National Native Title Tribunal

Registration test decision

Application name	Ramindjeri People
Name of applicant	Mr Lance Gilbert (Karno) Walker
State/territory/region	South Australia
NNTT file no.	SC10/3
Federal Court of Australia file no.	SAD162/2010
Date application made	26 October 2010
Date application last amended	The amended application was accepted by the Federal Court in accordance with Order 13 Rule 3 of the Federal Court Rules on 20 January 2011
Name of delegate	Nadja Mack

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: 24 March 2011

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Nadja Mack

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

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision not 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 Ramindjeri People claimant application to the Registrar on 26 October 2010 pursuant to s. 64(4). This has triggered the Registrar's duty to consider the claim made in the application under s. 190A.

On 11 November 2010, I provided to the Applicant a preliminary assessment of the application against the conditions of the registration test. The Applicant advised the Case Manager for this matter in November 2010 that he intended to amend the application in response to that preliminary assessment. On 20 January 2011 an amended application was filed. On 8 February 2011, following a telephone conversation between the Court and the Tribunal, the Court confirmed in writing that the amended application was accepted by the Court in accordance with Order 13 Rule 3 of the Federal Court Rules. The Court noted that 'given the early state of the proceedings amendment without leave is permitted by the Rules in this instance'.

As the application has not been amended pursuant to order of the Court under s. 87A , and has not previously been registered since it was first made on 26 October 2010, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. Therefore, as the Registrar was given the amended application under s. 64(4), in accordance with s. 190A(1), I must consider the claim made in the amended application. I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C. This is commonly referred to as the 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.

I conclude that 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 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.

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:

- The Ramindjeri People native title determination application filed on 26 October 2010 (original application);
- The Ramindjeri People native title determination application filed on 20 January 2011 (amended application);
- The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack number 2010/2084, dated 5 November 2010, being an expert analysis of the external and internal boundary descriptions and an overlap analysis against the Register of Native Title Claims (Register), Schedule of Applications, determinations, agreements and s. 29 notices and equivalent (the geospatial report);
- ISpatialView assessment undertaken on 22 March 2011;
- Letter of Federal Court to Tribunal dated 8 February 2011;
- Extract from Register for Kaurna Peoples Native Title Claim, SAD6001/00, SC00/1;
- Extract from Register for Ngarrindjeri and Others Native Title Claim, SAD6027/98, SC98/4;
- Submissions from the State of South Australia (the State), dated 2 March 2011.

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. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 8 February 2011, the Tribunal advised the State that the registration test would be applied to the amended application inviting submissions by 1 March 2011.

The State provided submissions on 2 March 2011 which were provided to the Applicant for comment on the same day. No submissions in response were made by the Applicant.

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 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)— *Attorney General of Northern Territory 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.

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).

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group indicates that not

all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I could not accept the claim for registration—*Doepel* at [36].

I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

The identification of the native title claim group, the Ramindjeri People, is set out in Attachment A to Schedule A of the application. The Ramindjeri People are identified in two parts: firstly, by reference to a list of names; secondly by way of an explanation of the principle of incorporation into the claim group.

State's submissions

The State submits that '[f]rom my reading of Schedule A, numerous members of the Ramindjeri native title claim group also appear to be members of other native title groups such as the Kaurna and Ngarrindjeri. This would tend to suggest that the Ramindjeri is a sub-group of parts of both the Kaurna and the Ngarrindjeri native title groups. The NTA [*Native Title Act*] does not permit such groups to maintain claims. The claim group must include *all* people who, under the traditional laws and customs, hold the native title rights and interests. The reading of paragraphs 2 and 8 of Attachment O also would suggest that there are fundamental errors with the make up of the claim group'.

Attachment O, an affidavit by applicant Lancelot Gilbert (Karno) Walker of 22 October 2010, at paragraphs 2 states:

> Each person declaring and affirming that they are a 'Ramindjeri person' at that meeting also acknowledged that that (sic) Declaration 'is capable of being used in either the Kaurna or the Ngarrindjeri Native Title claims as evidence of who my people are'.

To put paragraph 2 in context I also set out paragraph 1:

> I am an applicant and a member of the native title group for the Ramindjeri application in respect of traditional land located in 'the Ramindjeri claim'. The other Applicants on the claim, who are also members of the native title claim group, are descendants of King Condoy, a Ramindjeri man of Rapid Bay, Encounter Bay and Kangaroo Island, and/or were self-identified as Ramindjeri people for the purpose of Section 61(4) of the *Native Title Act* 1993 (Cth) at the Ramindjeri Native Title meeting held on 16 December 2009 at the Box Factory Community Centre, 59 Regent Street South, Adelaide.

Paragraph 8 states:

> Persons included in the Ramindjeri People Native Title claimant group have not authorised the apparent inclusion of themselves in other Native Title claimant groups such as the Kaurna Peoples and Narrindjeri Native Title applications, via the indiscriminate reference to apical ancestors and the subsequent apparently automatic, but unauthorised, inclusion of all descendents regardless of their traditionally chosen identities and traditional tribal identity. As such the primary applicant on behalf of the members of the Ramindjeri People claimant

group refute their apparent inclusion in the Kaurna or Narrindjeri Native Title claimant groups.

In my view the above statements do not by themselves support the conclusion that the claim group is merely a sub-group, as submitted by the State. Mr Walker's statements at paragraph 8 are also made elsewhere in the application (see for example Attachment T, 'Overview – Kaurna & Ngarrindjeri Claims – Lack of historical evidence of pre-European settlement traditional indigenous custodianship') to refute the inclusion of Ramindjeri People in the other two claims.

I note that I deal with the issue of common membership in the native title claim groups of the Ramindjeri, Kaurna and Ngarrindjeri applications below in relation to the condition of the test at s. 190C(3).

