



Registration test decision

Application name	Mt Denison Pastoral Lease
Name of applicant	Jack Cook Ngal/Jangala, Teddy Long Jupurrurla, Maggie Ross Napaljarri, Peggy Tilmouth Nungarrayi on behalf of the members of the Rrwerk/Mamp/Arrwek, Yinjirrpikurlangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding groups
NNTT file no.	DC2013/009
Federal Court of Australia file no.	NTD27/2013
Date application made	6 December 2013

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

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

Date of decision: 7 April 2014

Jessica Di Blasio

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 30 July 2013 and made pursuant to s. 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Mt Denison Pastoral Lease claimant application (the application) to the Registrar on 10 December 2013 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 6 December 2013 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

Registration test

[6] 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.

[7] Pursuant to ss 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

Information considered when making the decision

[8] 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.

[9] 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.

[10] I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- Form 1 and all attachments; and
- Geospatial assessment and overlap analysis dated 12 December 2013.

[11] 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 of the Act.

[12] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[13] 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]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[14] On 11 December 2013, the case manager with carriage of this matter wrote to the Northern Territory Government informing it of the Registrar's receipt of the application and providing a timeframe in which the Registrar proposed to complete the registration test. The same letter invited submissions regarding the registration testing of the application from the Northern Territory Government.

[15] On 11 February 2014 the Northern Territory Government wrote to the case manager stating that it did not intend to make any submissions in relation to the registration testing of this application.

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.

[16] 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.

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

[18] 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). 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.

[19] Below I consider 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)

[20] In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [37] and [39]. I therefore understand that I should consider only the information contained in the application and should not undertake any form of merit assessment of the material when considering whether I am satisfied that 'the native title claim group as described is in reality the correct native title claim group'—*Doepel* at [37].

[21] If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then, in my view, the relevant requirement of s 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

[22] There is a description of the claim group included at Schedule A of the application.

[23] There is nothing on the face of the application which suggests that the application is not brought on behalf of all members of the native title claim group, I am therefore satisfied that the native title claim group as described in Schedule A meets the requirements of s 61(1).

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

Name and address for service: s 61(3)

[25] The name and address for service of the applicant is contained at Part B of the application.

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

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

[27] I understand that this provision is ‘a matter of procedure’ and does not require me to consider whether the description is ‘sufficiently clear’, merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198—at [34].

[28] The native title claim group is described at Schedule A of the application.

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

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

[30] The application is accompanied by four affidavits each affirmed by one of the people who comprise the applicant.

[31] Each of the affidavits include the statements required by s 62(1)(a)(i)–(v) and is competently signed and witnessed

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

Details required by s 62(1)(b)

[33] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a)–(h), as identified in the reasons below.

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

[34] Schedule B is a written description of the application area. Part (a) describes areas covered by the application and part (b) describes areas excluded from the application.

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

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

[36] Schedule C refers to Attachment A which is a monochrome copy of an A3 coloured map of the application area.

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

Searches: s 62(2)(c)

[38] Schedule D includes details of searches carried out over the application area.

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

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

[40] Schedule E includes a description of the native title rights and interests claimed by the native title claim group.

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

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

[42] Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s 62(2)(e)(i)–(iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s 190B(5). I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

[43] Information relevant to the asserted factual basis of the claim is included at Schedule F of the application.

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

Activities: s 62(2)(f)

[45] Details of activities currently carried out by the native title claim group in the application area are included at Schedule G of the application.

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

Other applications: s 62(2)(g)

[47] Schedule H of the application states that '[t]he applicant is not aware that any other applications seeking a determination of native title or a determination of compensation in relation to native title have been made in relation to the whole or a part of the area covered by the application.'

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

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

[49] Schedule HA states '[n]ot applicable'. I take this to mean that the applicant is not aware of any s 24MD(6B)(c) notices that have been given over the application area.

[50] The application contains all details and other information required by s 62(2)(ga).

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

[51] Schedule I includes the details of a s 29 notice given for proposed grant of petroleum license.

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

Conclusion

[53] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

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.

[54] This requirement is concerned to ensure that the Registrar is satisfied that no person included in the native title claim group for the current application is a member of the native title claim group for any previous application.

[55] I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied — *State of Western Australia v Strickland* [2000] FCA 652. I therefore must first consider if there are any previous claims that overlap the application area, that were on the

Register when the current application was made, and that remain of the Register at the date of this decision. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

[56] The Tribunal's Geospatial services prepared a Geospatial assessment and overlap analysis of the application area dated 12 December 2013, which states that no applications as per the Register of Native Title Claims overlap the external boundary of this application. My own searches of the Tribunal's databases confirm this. As such, there is no 'previous overlapping application' for the purposes of this requirement.

