National Native Title Tribunal

Registration test decision

Application name	Ngemba/Ngiyampaa People
Name of applicant	Elaine Ohlsen, Grace Gordon, Peter Williams, John Shipp, Edward Shipp, Neville Merritt, Danielle Flakeler-Carney, Jason Ford and Brett Smith
State/territory/region	New South Wales
NNTT file no.	NC2012/1
Federal Court of Australia file no.	NSD415/2012
Date application made	14 March 2012
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) (the Act).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the Act.

Date of decision: 12 April 2012

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Nadja Mack

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 24 August 2011 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the claim in the Ngemba/Ngiyampaa People claimant application (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 1 September 2007, 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 application to the Native Title Registrar (the Registrar) on 15 March 2012 pursuant to s. 63. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A.

In accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C. This is commonly referred to as the registration test.

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

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

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

Below is a list of all the information and documents that I have considered in reaching my decision.

- Ngemba/Ngiyampaa People native title determination claimant application filed on 14 March 2012 and its attachments;

- Geospatial assessment by the Tribunal's Geospatial Services (GeoTrack number 2012/0467) of 23 March 2012 (geospatial assessment);

- Copy of the Geospatial database iSpatialView search results of the application area, dated 26 March 2010 (iSpatialView search results); and

- 'Submission to the Delegate of the Native Title Registrar on behalf of the Ngemba/Ngiyampaa People in relation to the application of the registration test criteria' (NTSCORP submission) made by NTSCORP on 10 April 2012, 'Expert Report of James William Rose, senior anthropologist, for the purposes of the registration test being applied to the native title determination application of the Ngiyampaa, Ngemba, Wangaaypuwan and Wayilwan People' (senior anthropologist's expert report) also received on 10 April 2012 and 'Dr Michael Bennett's Apical Ancestor Biographies' (apical ancestor biographies) received on 11 April 2012.

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). 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. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

The State of New South Wales was provided with an opportunity to comment on the application by letter of 15 March 2012. The letter advised the State that comments are to be provided by 23 March 2012. No submissions were made by the State.

The Applicant was invited to provide further material in relation specified matters on 3 April 2012. Further material was submitted on 10 and 11 April 2012 (outlined above under 'information considered when making the decision'). The State was advised of the receipt of the material on 11 April 2012. The State responded on 11 April 2012 that it 'will not be making a submission on registration, but reserves all its rights in relation to responding to the claim. Accordingly there is no need to send the additional material, as they may only to be used for the purposes of providing information in relation to registration'. As a consequence the material was not provided to the State.

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].

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

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

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

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

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 description of the native title claim group is set out in Schedule A.

There is nothing on the face of the application which leads me to conclude that the description indicates that not all persons in the native title group have been included, or that it is in fact a subgroup of the native title claim group.

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 contains a description of the persons in the native title claim group in Schedule A. In accordance with *Doepel*, I consider whether the description is sufficiently clear so that it can be ascertained whether any particular person is one of those persons, under the corresponding merit condition in s. 190B(3). See also *Gudjala v Native Title Registrar* [2007] FCA 1167 (*Gudjala)* at [31].

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

> The application must be accompanied by an affidavit sworn by the applicant:
> (i) that 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) that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) that the applicant believes all of the statements made in the application are true, and
> (iv) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application is accompanied by the affidavits required by s. 62(1)(a) from each person jointly comprising the applicant namely Elaine Ohlsen, Grace Gordon, Peter Williams, John Shipp, Edward Shipp, Neville Merritt, Danielle Flakeler-Carney, Jason Ford and Brett Smith (Applicant).

Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s. 62(1)(a)(i)-(v).

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

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

The application contains all details and other information required by s. 62(1)(b).

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 and Attachment B contain a description of the external boundaries of the area covered by the application and also provide a description of the areas within the external boundaries that are excluded from it.

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 by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

Schedule D states that no searches have been carried out.

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

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

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

Schedule E refers to Attachment E and Attachments F(1) to (14) which provide a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application.

I assess the adequacy of the description in the corresponding merit condition.

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 at [25] notes that it is not enough to merely recite the general or the three particular assertions in s. 62(2)(e); what is required is a 'general description' of the factual basis for the three particular assertions.

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

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

Schedule F refers to Attachment F and Attachments F(1) to (14) which provide a general description of the rights and interests claimed and the factual basis for the three 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 sets out the details of activities currently carried out by the native title claim group in relation to the area claimed. Reference is also made to Attachment M and Attachments F(1) to (14).

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 three previous applications to the Federal Court made in relation to part of the area covered by this application. It is stated that the previous applications were discontinued and that no determination of native title was made.

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 notifications given in accordance with s. 24MD(6B)(c). There is no information before me to indicate that the applicant is aware of any notifications of the kind described in this section.

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 two notifications from Trade & Investment NSW have been given under s. 29. Schedule I sets out the relevant details of the notifications.