As I am able to consider the material contained in the application *only*, I am of the view that on balance, the identification of the claim group does not indicate that all persons in the native title group have not been included. Nor does it indicate that it is in fact a subgroup of the native title claim group.

The application therefore meets the condition required of s. 61(1).

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 and address for service of the applicant's representative is found in Part B of 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 names the persons in the native title claim group at Attachment A to Schedule A of the application.

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).

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in subparagraphs (i)–(v).

The application is accompanied by an affidavit from Lancelot Gilbert (Karno) Walker, the person comprising the Applicant. The affidavit is dated 17 January 2011 and signed by the deponent and competently witnessed. It is attached to the application as Attachment R.

State's submissions

The State submits that s. 62 'requires the affidavit accompanying the application to provide details of the decision-making process used by the Ramindjeri to authorise the claim. Insufficient detail is provided in the application...'.

I note that Mansfield J in *Doepel* decided that the particular task in s. 62(1) is constrained by the overarching task at s. 190C(2) – the delegate is not required at s. 190C(2) to be satisfied about the fact of authorisation; he/she must merely be satisfied that the affidavit contains the statements required by s. 62(10(a) – at [87]. In my view the affidavit sufficiently addresses the matters required by s. 62(1)(a)(i) to (v). Contrary to the State's submissions, I am of the view that the affidavit sufficiently sets out the details of the process of decision-making agreed to and adopted to authorise the Applicant to make the application and to deal with matters arising in relation to it. I refer to the statements in paragraphs 3 to 6 of Mr Walker's affidavit which are, in my view, sufficent for the purposes of s. 62(1(a)(v).

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

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 Attachments BA and BB, which contain a description of the external boundaries of the area covered by the application and a description of the areas within the external boundaries that are excluded from 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).

Schedule C refers to Attachment C, which is a map showing the application area and its boundaries.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out 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 states that no searches have been carried out by the Applicant and there is no information before me to indicate that the Applicant has made any searches of the kind described in this section.

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. 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. 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.

I assess the adequacy of the description in the corresponding merit condition at s. 190B(4) below.

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).

Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 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 for the three particular assertions —at [25].

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– at [92].

Schedule F and the material in Attachment G, O and T provide a general description of the rights and interests claimed and the factual basis for the assertions set out in s. 62(2)(e).

The description 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.

I assess the adequacy of the description in the corresponding merit condition at s. 190B(5) below.

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 and Attachment G set out details of activities currently carried out by the native title claim group in relation to the area claimed.

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 the details of two other native title determination claimant applications over the whole or part of the area covered by the application:

- Proceeding No SAD 6027 of 1998 in the Federal Court (the Ngarindjeri)
- Proceeding No SAD 6001 of 2000 (Garth Agius and Others on behlaf og the Kaura people Native Title Claim v State of South Australia) (the Kaurna claim)

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).

Schedule HA states that the Applicant is not aware of any notices given under s. 24MD(6B)(c) 'that have been given and that relate to the whole or a part of the claim area'.

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).

Schedule I states that the Applicant is not aware of any notices given under s. 29 'that have been given since 30 September 1998 and that relate to the whole or a part of the claim area'.

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).

The nature of the Registrar's task at s. 190C(3) is to consider whether there are members in common between the application being considered for registration ('the current application') and a 'previous application'. An application will be a previous application where each of the conditions in subparagraphs (a) to (c) arise. Accordingly, where each of the conditions in s. 190C(3)(a) to (c) are satisfied in relation to a particular application, I must consider whether any member of the native title claim group in the current application was a member of a native title claim group in that previous application: *State of Western Australia v Strickland* [2000] FCA 652; (2000) 99 FCR 33 (*Strickland FC*)—at [9].

Was the current application overlapped by any other application for a determination of native title?

The first question I must consider is whether this application is covered by any other application for a determination of native title.

The Tribunal conducted a geospatial overlap analysis which confirms the statement set out in Schedule H of the application that there are two native title determination applications which cover part of the Ramindjeri application, both of which were on the Register as a result of consideration under s. 190A at the time the Ramindjeri claim was made:

- SAD6027/98—Ngarrindjeri and Others Native Title Claim—SC98/4, accepted for registration on 13 January 2000; and
- SAD6001/00—Kaurna Peoples Native Title Claim—SC00/1, accepted for registration on 22 August 2001.

I note that Schedule O and Attachment O (at paragraph 8) of the application contain a statement in relation to the above overlap which I will refer to in detail below. According to the statement any inclusion of members of the Ramindjeri claim group in the above applications was not authorised.

Are there common claim group members?

Secondly, I must be satisfied, in this particular matter, that no person included in the Ngarrindjeri claim or the Kaurna claim is a member of the Ramindjeri claim. I not only have to take into account the information contained in Schedule O and Attachment O, I must also consider information elsewhere in the application and the descriptions of each of the three claim groups.

As stated above, the persons in the Ramindjeri claim group are listed in Attachment A. Elsewhere in the application (for example Attachments O and T) reference is made to an ancestor, King Condoy, 'headman of Ramindjeri'. King Condoy is the father of Princess Con, also known as Sally Walker. The Applicant, Lance Walker is said to be a descendant of King Condoy and Sally Walker (see Attachment T, page 83, which contains a 'Walker Genealogy' and Attachment O, which includes a description of the 'lineal descent of Mr Walker from King Condoy and Sally Walker at paragraph 10).

The entry on the Register of the Kaurna claim provides a description of the native title claim group as being the descendents of eight named ancestors. The names do not include King Condoy or Sally Walker. None of the twelve applicants for the claim appear to be included in the list of Ramindjeri claim group members. On the face of the applications I cannot see any members in common between the Kaurna claim group and the Ramindjeri claim group. This does not mean that there are no members in common between the two native title claim groups; only that they are not readily identifiable on the basis of the information before me.

