is not consistent with the expression of the rights in [9] and [12] of schedule E in that it is not limited in its application to members of the Aboriginal society to which the native title group belong or the wider aboriginal community. Given my earlier findings in relation to the right to exercise possession and the lack of prima facie evidence of a right to exclude all persons from Kariyarra country I am not satisfied it has been prima facie established.

11. A right to speak authoritatively about the area among other Aboriginal people in accordance with traditional laws and customs

Not established

I have found that the right expressed in [9] of Schedule E has been prima facie established. I assume that the inclusion of the right expressed in [11] is therefore not a right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong, but an expression of a different kind of right.

3. A right to take traditional resources, other than minerals, petroleum and gas from the area
23. A right to take flora (including timber)
24. A right to take soil
25. A right to take sand
26. A right to take stone and/or flint
27. A right to take clay
28 A right to take gravel
29. A right to take ochre
31. A right to take water
32. A right to take shells
33. A right to trade in shells
34. A right to manufacture traditional items from the resources of the area
35. A right to trade in the resources of the area

Not established

I note that Schedule G makes general assertions relating to members of the claim group being engaged in activities that involve the taking of resources of the kind referred to in these claimed rights and the manufacture of traditional items from those resources. These are, however, general assertions which are of themselves insufficient to support the claimed rights. The application and related material does not specifically disclose evidence supporting a claim under traditional law and customs to these rights and consequently I am not satisfied that there is sufficient evidence to prima facie establish them.

14. A right to live within the area
15. A right to erect shelters upon or within the area
16. A right to camp upon or within the area

Not established

I note that while Schedule G makes general assertions regarding members of the claim group residing, erecting shelters and camping within the application area, these assertions alone are insufficient to support the claimed rights. The application and related material does not specifically disclose evidence supporting a claim under traditional law and customs to these rights and consequently I am not satisfied that there is sufficient evidence to prima facie establish them.

20. A right to conduct burials on the area

Not established

The application and related material does not disclose evidence supporting a claim under traditional law and customs to this right and consequently I am not satisfied that there is sufficient evidence to find that it is prima facie established.

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 **satisfies** the condition of s. 190B(7).

Under s. 190B(7), it is my view that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' as discussed in *Yorta Yorta*.

Sufficient material is provided in the affidavit of [name deleted]regarding his traditional physical connection with the land or waters covered by the application. Relevant information provided by [name deleted]has been referred to at length in my consideration for both s. 190B(5) and s. 190B(6).

I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

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

Section 61A provides:
(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If :
(a) a previous exclusive possession act (see s. 23B) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made 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, 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 confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

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

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

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

The application **satisfies** 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).

The geospatial analysis states that there are no determinations of native title in relation to the application area. I am satisfied that this is the case.

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, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2) because Schedule B excludes any land or waters covered by previous exclusive possession acts as defined in s. 23B. I am therefore satisfied that the application is not made over any such areas.

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 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) because Schedule B, paragraph 3 states that exclusive possession is not claimed over areas covered by previous non-exclusive possession acts.

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 **satisfies** the condition of s. 190B(9), because it **meets** 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).

Schedule Q of the application states that there is no claim to 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 application at Schedule P states that there is no claim to exclusive possession of any offshore place.

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

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

Schedule B excludes from the application area any area where native title rights and interests have otherwise been wholly extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Kariyarra Pipingarra**
NNTT file no.	**WC09/3**
Federal Court of Australia file no.	**WAD32/2009**
Date of registration test decision	**6 May 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)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	s. 190C(4)(b)		N/A

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

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

Attachment B
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration:

- WAD232/2009 Kariyarra Pipingarra Form 1 application filed 18 December 2009
- Declaration of [name deleted], declared 6 April 2010 (3 pages).
- Annexure RM1, Excerpt from A. R. Brown 'Three Tribes of Western Australia' – The Journal of the Royal Anthropological Institute of Great Britain and Ireland 1913, Vol 43. Pp 143-170 (28pages)
- Annexure RM2 – Affidavit of [name deleted], affirmed 6 April 2010 (3 pages)
- Annexure RM3 – Unnamed genealogical family tree (1 page)
- Annexure RM4 - Unnamed genealogical family tree (1 page)
- Geospatial assessment by the Tribunal's Geospatial Services unit, dated 13 January 2010

[End of document}