Subsection 190C(3)

No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and
(b) the previous application was on the Register of Native Title Claims when the current application was made, and
(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all three of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

The geospatial assessment shows that there is no application on the Register of Native Title Claims that covers all or part of the area covered by this 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 s. 251B.

The application satisfies the requirements set out in s. 190C(4)(b).

In order for the condition of s. 190C(4) to be satisfied, I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met.

The application is not certified. 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.

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

The application contains the relevant statements and briefly sets out the relevant grounds in Schedule R and in the applicant's s. 62(1)(a) affidavits as well as the affidavit of Mishka Holt, Principal Solicitor at Native Title Services NTSCORP Limited (NTSCORP), the legal representative of the applicant. I am therefore satisfied that the requirements of s. 190C(5) have been met.

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

The first requirement of this section is that the applicant is a member of the native title claim group. The persons jointly comprising the applicant state in their s. 62(1)(a) affidavits that they are 'a member of the native title claim group through my descent from [relevant name of apical ancestor provided], one of the apical ancestors named in Schedule A of the application'. On the basis of this information I am satisfied that the persons comprising the applicant are members 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:

- 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
- where there is no such process, by a process agreed to and adopted by the group.

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].

Doepel at [78] 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'.

In summary, the test under s. 190C(4)(b) requires me to ascertain from the material before me whether the claim group has a mandated traditional decision-making process and if f this is the case, whether this mandated process was followed. If there is no mandated process that must be complied with, then I must consider whether the persons in the native title claim group agreed to and adopted a decision-making process and that they then followed it in authorising the applicant.

The applicant in their respective affidavits state that there is 'no particular process of decision making under traditional laws and customs that must be complied with. Accordingly, Ngemba/Ngiyampaa People adopted the following process of decision making for the purpose of the native title application:

1. a decision to be made will be discussed by the native title claim group;
2. following discussion the decision to be made will be put in the form of a clearly worded written motion;
3. the motion will be read out to the meeting of members of the native title claim group;
4. the motion must be moved and seconded by members of the native title claim group before it is decided on;
5. the decision will then be made by the members of the native title claim group by a show of hands; and
6. a decision of the majority in relation to the motion shall be the decision of the native title claim group'.

The above is confirmed in the detailed affidavit provided by Mishka Holt which is referred to in Part A(2) of the application. In her affidavit she also sets out the following relevant information about the authorisation meeting held on 28 August 2010 at the Cobar Memorial Services and Bowling Club in Cobar:

- Meeting notices were published by NTSCORP in the Koori Mail (11 August 2010) and the Western Magazine (9 August 2010);
- Meeting notices were sent by NTSCORP to all those Aboriginal persons who had previously advised NTSCORP that they assert native title rights and interests in the proposed claim area and for whom NTSCORP had contact details; a copy of the notice was also sent to the NSW Aboriginal Land Council and 14 Local Aboriginal Land Councils (the names of which are set out in the affidavit);
- Travel, meal and accommodation bookings were made for eligible persons who wished to attend the meeting by NTSCORP;
- About 75 persons attended the meeting;
- Natalie Rotumah, then Deputy Group Manager Projects and Head of Community Relations of NTSCORP, now General Manager of NTSCOPR, chaired the meeting; several other NTSCORP staff attended the meeting;
- The meeting passed the following resolutions unanimously:
    - Confirmation that those present at the meeting are sufficiently representative of Ngemba/Ngiyampaa People and are able to make decisions including authorising the filing of a native title determination application;
    - Confirmation that the group does not have a traditional decision making process;

    - Adoption of a agreed decisions making process [as set out in the applicant's affidavits and outlined above];
    - Decision to file this native title claimant application;
    - Decision to authorise the applicant [plus[NAME REMOVED]] to make the application and to deal with matters arising in relation to it;
    - Decision that one of the persons comprising the applicant passes away or wishes to resign those who remain shall proceed as the applicant without alteration until a full claim group meeting authorises a new applicant.
- On 17 August 2011, [NAME REMOVED] informed NTSCORP that he wished to resign as one of the persons who jointly comprise the applicant. The next meeting of the group will not be convened until on or around early 2013. The applicant is therefore authorise to make this application and to deal with matters arising in relation to it.

Meeting notices are attached to Mishka Holt's affidavit. Also provided as attachments R(2) to (10) to Schedule R are affidavits by the persons jointly comprising the applicant confirming the above authorisation process and steps.

Based on the above information I am satisfied that the persons jointly comprising the are 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.

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).

The geospatial assessment identifies the following:

'Assessment of description and map

This assessment provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty. It is based on a copy of the description (Schedule B) and map (Schedule C) for the native title determination application NSD415/12 Ngemba/Ngiyampaa People (NC12/1) as filed in the Federal Court on 14 March 2012.

Description

Schedule B of the application refers to "all of the land and waters within the external boundaries described in Attachment B". Attachment B, produced by Geospatial Services, National Native Title Tribunal and dated 19 August 2011, and is a metes and bounds description defining the boundary of the application, referring to road reserves, rivers and creeks, the eastern boundary of NSD6084/98 Barkandji Traditional Owners 8 (NC97/32), cadastral boundaries and GDA94 geographic coordinate points.