The entry on the Register of the Ngarrindjeri claim provides a description of the native title claim group as being the descendents of ancestors listed at paragraphs 1.1. to 1.78 (in total amounting to more than a hundred named persons). Among them is 'the woman who is the mother of George Walker and Joe Walker'. Attachment T of the Ramindjeri application contains the report, '*A History of the Walker Family of the Ramindjeri peoples'* which on page 6 refers, under the heading 'Sally Walker', to 'Sally Walker's two sons George and Joseph'. The above mentioned 'Walker Genealogy' (Attachment T, page 83) also confirms that Sally Walker had two sons named George and Joseph Walker. It is therefore likely that descendants of Sally Walker who are members of the native title claim group for the Ngarrindjeri application are also included in the native title claim group for the current Ramindjeri application. Mr Walker is one of those persons.

As noted above, statements in Schedule O of the application refer to the matter of the overlap between the three claims and, whilst the authority for this is refuted, the existence of a common membership between the Ramindjeri claim group and the Kaurna and Ngarrindjeri groups can be inferred:

> The Applicant has not authorised his inclusion in, or membership of, any other Native Title Claim Group for any other application that has been made in relation to the whole or part of the area covered by this application.
>
> Persons included in the Ramindjeri People Native Title claimant group have not authorised the apparent inclusion of themselves in, or membership of, other Native Title claimant groups for any other application that has been made in relation to the whole or part of the area covered by this application, for example the Kaurna Peoples and Narrindjeri Native Title applications via the indiscriminate reference to apical ancestors and the subsequent apparently automatic, but unauthorised, inclusion of all descendants regardless of their traditionally chosen identities and traditional tribal identity. As such the primary applicant on behalf of the members of the Ramindjeri People claimant group refute their apparent inclusion in the Kaurna and Narrindjeri Native Title claimant groups.
>
> In accordance with traditional custom Ramindjeri people have traditionally intermarried with neighbouring groups with subsequent descendents retaining their right to identify themselves as Ramindjeri people. This is also historically recorded, including by Norman B Tindale, Journal S.E. of South Australia, Volume II, notes from Reuben Walker p. 158 (see Attachment T, source reference No. 7, "Ramindjeri man never married Ramindjeri woman).

Similar statements are made in Attachment O, Mr Walker's affidavit dated 22 October 2010.

I also note that the State in its submissions refers to such a common membership between the claim groups. As noted above, the State submitted that 'numerous members of the Ramindjeri native title claim group also appear to be members of other native title groups such as the Kaurna and Ngarrindjeri'.

In my view, whether or not Mr Walker or other persons of his group authorised their inclusion in the other applications is not relevant to my consideration. What I am required to be satisfied of under s. 190C(3) is that no person included in the native title claim group for the Ramindjeri application was a member of the native title claim group for any previous application.

As the above examination reveals, on the face of the material before me there are *at least* common members between the Ramindjeri and the Ngarrindjeri claims, and I cannot be satisfied that no person included in the Ramindjeri claim group was a member of the native title claim group for any previous application.

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.

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

The Registrar under this section 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.

The application is not certified by a representative Aboriginal/Torres Strait Islander or s. 203FE funded body that could certify the application. Therefore the requirements of s. 190C(4)(a) do not apply and I must consider whether I am satisfied that the requirements of s. 190C(4)(b) are met.

Section 190C(4)(b) sets out that the Registrar must be satisfied that:

- 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.

Section 190C(5) adds that the Registrar can only be satisfied that the condition in s. 190C(4) has been met in circumstances where an application has not been certified, if the application:

- includes a statement to the effect that the requirement set out in paragraph (4)(b) of s. 190C has been met; and
- briefly sets out the grounds on which the Registrar should consider that it has been met.

Information considered

I have considered the information contained in Schedule R of the application as well as the attachments to this schedule, being a copy of an advertisement published in *The Advertiser* and an affidavit by Lancelot Gilbert (Karno) Walker of 17 January 2011 (the Applicant's s. 62(1) affidavit). I have also considered submissions made by the State on 2 March 2011.

I note in this regard that I am not confined to the statements in the application and in the accompanying s. 62(1)(a) affidavits when deciding whether or not the requirements of s. 190C(4)(b) have been met. I may also have regard to other material provided by the applicant or otherwise available in relation to the authorisation of the applicant—see *Strickland v Native Title Registrar* (1999) FCA 1530 at [57].

Are the requirements of s. 190C(5) met?

I will first consider whether the requirements of s. 190C(5) have been met, before I turn to s. 190C(4)(b).

The application contains relevant statements and briefly sets out the relevant grounds in Schedule R and in the Applicant's s. 62(1) affidavit. I am therefore satisfied that the requirements of s. 190C(5) have been met.

The interaction of s. 190C(4)(b) and s 190C(5) is considered in *Doepel* in that:

> [It] may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

It is therefore still necessary for me to consider whether I am satisfied that the Applicant is authorised pursuant to s. 190C(4)(b).

Are the requirements of s. 190C(4)(b) met?

In relation to the first requirement of this section, that the Applicant is a member of the native title claim group, Mr Walker in his s. 62(1) affidavit at paragraph 6 states that he is a senior Ramindjeri man. This statement is also contained in Schedule R. On the basis of this information I am satisfied that the Applicant is a member of the native title claim group.

In relation to the second requirement that the Applicant is authorised to make and deal with the application, I note that the term 'authorise' as used in s. 190C(4)(b) is defined in s. 251B. That is, an applicant's authority from the rest of the native title claim group to make the application and deal with related matters must be given in one of two ways:

a) in accordance with a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group; or
b) where there is no such process, by a process agreed to and adopted by the group.

Doepel is authority that s. 190C(4)(b) 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'—at [78].