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

Subsection 190C(4)

Authorisation/certification

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

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

[59] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

[60] Schedule R of the application includes a certification from the Central Land Council (CLC). The certificate is dated 4 December 2013 and is signed by the Director of the CLC. I have had regard to the Geospatial assessment dated 12 December 2013 which identifies the CLC as the only representative body responsible for the area covered by the application. The CLC is therefore the only body that could certify the application.

[61] Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss 203BE(2)(a) and (b) have been met, their reasons for being of that opinion, and where applicable set out what the body has done to meet the requirements of s

203BE(3). The necessary opinions at ss 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(a)

[62] This provision requires a statement from the representative body that they are of the opinion that the requirements set out in s 203BE(2)(a) and (b) have been met.

[63] The certificate contains the required statements.

Section 203BE(4)(b)

[64] This provision requires the representative body to set out their reasons for being of the opinion required at s 203BE(4)(a).

[65] The certificate provides the following relevant information with regard to the authorisation of the applicant:

- The CLC has provided representation to the Anmatyerr and Walpiri people since the CLC was established.
- A meeting of the native title claim group was held on 12 April 2012 at Karkadu Outstation on Mount Denison Pastoral Lease. The meeting was organised and facilitated by the CLC and was well attended by members of the claim group, including senior knowledgeable members of each of the five landholding groups that comprise the claim group. The meeting was attended by the CLC legal and anthropological staff.
- Under the traditional laws and customs of the claim group there is a process of decision-making that must be complied with when making decisions about country. In accordance with that process the persons who attended the meeting had authority to make decisions relating to the application. As such, they authorised the people who comprise the applicant to make the application and deal with matters arising in relation to it.
- The CLC consulted the meeting about the application and received instructions from claimants agreeing to its content. The persons authorised to make the application were also consulted about its contents.

[66] The certificate provides the following relevant information with regard to the making of all reasonable efforts to ensure the application describes or otherwise identifies all of the other persons in the native title claim group:

- The CLC has undertaken anthropological and historical research in relation to Anmatyerr and Walpiri people, including specifically the five (5) landholding groups that comprise the claim, for over 20 years. According to this research:
 - the members of the native title claim group as described in the application are the only persons who assert and are entitled to claim native title in the application area and this is acknowledged by the wider Aboriginal community; and
 - the description of the persons and criteria for membership of the claim group provided in the application accords with the traditional laws and customs of those persons and identifies and describes all persons who hold common or group rights comprising the native title claimed in the application area.

[67] The certificate contains the required information pursuant to s 203BE(4)(b).

Section 203BE(4)(c)

[68] This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

[69] The certification states that '[t]he Central Land Council is not aware of any other application or proposed application that partly or wholly covers the application area.'

[70] In my view the certification meets the requirement of s 203BE(4)(c).

My decision

[71] For the above reasons I am satisfied that the application has been certified under Part 11 by the only representative body that could certify the application and I am satisfied that it complies with s 203BE(4).

[72] For the reasons set out above, I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

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.

[73] A description of the application area is included at Schedule B of the application.

[74] Schedule B is divided into two parts, the first being 'the area covered by the application' which describes the application area as the area covered by Northern Territory (NT) Portion 312 (held under Perpetual Pastoral Lease No. 1110) and NT Portion 4513 (located within the boundaries of NT Portion 312).

[75] The second part of Schedule B is titled 'any areas within those boundaries that are not covered by the application' and specifically excludes from the application area:

- NT Portion 3408
- NT Portion 4747
- Three (3) roads that run through the external boundary of the application area.

[76] Schedule C of the application refers to Attachment A which is a reduced monochrome copy of an A3 colour map entitled 'Mt Denison Native Title Application Area'. The map is dated 4 December 2013 and includes:

- the application area depicted by a bold black outline with a hatched fill;
- surrounding tenure is shown and labeled;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

[77] Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied that it can be said with reasonable certainty whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

[78] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 12 December 2013. The Geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having also considered the map and boundary description contained in the application, I agree with that conclusion.

[79] Given the above, I am satisfied that the information and map 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.

[80] The application satisfies the condition of s 190B(2).

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.

[81] The application contains a description of the native title claim group. Thus, I must consider whether 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

Description of the native title claim group

[82] The native title claim group is described as comprising members of the 'Rrwerk/Mamp/Arrwek, Yinjirrpikulangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding groups ('the landholding groups')'. These persons, according to their traditional laws and customs, have spiritual, physical and/or historical associations with the application area and are connected to the area through:

- descent from ancestors (including adoption) connected with the application area as described in paragraph 8(a) of Schedule A; or
- non-descent based connections as described in paragraphs 8(b) and 10 of Schedule A;

[83] Paragraph 8 of Schedule A is headed 'Membership of the native title claim group' and states:

In accordance with the claimants' system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:

- (a) descendants (by birth or adoption) of one or more of the following named and un-named ancestors of the landholding groups ("the ancestors"): [a number of named and un-named

ancestors in respect of each landholding group are included. In respect of each of the landholding groups a number of descendants from each ancestor are also listed]

- (b) accepted as members of one (or more) of the landholding groups by the senior descent based members of the groups on the basis of their non-descent connections to the estate.