Schedule B item (B) defines general exclusions, and specifically excludes the following:

"the lands and waters covered by the Barkandji Peoples native title determination application NSD6084/1998 (NC97/32)".

Map

Schedule C refers to attachment C of the application. Attachment C is an A3 colour map dated 19 August 2011, produced by Geospatial Services, National Native Title Tribunal and titled "Native Title Determination Application, Ngiyampaa". This map displays the following detail:

The application area depicted as a bold dark blue outline;

Labelled roads, creeks and rivers, conservation areas towns and localities shown and labelled;

The NSD6084/98 Barkandji Traditional Owners 8 (NC97/32) application boundary depicted in light grey transparent fill and thick light grey outline, and labelled;

Scalebar, northpoint, legend, locality map and GDA94 one degree coordinate grid; and

Notes relating to the source, currency and datum of data used to prepare the map.

Assessment

The description and map are consistent and identify the application area with reasonable certainty'.

Having regard to the identification of the claim area at Schedule B's Part (a), Attachment B and the map at Schedule C, I am satisfied that the application area has 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 Schedule B's Part (b) and are sufficient to offer an objective mechanism to identify which areas fall within the categories described.

I therefore agree with the geospatial assessment and 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.

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. The application does not name the persons in the native title claim group but contains a description in Schedule A. Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

In considering the operation of s. 190B(3)(b) in *Doepel*, Mansfield J stated that:

> Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

Further, Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

Schedule A sets out a list of apical ancestors. The native title claim group comprises of all descendants of these ancestors.

Describing the claim group as the 'descendants' of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership of the group. It may be that some factual inquiry may be required to ascertain how members of the claim group are

descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

I am therefore of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

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

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

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

Section 190B(4) requires 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 in a clear and easily understood manner —*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 refers to Attachment E which contains the following description of the claimed native title rights and interests:

1. Where exclusive native title can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the Ngemba/Ngiyampaa People as defined in Schedule A of this application, claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.

2. Where exclusive native title cannot be recognised, the Ngemba/Ngiyampaa People as defined in Schedule A of this application, claim the following non-exclusive rights and interests including the right to conduct activities necessary to give effect to them:

    (a) the right to access the application area;
    (b) the right to use and enjoy the application area;
    (c) the right to move about the application area;
    (d) the right to camp on the application area;
    (e) the right to erect shelters and other structures on the application area;
    (f) the right to live being to enter and remain on the application area;
    (g) the right to hold meetings on the application area;
    (h) the right to hunt on the application area;
    (i) the right to fish in the application area;
    (j) the right to have access to and use the natural water resources of the application area;
    (k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);
    (l) the right to share and exchange resources derived from the land and waters within the application area;
    (m) the right to participate in cultural and spiritual activities on the application area;
    (n) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;

(o) the right to conduct ceremonies on the application area;
(p) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;
(q) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;
(r) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
(s) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

3. The native title rights and interests referred to in paragraph 2 do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.

4. The native title rights and interests are subject to and exercisable in accordance with:
   (a) the laws of the State of New South Wales and the Commonwealth of Australia including the common law;
   (b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales; and
   (c) the traditional laws and customs of the Ngemba/Ngiyampaa People for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

I am satisfied that the description of all the native title rights and interests claimed is sufficient to allow for them 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 satisfies the condition of s. 190B(5) because the factual basis provided is sufficient to support each of the particularized assertions in s. 190B(5), as set out in my reasons below.

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

Law in relation to the requirements of s. 190B(5)

The Registrar is not confined to the information contained in the application when considering the requirements of this section: *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [62] (*Strickland*); approved on appeal by the Full Court in *Western Australia v Strickland* (2000) 99

FCR 33; [2000] FCA 652 at [88]—[89]; *Martin v Native Title Registrar* [2001] FCA 16 at [23] (French J); *Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 at [25] and *Doepel* at [16].

The Full Court in *Gudjala FC* observed at [90] to [92] that there is a correlation between the requirements of ss. 62(2)(e) and 190B(5) in that s. 62 prescribes the information to be contained in an application in relation to the factual basis and s. 190A provides for an assessment by the Registrar of that information, with a view to deciding whether it should be accepted for registration. The Full Court concluded at [90] that the statutory scheme in ss. 62 and 190A contemplates that an application and accompanying affidavit which 'fully and comprehensively' addressed all the matters in s. 62, could 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B'.

Gudjala FC allowed an appeal against the decision of Dowsett J in *Gudjala 2007* that the Gudjala native title determination application did not satisfy the requirements of s. 190B(5) on the basis that Dowsett J 'applied to his consideration of the application a more onerous standard than the NTA requires'—at [7]. The matter was remitted back to Dowsett J who reconsidered the application against the conditions in ss. 190B(5), (6) and (7) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 on 23 December 2009 (*Gudjala 2009*).