Decision-making process

There is a long line of authority that an agreed and adopted process can only be used where there is no traditional process mandated for authorising 'things of that kind' (i.e. authorising an applicant to make a native title determination application)—see for example *Evans v Native Title Registrar* [2004] 1070 at [7] and [52].

Therefore, the first question that I must ask is whether the claim group has a mandated traditional decision-making process. If this is the case, then I must inquire whether this mandated process was followed. If this is not the case, then I must consider whether I am satisfied that the persons in the native title claim group agreed to and adopted a decision-making process that they then followed in deciding to authorise the applicant.

Although not stated expressly, there is no information before me that indicates that the group has a mandatory traditional decision-making process (s. 251B(a)). I therefore consider whether the requirements of s. 251B(b) have been met.

Schedule R (at paragraph (c)) and Attachment R (at paragraph 1(v)(b)(3)) set out that 'authorisation was given by the native title group pursuant to a process of decision-making that was agreed to and adopted by the persons in that tribal group in relation to authorising the making of the application; and which was also consistent with traditional Ramindjeri laws and customs in relation to authorising things of that kind.'

How was the authorisation process conducted?

Schedule R and Mr Walker's s. 62(1) affidavit at paragraph 1(v)) set out that the Applicant was authorised to make the application by virtue of resolutions passed at the following two meetings:

> 1. a meeting of the native title claim group held on 30 October 2008, at National Native Title Unit, 91 Grenfell Street, Adelaide chaired by Mr Chris Sumner [a Member of the National Native Title Tribunal]; and

> 2. a publicly notified meeting advertised in *The Advertiser* and subsequently held on 16 December 2009, at the Box Factory Community Centre, 59 Regent Street South, Adelaide, chaired by Mr Alan Hunter, Deputy Chairman of South Australia Native Title Services Ltd.

No further information appears in the application in relation to the first meeting.

In relation to the second meeting, a copy of the notice advertising the meeting is attached to the application as Attachment R. It is not clear from the copy of the notice when the advertisement appeared in *The Advertiser*.

The notice invites 'all persons who identify as Ramindjeri and who wish to participate in a consideration of whether a claim should be made on behalf of the Ramindjeri People for a Native Title Determination by the Federal Court' in relation to the land and waters depicted on a map which is inserted in the notice (and mirrors the map of the claim area) to attend the meeting where it is said the following business will be conducted:

> a) to determine the process (whether traditional or otherwise) by which to decide whether to make a Native Title Claim on behalf of the Ramindjeri People for a Native Title Determination by the Federal Court; and then
>
> b) to embark upon that process for the purpose of deciding whether or not to make such a claim, and if so decided, whom to authorise as applicant.

Meeting and contact details are given.

Schedule R (at paragraph (d)) and Attachment R (at paragraph (1)(v)(b)(4)) describe the decision-making process agreed to and adopted at the December 2009 meeting as follows:

> This process of decision-making involves the convening of meetings of Ramdinjeri people, and the acceptance of decisions reached by the Ramindjeri people at those meetings. Decisions are made in consultation with representatives of significant Ramindjeri families who attend such meetings. The Ramindjeri people recognise that, under their traditional laws and customs, meetings of such representatives, they have the authority to make decisions on behalf of the Ramindjeri families who are so represented, and that such decisions are binding on all Ramindjeri people.

Schedule R (at paragraphs (e) and (f)) and Attachment R (at paragraphs (1)(v)(b)(5) and (6)) go on to state that Mr Walker attended the December 2009 meeting. At the meeting 'representatives of the Ramindjeri people' decided that 'a Ramdindjeri claim should be submitted for registration' and 'Lancelot Gilbert (Karno) Walker was authorised to lodge an application for native title on behalf of the Ramindjeri'. It is further stated that

> [d]uring the course of the above meeting it was confirmed that these were the right meetings, and attended by sufficient representatives of the Ramindjeri families, to decide about matters such as land, including decisions relating to native title claims and the authorisation of people to make decisions dealing with such claims. As a senior Ramindjeri man, I know that decisions of this kind should be made in this way under the traditional laws and customs of the Ramindjeri people.

Consideration

I note in relation to the first mentioned meeting that no information is provided as to how it was notified, its purpose and its attendance, the decision-making process used and resolutions passed. I understand from the State's submissions that the meeting was an unadvertised Tribunal mediation meeting. This was confirmed to me by the Case Manager for this matter. I am also informed by the Case Manager that it was not the meeting's purpose to authorise the making of this application. As no relevant information is provided other than an assertion that the meeting passed resolutions which authorised the Applicant to make the application, I give little weight to this assertion.

I will therefore focus my consideration on the information in relation to the 16 December 2009 meeting:

Contrary to the State's submissions I am of the view that the material before me sufficiently *describes* the decision-making process used by the group at this meeting. It is described in Mr Walker's affidavit (at paragraph (1)(v)(b)(4)) and Schedule R (at paragraph (d)) as involving the convening of meetings of Ramindjeri People and decisions being made in consultation with representatives of significant Ramindjeri families who attend such meetings.

Whilst the brevity of the description of the process may be criticised, I note French J's comment in *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [57] that the insertion of the word 'briefly' in s. 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained. The sufficiency of the grounds upon which the Registrar should consider that the requirement has been met is primarily a matter for the Registrar'.

I am, however, of the view that insufficient information is provided as to how this decision-making process has been agreed to and adopted and by whom, and how decisions have been made following this process.

I note in this regard Stone J's comment in *Lawson v Minister for Land and Water Conservation for the State of New South Wales (*2002) FCA 1517 that

> It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process —at [25]
>
> Given that [there was a] well-attended meeting [that] was appropriately advertised and that there was no dissent from any of the resolutions that were passed, it can safely be assumed that the resolutions approved by [sic] meeting have been approved by the Claim Group — [27].