[84] Paragraph 10 of Schedule A describes the non-descent based method of membership to the claim group as follows:

Under the claimants' system of traditional laws and customs a person who is not descended from the ancestors becomes a member of a landholding group when accepted by the senior descent based members of the group on the basis of non-descent connections to the estate. The non-descent criteria that senior members of a landholding group have regard to when considering the recruitment of a particular individual are:

- (a) conception site and/or birthplace affiliation;
- (b) long term residence in an estate;
- (c) possession of secular and traditional spiritual knowledge, authority and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology;
- (d) authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate.

The requirements of s 190B(3)(b)

[85] The nature of the task at s 190B(3)(b) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51].

[86] It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has not been described sufficiently.'—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] (*WA v NTR*).

[87] In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person fell within one of the criteria identified in the description—at [67]. For the same reasons I am satisfied that the first criteria for membership to the native title claim group, being descent from an apical ancestor, (as described at paragraph 8 of the extract from Schedule A above) is sufficient for the purposes of s 190B(3)(b).

[88] Turning to the second limb of criteria for membership of the claim group, being non-descent based affiliation, I am again satisfied that this criteria meets the requirements of s 190B(3)(b). This is because the criteria upon which non-descent based membership to the claim group is determined is clearly set out at paragraph 10 of Schedule A, as outlined above. This criteria provides an objective reference point, both in terms of which people have the power to decide non-descent based connection (namely senior descent based members of the group) and in terms of the level of connection required to be eligible for membership to the group via non-descent based means. From this criteria, I consider that it is possible, again with some factual inquiry, to determine whether any particular person is a member of the claim group through non-descent based connections.

[89] I am therefore satisfied that the overall requirement of s 190B(3)(b) is met, as it is possible, through some factual inquiry, to ascertain, by reference to the description in Schedule A of the application, whether a particular person is a member of the native title claim group.

[90] The application satisfies the condition of s 190B(3).

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.

[91] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise ‘judgment upon the expression of native title rights and interests claimed’. His Honour considered that it was open to the decision-maker to find, with reference to s 223 of the Act, that some of the claimed rights and interests may not be ‘understandable’ as native title rights and interests—at [99] and [123].

[92] Primarily the test is one of ‘identifiability’, that is, ‘whether the claimed native title rights and interests are understandable and have meaning’—*Doepel* at [99].

[93] The following list of native title rights and interests claimed in the application area is included at Schedule E:

1. To the extent that any extinguishment of native title rights and interests must be disregarded the native title rights and interests that are claimed in relation to the application area are possession, occupation, use and enjoyment to the exclusion of all others.
2. The native title rights and interests of the native title holders are the rights possessed under and exercisable in accordance with their traditional laws and customs, including the right to conduct activities necessary to give effect to them, being:

- (a) the right to access and travel over any part of the land and waters;
- (b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
- (c) the right to hunt, gather and fish on the land and waters;
- (d) the right to take and use the natural resources of the land and waters;
- (e) the right to access, take and use natural water on or in the land except water captured by the holder of a pastoral lease;
- (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;
- (g) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;
- (h) the right to conduct and participate in the following activities on the land and waters:
 - (i) cultural activities;
 - (ii) ceremonies;
 - (iii) meetings;
 - (iv) cultural practices relating to birth and death including burial rites;
 - (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs, and, subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land, the right to privacy in the exercise and enjoyment of those activities;
- (i) the right to speak for country and to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;
- (j) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;
- (k) the right to be accompanied on the land and waters by persons who, though not native title holders, are:
 - (i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the land and waters;
 - (ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;
 - (iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.

3. Subject to paragraph 1 and the operation of the non-extinguishment principle where it applies

all the rights and interests listed in paragraph 2 above existed and continue to exist in relation to the application area as a whole.

4. Unless any extinguishment of native title rights and interests must be disregarded the native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.
4. The applicant acknowledges that the native title rights and interests are subject to and exercisable in accordance with valid laws of the Northern Territory of Australia and the Commonwealth of Australia.
5. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interests within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including:
 - (a) the particular association that members of the native title claim group have with one or more of the landholding groups and their respective estate areas; and
 - (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.
6. The activities referred to in Schedules G and M were and are undertaken in the exercise of the native title rights and interests set out in paragraph 1.

[94] It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

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 nature of the task at s 190B(5)

[96] The nature of the Registrar's task at s 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions' – *Doepel* at [17].

[97] The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s 190B(5). The Full Court also said that a 'general description' of the factual basis as required by 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 together with the applicant's affidavits swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s 190B(5) – at [83]–[85] and [90]–[92].