I am not, as the Registrar's delegate, to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis', I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was approved in *Gudjala FC* at [83] to [85].

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

I refer also to the following comments from *Gudjala FC*:

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

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the factual basis materials that are before me as if they were evidence furnished in support of the claim. My task is not to criticise or refuse to accept as true what is stated in the application and the additional information, but to consider the sufficiency of the factual basis material to fully and comprehensively address the relevant matters set out in s. 190B(5). My assessment is limited to whether the asserted facts in the

application and supporting material can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

In *Gudjala FC* at [68] to [72] and [77], the Full Court considered the analysis by Dowsett J in *Gudjala 2007* as to what must be addressed when providing a sufficient factual basis for the assertions in s. 190B(5). There is nothing in the reasons to indicate that the Full Court considered Dowsett J to have erred in this respect. It is therefore my view that in assessing whether the asserted facts are sufficient to support the assertions in s. 190B(5)(a) to (c), I must consider the decision in *Gudjala 2007* where it was not expressly criticised by the Full Court.

I am of the view that the most recent *Gudjala 2009* decision does not appear to detract or depart from the general principles enunciated in either of the *Gudjala 2007* decision or the *Gudjala FC* decision as to the requirements of s. 190B(5).

Finally, in relation to how I approach the task, I note that *Doepel* is authority that I should analyze 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to the comments of Mansfield J at [132] that it is correct for the Registrar 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 to the task at hand. If the factual basis supports the three assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three assertions before concluding whether overall the requirements of the section are met.

Information considered by the delegate

The factual basis in support of this assertion is provided in the application in Attachment F and the affidavits of 14 members of the claim group (Attachments F(1) to F(14)). In addition, the Applicant provided additional material in support of the requirements of s. 190B(5):

- NTSCORP submission;

- senior anthropologist's expert report; and

- apical ancestor biographies.

In my view the senior anthropologist's expert report and the NTSCOPR submission comprehensively outline the factual basis for the assertions in s. 190B(5).

I will only refer to the other documents provided by the applicant (outlined above) where required, for example when they enhance the information provided in the two documents or illustrate it. As the affidavit material is detailed and extensive, I have extracted relevant examples from some but not all of the 14 affidavits.

In relation to the senior anthropologist's expert report I note the following:

- its author, James William Rose, has been employed by NTSCORP for the past 7 years to conduct anthropological research;

- he has lived and worked with Aboriginal communities since the mid 1980s and since 1999 has been engaged in anthropological research concerning a number of Aboriginal communities across Australia;

- since mid 2006 he has been engaged by NTSCROP to research the potential native title rights of the community comprising the Ngiyampaa/Ngemba language community, the community which constitutes the claim group;

- he has conducted over 70 consultations with over 70 members of the claim group which were specifically concerned with the potential native title rights of those individuals and the community of which they are part. Other research staff have also consulted with claim group members and in total NTSCORP has consulted with over 140 members of the claim group; Mr Rose has reviewed records of all consultations, estimated to be over 190; and

- he has read extensive anthropological, ethnographic, historical and linguistic literature associated with the region encompassing the claim area and directly concerned with the claim group, including over 30 texts dating from 1866 to 2005.

Finally, I note that in the senior anthropologist's report refers to the claim group as 'Ngiyampaa/Ngemba'. For consistency, in my reasons I use the reference as used in the application, Ngemba/Ngiyampaa.

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

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

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 2007* that a sufficient factual basis for the assertion in s. 190B(5)(a) 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].

As I have noted above, this analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*— at [69] and also at [96]. I note that the elements discussed by Dowsett J at [52] and referred to by the Full Court at [96], appear to refer to the assertion that there is a cohesive community of people who observe 'traditional'[1] law and custom and who are associated with the application area over the period since sovereignty or European settlement (see *Gudjala FC* at [96] and *Gudjala 2009* at [26]).

The senior anthropologist's expert report at paragraphs 10 to 13 and 16 sets out, in summary, the following professional opinions in relating to the group's past and present association with the claim area based on the research referred to above:

- There exists a single community of indigenous people referring to themselves as the Ngemba/Ngiyampaa, Wangaapuwan and Wayilan People that occupies the current claim

[1] The meaning of 'traditional', as it appears in s. 223(1)(a), is the subject of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta HC*).

area, the Wayliwan and Wangaaypuwan being two linguistic sub-deviations of the Ngemba/Ngiyampaa language community;

- The Ngemba/Ngiyampaa People have maintained an association with the claim area from the time of contact until the present. The comprehensive geographic and genealogical model of this community which has been developed by the senior anthropologist in collaboration with NTSCORP historian Dr Michael Bennett, supports this view. The genealogy which incorporates over 3240 descendants of 45 apical ancestors clearly shows systematic intermarriage among families distributed throughout the claim area and the maintenance of strong localised connection from one generation to the next; and
- Previous ethnographic and anthropological research supports the consistent association of the claimant group with the claim area. Between 1866 and 2005, dozens of scholarly texts have been compiled, supporting the association of the claim group with the claim area, including unpublished field journals of ethnographers and anthropologists Robert Mathews, Adolphus Elkin, Alfred Radcliffe-Brown, Norman Tindale and Ronald and Catherine Berndth, which record consultations with numerous deceased members of the claim group as well as apical ancestors forming part of the claimant group description during the late 19th and early 20th centuries.