It is not clear from the information before me whether all members of the Ramindjeri claim group were in fact given every reasonable opportunity to participate in the decision-making process. In particular:

- it is not clear from the copy of the notice when the meeting was advertised and therefore how much notice prospective attendees were in fact given;

- it may not be sufficient to advertise in a newspaper alone, and the application does not indicate that other forms of notice where given to invite persons identifying as Ramindjeri to attend the meeting (for example, letters to members or families of the claim group, public notices provided to Aboriginal organisations operating within the proposed application area); and
- verbal notice and consultation between the organisers of the meeting and those who identify as Ramindjeri does not appear to have occurred which may have been a supplement to the newspaper advertisement in providing people with the opportunity to attend the meeting.

There is also no information before me to ascertain how well the meeting was attended:

- it is not clear what proportion of those persons listed at Schedule A who are said to comprise the native title claim group, attended the meeting and participated in the decision-making process;
- there is no information regarding how the decision-making process dealt with the views (or decisions) of persons unable to attend the meeting; and
- while Mr Walker attests in his affidavit that the meeting was 'attended by sufficient representatives of the Ramindjeri families', it is not clear to me who and how many of these representatives are said to have made decisions under the agreed to and adopted decision making-process.

In my view, the statements contained in Mr Walker's sworn affidavit can be given considerable weight, however, neither Schedule R nor any other information in the application provides any further demonstrable facts in relation to the authorisation process, such as outlined in the points above.

State submission

The State submitted the following:

> The application states (in Schedule R(2)) that Lancelot Gilbert Walker is a member of the Ramindjeri native title claim group and is authorised by them to speak for them. The NTA requires an applicant in a native title claim to be authorised by *all* of the claim group *to bring the claim*. Reference is made to two meetings, one of which appears to have been an unadvertised meeting with the Tribunal and the other a meeting at the Box Factory. Without further evidence that all of the claim group has authorised Mr Walker as applicant and without some indication of the method used to gain that authorisation, the claim cannot proceed. I am aware of anecdotal evidence that members of the Kaurna and Ngarrindjeri claims sought and were denied access to the latter meeting.

The State also submitted, as noted above, that '[s]ection 62 of the NTA requires the affidavit accompanying the application to provide details of the decision-making process used by the Ramindjeri to authorise the claim. Insufficient detail is provided in the application, a matter I have raised with Mr Walker and will be bringing to the Court's attention'.

I have dealt with the State's submissions to a large degree in my reasons above. I now turn to the State's submission that it is 'aware of anecdotal evidence that members of the Kaurna and Ngarrindjeri claims sought and were denied access to the latter meeting'. In this context I also consider the State's submission that it is of the view that the Ramindjeri group as identified in its application is not the full extent of the native title claim group, that 'the Ramindjeri is a sub-group of parts of both the Kaurna and Ngarrindjeri native title claim groups'.

In my view, these submissions would only be relevant to my consideration of the authorisation condition if together all of the material before me raised a significant possibility that the Ramindjeri claim group comprised more that those identified at Attachment A.

The only compelling information I do have is that Sally Walker is an ancestor included in the description of the Ngarrindjeri native title claim group and is also an ancestor for the Ramindjeri group (see my consideration of the condition in s. 190C(3) above). It may be that there are descendants of Sally Walker who are not included in the list identifying the Ramindjeri native title claim group at Attachment A. It may be that the said Kaurna and Ngarrindjeri claim group members, who were denied access to the Ramindjeri authorisation meeting, are persons who are descendants of Sally Walker and therefore should have been listed in Attachment A and as such would have been entitled to attend the meeting. It may equally be that their names are included in the list at Attachment A identifying the Ramindjeri claim group in which case denying them access to the meeting would raise relevant issues in relation to authorisation.

Without further information, such as the names of the persons who were allegedly not permitted to attend the meeting, or more direct evidence, in my view, I cannot come to a conclusion on this issue. In my view the first submission carries little weight for the fact that it is based on anecdotal evidence of unnamed members of groups who may be in conflict with the claim group. No evidence is provided in support of the second submission. I note that I have not received submissions by members of the Kaurna or Ngarridjeri claim groups or other persons alleging that the Ramindjeri claim group as identified in Attachment A is not a full group.

Finally, I acknowledge the statements made by Mr Walker in his affidavits and that there is much information in the application that references the Kaurna and Ngarrindjeri groups and their intersection with Ramindjeri People and the area of the application (in particular in the Overview in Attachment T). Whilst this information may suggest areas of dispute or conflict between the groups, I am not of the view that it is sufficient for me to reach a definitive conclusion that not all of the native title claim group has been identified in the Ramindjeri application and as a consequence has not authorised the applicant to make and deal with the application.

Conclusion

It is for the shortcomings outlined earlier in relation to the conduct of authorisation and the decision-making process, that I cannot be certain that all persons were provided with a reasonable opportunity to participate in the authorisation process. That is, despite Mr Walker's assertions, it is not clear to me who attended the meeting and whether those who did attend were sufficiently representative of all of the native title claim group to make decisions (nor how those

decisions resulted in the said resolutions) in relation to authorising the Applicant to make and deal with the Ramindjeri application. I therefore am of the view that requirements of s. 190C(4) are not 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).

In the Tribunal's preliminary assessment of the original application, the following was noted in relation to the identification of the area subject to the claim:

'The Tribunal's geospatial unit on 5 November 2010 undertook an assessment of the description and map provided in Schedules B and C of the application to advise whether the application area has been described with reasonable certainty. The assessment notes the following:

Description
Schedule B refers to Attachment B.
Attachment B contains two descriptions of the application area.

- The first description is a dot point description which generally describes that application area.
- The second description is a partial copy of a metes and bounds description prepared by Geospatial Services, dated 2 December 2008 but with pages 2 and 4 missing.

Map
Schedule C makes no reference to maps included or attached.
However a map is attached to the Form 1 and is a monochrome copy of an A3 colour map, entitled "Native Title Determination Application Ramindjeri", produced by Geospatial Services, NNTT, dated 2 December 2008.

Assessment
Due to the incomplete claim area description the descriptions and map are inconsistent and do not identify the application area with reasonable certainty'.

The amended application

A copy of the complete description of the claim area, which was prepared by the Tribunal on 2 December 2008 and updated on 5 November 2010, was provided to the Applicant together with the preliminary assessment.

The complete description now forms part of the amended application as Attachment BA. As such the claim area description and map are now consistent and do identify the application area with reasonable certainty.

Having regard to the identification of the external boundary at Attachment BA and the map at Attachment C showing the external boundary, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

The specific exclusions to the area of the application are clearly identified at Attachment BB and are sufficient to offer an objective mechanism to identify which areas fall within the categories described.

I am satisfied that the information and the 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 areas of the land or waters.The application satisfies the condition of s. 190B(2) as a whole.

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).

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met.

Preliminary to any consideration about whether or not I am satisfied about the identification of the native title claim group, I need to determine how the application identifies the group. That is, are the persons in the group named in the application pursuant to s. 190B(3)(a) or are the persons described pursuant to s.190B(3)(b)?

Schedule A of the application refers to Attachment A for information on the identification of the native title claim group. The information in Attachment A is provided in three parts:

1. a list of the members of the native title claim group;
2. the principle of incorporation into the claim group;
3. an explanation that the claim group has the authority to determine whether a person is part of the claim group.

The decision in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) supports interpreting a description of a native title claim group with a view to giving it meaning as the priority. Dowsett J defines the requirement of s. 190B(3) as such:

> However subs 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification—at [33].

Significantly, Dowsett J finds that the way a description is read can determine its meaning. The description of the Gudjala claim group was made in two parts, and His Honour's approach was to not read the two paragraphs as discrete parts:

> However it is consistent with traditional canons of construction to read the paragraphs as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open. The preferable construction of the description is that all members of the claim group are descendants of the four apical ancestors. Such membership, it is claimed, is based upon law and custom, but details are not given. Although I would not encourage a repetition of this approach to compliance with the requirements of subs 61(3) [sic], I am of the view that it sufficiently identifies the members of the claim group by reference to apical ancestors—at [34].

While I am not of the view that I have a 'description' as such before me, the information is put in a way that I believe requires me to read it with a view to securing consistency. This is my preferred approach in respect of how the native title claim group is defined in this application. That is, the Ramindjeri claim group is defined by a list of names of the persons comprising the group. I understand the basis upon which the persons are named in the list is:

a) that they are of Aboriginal descent; and
b) they have a connection with the area by way of a principle of descent from their ancestors.

The explanation considers that there may be instances whereby it is uncertain that a person is a member of the group, but the claim group has authority (through appropriate persons) to determine whether a person of Aboriginal descent has a connection to the area in accordance with the principle of descent from their ancestors.

In my view, it is not for me to ascertain how the native title claim group's 'principles of incorporation' operate or to consider the merits of the principles by which the list of names has been derived. It is sufficient for me to be satisfied that the persons in the native title claim group are named in the application.

I am therefore satisfied that the requirements of s. 190B(3)(a) have been 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 **does not satisfy** the condition of s. 190B(4).

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. The description must be clear and easily understood—*Doepel* at [91], [92], [95], [98] to [101] and [123]. An assessment of whether the rights and interests can be established,

prima facie, as 'native title rights and interests' (as defined in s. 223) will be made under s. 190B(6) below.

Schedule E contains the following description of the claimed native title rights and interests:

> The native title rights and interests claimed are the rights and interests of common law holders of native title derived from and exercisable by reason of the existence of native title, in particular:
>
> 1. The generic aspects of the claim group's proprietary and beneficial rights and interests:
> 1.1 full beneficial ownership of the claim area where exclusive and non-exclusive rights exist, including possession, occupation, use and enjoyment as of right;
> 1.2 carriage of responsibilities for the care and maintenance of the claim area;
> 1.3 the right to hold the claim area as cultural property and the source of the native title group and it's identity;
>
> 2. Rights which flow from the property [sic] and beneficial rights:
> 2.1 the right to access and occupy the claim area. Including to live and erect residents on the land;
> 2.2 the right to take, use, enjoy and develop the natural resources of the claim area;
> 2.3 the right to make a living and derive economic benefits from the claim area, including to dispose of resources or products of the claim area by commerce or exchange;
> 2.4 the right to make decisions over, manage and conserve the claim area and its natural resources;
> 2.5 the right to control access, occupation, use and enjoyment of the claim area and its resources by others;
> 2.6 the right to conduct social, cultural and religious activities including burials on the claim area;
> 2.7 the right to inherit and bestow native title rights and interests.
>
> The native title rights and interests claimed are also subject to the effect of:
> - all existing non-native title rights and interests, and;
> - all laws in South Australia made in accordance with sections 19, 22F, 23E or 231 of the Native Title Act;
> - to the extent that these are valid and applicable.

In my view there is an explicit contradiction (see *Doepel* at [123]) within the description of the right at 1.1, as far as 'full beneficial ownership' is claimed in areas 'where ... non-exclusive rights exist', as the right, as currently expressed, appears to make a claim for exclusive possession to the *whole* of the area of land and waters claimed, not just to those areas where exclusive possession could be recognised.

How the rights listed at 2.1 to 2.7 (described as 'rights which flow from the property [sic] and beneficial rights) relate to the statements at 1.1 to 1.3 (referred to as 'the generic aspects of the claim group's proprietary and beneficial rights and interests') is also not clear. Such rights are usually understood to be claimed over areas where a claim to exclusive possession cannot be recognised. The description as provided at Schedule E does not make this statement.

I note further that the rights at 1.2 and 1.3 are not expressed in a way that is easily understood so that they are readily identifiable.