The report also states at paragraph 30 that the claim group has a clear, normative principle of marriage and residency that encourages spouses to reside, subsist and raise their children in the areas of each other's birth, which resulted in conservative networks of physical association being reinforced, as evident in the repeated intermarriage between ancestors born in various parts of the claim area, but infrequently outside of it. Detailed information about the ancestors is contained in the apical ancestor biographies which illustrate the above.

In addition, the affidavit material before me provides ample information about the association of a number of family groups with the claim area that date back to the early 1900s, describing the deponents' lifelong association with the traditional laws and customs of the society to which they belong, the inter-generational transmission of those traditional laws and customs and their and their family members' particular connections to the application area. [SENSITIVE MATERIAL REMOVED]

In relation to the claim group's association with the claim area since *sovereignty* I note that the senior anthropologist's expert refers to association of the Ngemba/Ngiyampaa People at *first European contact* rather than at sovereignty (using the terms 'British colonization' and 'effective British sovereignty'). Contact is said to have occurred 'in the mid-19th century'/ in the '1850s'. In particular the report notes at paragraph 16 '[t]his is reflected in the documentary record of Aboriginal occupation of the region and particularly the birth, death and marriage certificates of Aboriginal people living in the region, which do not extend past this date'.

The NTSCORP submission refers to specific case law, including the judgement of the NSW Court of Appeal in *Mason v Tritton (1994) 34 NSWLR 572* in support of its submission that ,in the circumstances of this matter, the delegate can reasonably draw the inference that the Ngemba/Ngiyampaa People were in occupation of the claim area at the time of sovereignty based on the fact that the Ngemba/Ngiyampaa People's ancestors set out in Schedule A occupied the claim area at the time of first European contact.

I am prepared to make such an inference on the following basis:

- the 45 ancestors set out in Schedule A were born in the period between 1827 and 1878, i.e. in period shortly before and shortly after contact;
- where the location of birth is listed, almost all of the ancestors appear to have been born in the claim area; and
- the comprehensive geographic and genealogical model of this community developed by NTSCOPR's senior anthropologist and historian and the description by current members of the claim group of the ways they and their predecessors have maintained their consistent association with the claim area; in fact the senior anthropologist's expert report provides two examples of apical ancestors and their and their descendants' consistent association with the claim area, noting that many of the descendants of these persons live in the region occupied by their parents, grandparents and greatgrandparents.

I am therefore satisfied that the material I have reviewed supports the assertion that the native title claim group as a whole have, and their predecessors had, an association with the application area.

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

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

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 senior anthropologist's expert report in relation to the traditional laws and customs of the claim group relevantly states at paragraphs 16 and 17 that

- the date of European contact 'as it bears upon the traditional laws and customs of the claim group at the time', took place during the 1850s;
- the majority of the apical ancestors were born during the 1850s; and
- the laws and customs that have been practiced by the claim group's apical ancestors throughout their lifetimes reflect the traditional laws and customs of the claimant group practiced at the time of sovereignty.

The report further states in paragraph 39 that, based on author's research, it is his professional opinion that the system of traditional laws and customs of the claim group described in the affidavit material attached to the application as Attachments F(1) to (14) is 'functionally identical to that practiced by the same group at the time of sovereignty'.

In relation to the link between the claim group and the claim area and in particular the laws and customs giving rise to the composition of the claim group and its rights in land encompassing the claim area at the time of sovereignty the reports states at paragraph 18 that there are references in ethnographic and anthropological publications dating 1907 (Mathews, R.H. 'Notes on the Aborigines of New South Wales') and 1959 (Beckett, J. "Further Notes on the Social Organisation of the Wongaibon of Western NSW') which describe a system of regulating marriage and descent and the transmission of rights therein that applies to the Ngemba/Nyiyampaa People. At paragraph 21 the reports states the literary references show that the same system of allocating group membership and rights in land was practised continuously from 1907 to 1959. Genealogical records created by NTSCORP show that the apical ancestors who provided information on this system to Mathews in 1907 were alive at the time of European contact and in the author's view comprised part of the society represented by the claim group as it would have existed at sovereignty.

Two examples are provided in the senior anthropologist's expert report at paragraphs 22 to 33 which illustrate how this system comprises a means of allocating individuals a range of choices of marriage partner and partly through these choices, also allocates rights in particular areas of land. In the author's view, the examples, which are said to be comparable among every one of the 45 apical ancestors and their thousands of descendants, indicate the continous practice of the core principles of the system described by Mathews and Beckett.