I am of the view that should I be required to make inferences and assumptions about the words the Applicant intended to use or not use, or to have to construct a cogent meaning out of the description provided, then the rights and interests as claimed cannot be *readily* identifiable. I am therefore not satisfied that the description in the application is sufficient to allow the native title rights and interests claimed to be readily identified.

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 in the three paragraphs of s. 190B(5) in turn before reaching this decision.

Doepel provides authority that the Registrar's task in relation to s. 190B(5) is to consider whether the asserted facts, assuming that they are true, can support the claimed assertions identified in that section; the task is not to 'test whether the asserted facts will or may be provided at a 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 approved by the Full Court in *Gudjala FC* —at [83] and [85].

In *Gudjala FC* the Full Court commented that:

> 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 *(emphasis added)* at [92].

Doepel indicates that the delegate should approach the task by 'analysing the information available to address, and make findings about, the particular matters to which s 190B(5) refers'—at [130]. Mansfield J concludes that it is correct to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention—at [132]. If the factual basis supports the three particular assertions, then the requirements of the section overall are likely to be met.

Information considered

I have considered the information in Schedule F and the information that is referred to in this schedule, namely Attachments G, O and T. I have also considered a document referred to in Attachment O entitled 'Ramindjeri Native Title Report – 'Summary of Traditional and On-Going Interaction With Lands', 'On-Going Connection to Land' and 'Language''. The document has been attached to the original application but, whilst referred to in Attachment O, is not attached to the amended application, I assume by omission. I note that the content of the Native Title Report is almost identical with the statements made in Attachment G, Mr Walker's affidavit of 17 January 2011.

Attachment T contains extracts of some 55 source documents. The content of the extracts is helpfully summarised in a 'Summary of Source References'. The source documents include the following:

- extracts of Tindale's journal and notes
- accounts, observations and reports of early settlers and officials
- extracts from an anthropological thesis
- extracts from anthropological journals
- extracts from a publication by the Ramindjeri Heritage Association
- miscellanious correspondence, maps, photographs and other material.

Attachment T also contains a three-page 'Overview', the author of which is not disclosed. The Overview, which also refers to the above source documents, is a short summary of the source material and an assessment thereof.

Whilst voluminous, the information contained in Attachment T does not specifically address the requirements of s. 190B(5) for the reasons outlined below.

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).

Section 190B(5)(a) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the application area.

I understand from comments by Dowsett J in *Gudjala* that a sufficient factual basis for this assertion needs to address 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;
- there has been an association between the predecessors of the whole group over the period since sovereignty – at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC* – see [69] and [96].

The Overview in Attachment T sets out information about the previous association of Ramindjeri ancestors with the claim area:

- records of legends and myths of the Ramindjeri People indicate intergenerational transmission of knowledge of the River Murray, Fleurieu Peninsula, Kangaroo Island, Adelaide Plain and Southern Mount Lofty Ranges [all of which are located within the claim area];
- the Ramindjeri People are acknowledged to have been in the vicinity of Rapid Bay, Encounter Bay, Goolwa and on Kangaroo Island prior to official European settlement occuring in 1836;
- the Ramindjeri People were subsequently observed by the first surveyors and the earliest settlers throughout the Fleurieu Peninsula including, but not limited to, the vicinity of Yankalilla, the Onkaparinga, Noarlunga, Holdfast Bay [which are located within the claim area] and at Adelaide on the banks of the River Torrens including in the First Report of the Interim Protector of Aborigines, George Stevenson;
- the boundary of the Ramindjeri native title claim is supported by, and consistent with, historical evidence of Ramindjeri knowledge, occupation, use, access to and defence of territory, and with historical evidence of battles fought in defence of territorial interests by Ramindjeri People as an identifiable cultural group, in the vicinity of Holdfast Bay and against hostile northern tribes and south-eastern tribes;
- several Aboriginal legends appear to originate or be sourced from, connected with, or refer to the Ramindjeri People and Ramindjeri country.

The Overview concludes that

> Historical documents record indigenous occupation of the southern portion of South Australia prior to official European settlement/colonisation including multiple authoritative historical records, including but not limited to the material gathered in Documents No. 1-55 [which form part of Attachment T], that record the existence of the Ramindjeri people as a cultural group distinct from, and distinguishable from, the various tribes north of Adelaide's River Torrens, and distinct from, and distinguishable from, Lake Alexandria, Lake Albert, Coorong and other south-eastern tribes, at the time of, and subsequent to, official European settlement/colonisation.

Mr Walker's affidavit of 22 October 2010 (Attachment O) at paragraph 10 provides the following information to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area:

> The Ramindjeri native title group and their ancestors have prior to, and since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area, and had association with it, and as various family clans died out, as was tradition, their clan area was taken up by surviving

> family clans who had access and use rights anyway. The Walker family being an unbroken 7 generation lineage from King Condoy, headman of Ramindjeri and his daughter Princess Con (Sally Walker) have accumulated inheritance rights together with surviving Ramindjeri people. The Ramindjeri headman having authority to conduct processes on behalf of the tribe, Karno Walker now fulfils this inherited position.
> Members of the Ramindjeri native title claim group have continuously carried out activities on the land and waters within the claim area and have possessed, occupied, used and enjoyed the area.

While Mr Walker (in his affidavit of 22 October 2010, as well as in affidavit of 17 January 2011 (Attachment R) at paragraphs 4, 5, 6, 7, 8 and 9) provides information on current activities which are said to provide a factual basis for the claimants' assertion that they have a current association with the claim area, I am of the view that the information is too generalised and vague. I accept that Mr Walker and other members who claim to be Ramindjeri may currently have some association with the application area, and may have had a life-long association, however, in my view the information does not demonstrate that the *particular* claim group *as a whole* has an association with the *particular* claim area. The information does not identify places where the current activities are said to be undertaken nor does it identify members of the claim group, other than Mr Walker, who undertake the said activities. In fact, due to the generalised nature of the information before me it could equally apply to any other claim. I am of the view that the information in Mr Walker's affidavits and the application does not go beyond the mere assertion of a factual basis for the rights claimed in the application.

I am therefore not satisfied that the application provides sufficient material to support the assertion that the group as a whole have, and the predecessors of the group had, an association with the application area. I therefore cannot be satisfied that the requirements of s. 190B(a) are met.

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).

Section 190B(5)(b) requires me to be satisfied that the factual basis is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests. In my view this assertion must be understood in light of the High Court's finding in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*):

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. 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—at [46]-[47] *(emphasis added)*.

In particular, Dowsett J in *Gudjala* characterised the requisite asserted facts in support of the condition in s. 190B(5)(b) as follows:

> That the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
>
> That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65], [66] and [81];
>
> That there is an explanation of the link between the claim group described in the application and the area covered by the application. In the case of a claim group described by reference to apical ancestors this may involve identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage—[66] and [81] *(emphasis added*).

This approach was not criticised or overturned by the Full Court in *Gudjala FC*.

The material before me contains some relevant information:

- Mr Walker's affidavits of 22 October 2010 at paragraph 10 explains his (and his family members') ancestral links with the claim area to King Condoy who is said to be the 'headman of the Ramindjeri Tribe, father of the Sally Walker lineage';
- Mr Walker's affidavit of 17 January 2011 describes Mr Walker's life-long attachment to the claim area and also that of other Walker family members;
- Mr Walker's affidavit of 17 January 2011 describes the conduct of activities of a traditional nature on the claim area by himself and members of the claim group.

I note, however, that the majority of this information is of a general nature only and to a large degree contains assertions rather than a factual basis for the rights claimed in the application.

In particular, none of the material before me describes with any specificity:

- the society that operated in relation to the claim area at the time of European settlement;
- the society's system of identifiable laws and customs, having a normative content;
- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed continuously since that time;
- the link between members of the current claim group with the society that existed at the time of European settlement of the area. I note that the material includes information on the link between the Walker family and King Condoy (at Attachment T, page 83) but no information on the link of other claimants with their ancestors.

I am therefore not satisfied that the application provides sufficient material to support the assertion that there exist traditional laws and customs acknowledged and observed by the native

title claim group that give rise to the claim to native title rights and interests. I therefore cannot be satisfied that the requirements of s. 190B(5)(b) are met.

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).

Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta*—at [47] and [87].

Dowsett J at [82] in *Gudjala* indicates that 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 on to the current claim group;
- that there has been a continuity in the observance of traditional law an custom going back to sovereignty or at least European settlement.

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

I am of the view that the material before me does not provide a sufficient factual basis to support the assertions contained in the application, and I refer to my reasons in relation to the requirement of s. 190B(5)(b) above. There is insufficient material before me that identifies how the ancestral links and traditional activities described in the application are derived from a society of people living according to a system of identifiable laws and customs, having a normative content, being a society that operated in relation to the application area at the time of European settlement.

I am therefore not satisfied that the application provides sufficient material to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. I therefore cannot be satisfied that the requirements of s. 190B(c) are met.

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 established, prima facie.

In considering the requirements of this condition, I am guided by the comments of Mansfield J in *Doepel*:

> Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim—at [126].

As referred to in my reasons at s. 190B(5) above, the application does not provide sufficent material for me to make any measure of it against the claimed rights and interests found at Schedule E. *Doepel* contains further clarification on this:

> ... 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].

And

> ... s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Additionally, Dowsett J in *Gudjala* was of the view that an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(6)—at [87].

Therefore in the absence of sufficient supporting material, and as the application fails to meet the condition at s. 190B(5) I do not consider, that the native title rights and interests claimed in the application can be established, prima facie. I also note that, as I have found at s. 190B(4) that some of the rights and interests are not readily identifiable as currently expressed, an examination of whether they could be established prima facie would not be possible.

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).

Under s. 190B(7) 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*.

Dowsett J in *Gudjala* at [89] found that an application which fails to satisfy the requirements for a sufficient factual basis case will likewise fail this condition due to the requirement for material showing a '*traditional* physical connection'. Despite there being some material before me that decribes the Applicant's attachment with the claim area and his conduct of certain activities in the claim area, it is for these reasons outlined in *Gudjala* that the application cannot satisify this merit condition.

I am therefore not satisfied that the material before me supports the fact that any member of the claim group currently has or previously had a traditional pysical connection with parts of the claim 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 provisions as mentioned in s. 23E in relation to the act;
a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

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

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

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

(b) the application states that ss. 47, 47A or 47, 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 report of 5 November 2010 and a search that I made of the Tribunal's geospatial databases on 22 March 2011 reveals 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, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2) because the application, at Attachment BB, excludes from the application area 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 the application, at Attachment BB, excludes from the application area any such areas.

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).

The application, at Schedule Q, states that no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State.

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

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

The application, at Schedule P, states that the native title rights and interests claimed do not purport to exclude all other rights and interests in relation to the whole or part of the offshore place.

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

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

There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Ramindjeri People**
NNTT file no.	**SC10/3**
Federal Court of Australia file no.	**SAD162/2010**
Date of registration test decision	**24 March 2011**

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)(h)	**met**

Test condition	Subcondition/requirement	Result
s. 190C(3)		**not met**
s. 190C(4)		**Overall result:** **not met**
	s. 190C(4)(a)	**N/A**
	s. 190C(4)(b)	**not met**

Section 190B conditions

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

Test condition	Subcondition/requirement	Result
s. 190B(9)		**Aggregate result:** **met**
	re s. 190B(9)(a)	**met**
	re s. 190B(9)(b)	**met**
	re s. 190B(9)(c)	**met**

[End of document]