At paragraph 32 the expert states that in his view the principles informing this practice comprise the traditional laws and customs of the claim group which give raise both to their status as a land-

holding group and to the specific rights asserted by them in the claim area. At paragraph 33 it is explained that this system regulates amongst members of the group as well as other Aboriginal persons access to, use of natural resources contained within, and information concerning, their traditional lands. The NTSCOPR submission at paragraph 26 refers to Attachment F which is said to provide 'material which is sufficient to allow the Delegate reasonably to draw the inference that there was, at sovereignty, a Ngemba/Ngiyampaa society in the claim area observing traditional laws and customs'. [SENSITIVE MATERIAL REMOVED]

A table attached to the NTSCORP submission is said to provide a guide to where in each of the Attachment F affidavits the deponents give evidence of how they continue to observe these traditional laws and customs.

In addition, at paragraph 30 of the NTSCORP submission it is submitted that the 'combination of the statements made in Attachment F and the illustration of how those statements are true in the context of the lives of each of the deponents demonstrates how the traditional laws and customs currently acknowledged and observed by the claim group are rooted in the laws and customs of a Ngemba/Ngiyampaa society in existence at the time of sovereignty over the area of the application and how those laws and customs have continued to exist in substantially uninterrupted form from sovereignty to the present day'. [SENSITIVE MATERIAL REMOVED]

In my view the affidavits attached to Schedule F support and illustrate the statements and assertions found in Schedule F that members of the claim group possess rights and interests under their laws and customs by virtue of those laws and customs being handed down to them by their ancestors. I am invited to draw the inference that these laws and customs are the traditional laws and customs of a pre-sovereignty Ngemba/Ngiyampaa society.

I note that in *Gudjala 2009* Dowsett J outlined that it may be possible to infer the existence of a pre-sovereignty society 'simply because it clearly existed shortly thereafter and has continued since'. This kind of inference may be appropriate where clear details of a claim group's continous history since sovereignty or shortly thereafter are provided, and which may demonstrate the traditional content of the claim group's laws and customs—at [30].

In my view the material before me allows me to make such a favourable inference. The material sets out information about the current laws and customs acknowledged and observed of the claim group, explains that these laws and customs were acknowledged and observed by the ancestors of the claim group at time of European contact and that they have been passed down from generation to generation since.

I my view the material before provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the claim group and that these give rise to the native title rights and interests claimed.

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

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

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 2007* 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 to 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.

The factual basis in support of this assertion is provided in the application in Attachment F and the affidavits of 14 members of the claim group (Attachments F(1) to F(14)). From the senior anthropologist's expert report I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors or predecessors by traditional modes of oral transmission, teaching and common practice. This continues today amongst claim group members. There are numerous examples in the affidavits attached to Attachment F about the transmission of knowledge (e.g. Attachment F(1) at paragraphs 21 to 23; Attachment F(2) paragraphs 8 to 35).

Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

Subsection 190B(6)
Prima facie case

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

The application **satisfies** the condition of s. 190B(6).

To meet the requirements of s. 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s. 186(1)(g) and the note to s. 190B(6).

In relation to the consideration of an application under s. 190B(6) I note Mansfield J's comment in *Doepel*:

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].

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

The definition of 'native title rights and interests' in s. 223(1) guides my consideration of whether prima facie, an individual right and interest can be established. In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s. 190B(5) above) in relation to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group; and
- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC)* that a 'native title right and interest' must be 'in relation to land or waters'.

I also need to consider the case law relating to extinguishment when examining each individual right and interest claimed.

Any rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established.

As mentioned above in relation to the requirements of s. 190B(5), the registration test is an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is also not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, prima facie.

In summary, s. 190B(6) requires me to carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

In my consideration of the individual rights and interests claimed, I take into account information contained in the application on activities conducted by the claim group. While current activities by claimants on the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it.

Exclusive rights and interests

I first consider the claim to 'exclusive possession' and then the claim to non-exclusive rights and interests, as referred to in Attachment E.

> 1. Where exclusive native title can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the Ngemba/Ngiyampaa People as defined in Schedule A of this application, claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.

Ward HC is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act.

The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'—at [127].

The senior anthropologist's expert report, at paragraphs 34 to 39 relevantly states that, based on the author's research and the facts outlined in his report, he is of the professional opinion that:

- the traditional laws and customs of the claim group is functionally identical to that practiced by the same group at the time of sovereignty and the ongoing existence and vitality of this system continues to give rise the rights claimed by the claim group in relation to the claim area;
- the traditional laws and customs of the Ngemba/Ngiyampaa People comprise of a system for regulating among themselves and other Aboriginal groups access to, use of natural resources contained within, and information concerning, their traditional lands which is traditional in nature;
- the use of natural resources exercised by the Ngemba/Ngiyampaa People over their traditional lands and waters is traditional in nature and includes hunting, gathering of food and water and manufacturing traditional implements and artefacts; and
- the transmission of information practiced by the Ngemba/Ngiyampaa People in relation to their traditional lands and waters includes information concerning the distribution and proper use of natural resources such as plants, animals, water, materials used for the production of traditional implements and artefacts, and sites of traditional significance such as art sites, camp sites, artefact scatters and sacred sites which is traditional in nature. This information is transmitted from one generation of the claim group to the next according to principles of kinship, seniority, honour and trust. These principles are an accurate reflection of those prevailing and exercised at the time of contact and have been handed down through successive generations of the claim group.

The NTSCORP submissions refers to parts of the affidavits provided in Attachment F in support of the existence of laws and customs that relate to sanctions and prohibitions relating to access to land and waters, and their custodianship, including protocols for who can speak for country and appropriate permissions which must be sought. In my view the statements in the affidavits are of relatively broad nature (only two of the deponents refer to the Ngemba/Ngiyampaa People speaking for country (Attachment F(2) at paragraph 38 and Attachment F(3) at paragraph 41); the other deponents speak about protocols that relate to speaking about other Aboriginal People's country) and whilst they invoke the idea of territoriality being a feature of the traditional laws and customs of the group, it is only when read in conjunction with the above statements in the expert report that I am of the view that they sufficiently demonstrate that under the traditional laws and customs of the Ngemba/Ngiyampaa People its members are able to exercise control over the access to the claim area by other persons.

Ward HC is authority that the 'exclusive' rights are potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA. Paragraph 4 of Attachment E takes account of this authority in paragraph 1 as quoted above.

I therefore find that prima facie the exclusive rights claimed are established over areas where there has been no previous extinguishment of native title or where any extinguishment is to be disregarded pursuant to ss. 47, 47A or 47B.

Outcome: established, prima facie

Non-exclusive rights and interests

I now consider the remaining rights and interests claimed. Paragraphs 2 and 3 of Attachment E clarify that where exclusive native title cannot be recognised, the Ngemba/Ngiyampaa People claim the non-exclusive rights and interests listed in Attachment E at paragraph 2, including the right to conduct activities necessary to give effect to them.

For the purpose of assessing whether the rights and interests claimed Attachment E, paragraph 2 can be established, prima facie, as non-exclusive native title rights and interests I have grouped together those that appear to be of a similar character and therefore rely on the same evidentiary material, or are rights and interests which require consideration of the same law as to whether they can be established. I refer to them as listed in Attachment E and note that my reasons below should be considered in conjunction with, and in addition to, my reasons and the material outlined at s. 190B(5) above.

> (a) the right to access the application area;
> (b) the right to use and enjoy the application area;
> (c) the right to move about the application area;
> (d) the right to camp on the application area;
> (e) the right to erect shelters and other structures on the application area;
> (f) the right to live being to enter and remain on the application area;
> (g) the right to hold meetings on the application area;
>
> (q) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;
> (r) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
> (s) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

Being satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that the factual basis material establishes a right to access the claim area, use and enjoy it, move about it and to camp or live on it. These rights are inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession.

There is substantial material within the affidavits at Attachment F that speak of the claim group members and their predecessors exercising the above rights. [SENSITIVE MATERIAL REMOVED] I also refer to my considerations at s. 190B(5)(a) above and the extracts quoted there from the affidavits.

In relation to the non-exclusive rights to speak for the claim area and make non-exclusive decisions about it, to control access to the claim area by other Aboriginal People and to speak authoritatively about the claim area among other Aboriginal People I note that these rights, in my view, are inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession.

I note that these rights seek to establish some form of control by the claim group over the claim area and how it is used. In this way, it appears that the applicant seeks the recognition of rights in the nature of exclusive rights and interests, in areas where exclusive native title cannot be recognised. The case law dealing with the tension between non-exclusive rights expressed in an exclusive manner suggests that such rights are unlikely to be upheld by the Court. In *Ward HC*, referring to a claim to a right to control access it was held that:

It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead – at [52].

Similarly, in reference to the right to speak for country, the Court emphasised the exclusive nature of the right as follows:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of others – at [88].

However, the Court has, in certain cases, deviated from these conclusions reached in *Ward HC*. In *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J indicated a willingness to recognise the non-exclusive right to grant and refuse access to the application area to Aboriginal persons governed by the laws and customs of the native title holders – at [553]. Similarly, in the consent decision of *Mundraby v Queensland* [2006] FCA 436, the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by Aboriginal people' bound by the laws and customs of the native title holders and in the *Ngadjon-Jii People v State of Queensland* [2007] FCA 1937 the determination was explicit that the non-exclusive rights recognised did 'not extend to a right to control access to or a right to control the use of that land and water' [paragraph 5] however 'the non-exclusive rights of the Native Title Holders to use and enjoy the land and waters, being to: make decisions in accordance with traditional laws and customs about the use and enjoyment of the Determination Area by Aboriginal People who are governed by the by traditional laws acknowledged and traditional customs observed by the Native Title Holders' was recognised [paragraphs 3.2 (vii)].

At outlined above under my consideration of s. 190B(5)(b), the senior anthropologist's expert report identifies at paragraphs 19 to 33 that these rights are exercised under the traditional laws and customs of the native title claim group and are derived from the pre-contact normative system which allocated rights in particular areas of the claim area to members of the claim group. [SENSITIVE MATERIAL REMOVED] The senior anthropologist at paragraph 33 of his report states that the claim group's traditional laws and customs comprises a system for regulating amongst the claim group members and other Aboriginal groups access to, use of natural resources contain within, and information concerning, their traditional lands.

As noted above, the court, since the *Ward HC* decision, has recognised non-exclusive rights as claimed in this application where they are limited in their application to the Aboriginal people bound by the traditional law and custom of the claim group. In my view the material before me supports such recognition in this matter.

Therefore, based on this information, and on the right to exclusive possession established above, I am satisfied that these rights and interests are established by the factual basis material.

Outcome: established, prima facie

> (a) the right to hunt on the application area;
> (b) the right to fish in the application area;
> (c) the right to have access to and use the natural water resources of the application area;
> (d) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);
> (e) the right to share and exchange resources derived from the land and waters within the application area;

Being satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that the factual basis material establishes a right to hunt, fish and gather on the claim area and use and share and exchange its natural resources. These rights are inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession.

There are many examples within the affidavit material in Attachment F pertaining to these rights and interests and to their possession under the traditional laws and customs of the claim group. Almost all of the affidavits refer to traditional hunting methods and activities that claim group members still carry out today, including the gathering of natural resources. Similarly the right to fish is also referenced throughout the statements made by claim group members. I refer to my considerations under s. 190B(5)(b) above and the quoted extracts from the affidavits.

Based on the above information, I am satisfied that the claim group's factual basis material establishes the existence of these rights and interests under the claim group's traditional laws and customs.

Outcome: established, prima facie

> (f) the right to participate in cultural and spiritual activities on the application area;
> (g) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
> (h) the right to conduct ceremonies on the application area;
> (i) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;

Being satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that the factual basis material establishes a right to participate in cultural and spiritual activities and conduct ceremonies, transmit traditional knowledge and maintain and protect places of importance. These rights are inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession.

The affidavit material contains numerous references to the existence of such rights.[SENSITIVE MATERIAL REMOVED]Almost all of the affidavits contain information about the transmission of cultural knowledge to them from, or by them to, other members of the claim group.

Based on the above information, I am satisfied that the claim group's factual basis material establishes the existence of these rights and interests under the claim group's traditional laws and customs.

Outcome: established, prima facie

Decision

I also note in relation to all of the above rights and interests that they are native title rights and interests in relation to land or waters and there is no information before me that suggests that they have been extinguished over the whole of the application area. On the material before me, and having applied the test set out above, I find that , prima facie, they can all be established.

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application satisfies the condition of s. 190B(7).

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

Sufficient material is provided in the Attachment F affidavits by members of the claim group regarding their traditional physical connection with the claim area, as well as that of other members of the native title claim group (I refer to my assessment at s. 190B(5) above).

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

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made 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) because the geospatial assessment reveals that there are no approved determinations of native title over the application area. This is confirmed by the iSpatialView search results.

Reasons for s. 61A(2)

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

In my view the application **does not** offend the provisions of s. 61A(2) because Schedule B, paragraphs 1 and 2 exclude from the application area any areas covered by previous exclusive possession acts as defined in s. 23B.

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 Schdule B, paragraph 4 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth, State or territory.

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

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

The application satisfies the condition of s. 190B(9), because it meets all of the three subconditions, as set out in the reasons below.

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

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

Schedule Q states that the 'application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown'.

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

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

Schedule P states that the 'application does not make any claim to exclusive possession of any 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	**Ngemba/Ngiyampaa People**
NNTT file no.	**NC2012/1**
Federal Court of Australia file no.	**NSD415/2012**
Date of registration test decision	**12 April 2012**

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**

Test condition	Subcondition/requirement		Result
		s. 62(2)(ga)	met
		s. 62(2)(h)	met
s. 190C(3)			met
s. 190C(4)			Overall result: met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		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)	Met
s. 190B(4)		met
s. 190B(5)		Aggregate result: met
	re s. 190B(5)(a)	met
	re s. 190B(5)(b)	met
	re s. 190B(5)(c)	met
s. 190B(6)		met
s. 190B(7)(a) or (b)		met
s. 190B(8)		Aggregate result: met
	re s. 61A(1)	met

Test condition	Subcondition/requirement	Result
	re ss. 61A(2) and (4)	**met**
	re ss. 61A(3) and (4)	**met**
s. 190B(9)		**Aggregate result:** **met**
	re s. 190B(9)(a)	**met**
	re s. 190B(9)(b)	**met**
	re s. 190B(9)(c)	**met**

[End of document]