[98] The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- the applicant is not required 'to provide anything more than a general description of the factual basis' – *Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts – *Doepel* at [47]; and
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests – *Doepel* at [17].

[99] It is, however, important that the Registrar consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala* [2007] and *Gudjala People #2* [2009] FCA 1572 (*Gudjala* [2009]) gave specific content to each of the elements of the test at s 190B(5)(a)–(c). The Full Court in *Gudjala FC*, did not criticise generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala* [2007], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His Honour, in my view, took a consonant approach in *Gudjala* [2009].

[100] In line with these authorities it is, in my view, fundamental to the test at s 190B(5) that the claim provide a description of the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the identified

¹ See *Gudjala FC* [90] to [96]

claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' – *Gudjala [2007]* at [39].

[101] The following information is relevant to my consideration of this requirement:

- Schedule F;
- Schedule M; and
- affidavits of each of the persons who comprise the applicant.

[102] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[103] Dowsett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52]; and
- that there is information which supports that the claim group is associated with the 'area as a whole' – *Gudjala [2009]* at [67].

[104] I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section – *Martin v Native Title Registrar [2001]* FCA 16 at [26].

The applicant's factual basis material

[105] The application asserts that there are five landholding groups that comprise the native title claim group. I understand that these landholding groups are part of a wider society bound by their recognition of a common body of laws and customs and that the application area is located within the Walpiri and Anmatyerr linguistic territories. I note that according to Schedule A, rights and interests in an area arise as a result of association with a landholding group, or a particular area and that membership to a language group is not specifically relevant to membership to the native title claim group.

[106] Schedule A of the application states that the term 'estate' is used to describe the area that a particular landholding group is associated with. I understand that the landholding groups are

often named after a prominent site or place within the estate concerned and that each estate is affiliated to the following parts of the application area:

- (a) Rrwerk/Mamp/Arrwek- eastern/south-eastern
- (b) Yinjirrpikurlangu- north east
- (c) Janyinpartinya- northern
- (d) Yanarilyi/Anerely- south-western
- (e) Ngarliyikirlangu- western—Schedule A at [3].

[107] I understand that members of the Rrwerk/Mamp/Arrwek, Yinjirrpikurlangu and Yanarilyi/Anerely landholding groups have been recognised as the traditional Aboriginal owners of neighbouring land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[108] At both Schedule A and Schedule F of the application, it is asserted that the native title rights and interests claimed have their origins in a time before British sovereignty and that these same laws and customs continue to be acknowledged and observed by the native title claim group today:

The native title rights and interests described in Schedule E are held under and exercised in accordance with the traditional laws acknowledged and customs observed by members of the native title claim group and their ancestors, since time immemorial, including:

- (a) At the time when British sovereignty was asserted; and
- (b) At the time of contact with non-Aboriginal people—Schedule F at [2].

[109] I understand that the traditional rights and interests that are acknowledged and observed by the claim group have their basis in a common belief in a period of creation, or a time glossed in English, as the Dreaming. I understand that the foundations of the social norms to which the claim group adhere and which are asserted to have been passed from generation to generation from ancestors are based in the common understanding of this spiritual or Dreaming time:

There is a communally acknowledged belief amongst members of the society to which the claimants belong that the physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions of their continuity, were all produced by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *Jukurrpa* in Walpiri and *Altyerr* or *Anengkerr* in Anmatyerr. It is glossed as the “Dreaming” or “Dreamtime” in English. The claimants’ system of laws and customs- the “Law”- has its foundation in the *Jukurrpa/Altyerr*. It is held to be unchanged from the time of their creation and to have been transmitted to each succeeding generation by the ancestors—Schedule F at [5].

[110] Schedule F asserts that the claim group has been associated with the application area since Dreaming time and their ancestors have passed on knowledge originally received from this time through the generations. It is asserted that knowledge of the traditional laws and customs of the claim group have been passed from generation to generation through traditional modes of oral transmission, teaching and common practice. It further states that:

Ethnographic and historical sources confirm that at the time of contact and settlement of the region, and continuing to the present day, Warlpiri and Anmatyerr people, including members of the native title claim group and their ancestors, maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area itself—Schedule F at [19(c)].

[111] A long list of bibliographical material is provided regarding those ethnographic and historical sources mentioned in the extracted passage above, although no extracts or further detail from them is included with the application.

[112] Schedule M also provides information with regard to members of the claim groups' association with the application area. Information regarding where they were raised and spent their childhoods, spent most of their adult lives and continue to live today is provided. It is clear that these claim group members grew up travelling across Mt Denison, Napperby and Coniston (which both abut the application area) pastoral leases and continue to access the application area (with the exception of one claim group member mentioned, who is recently deceased but, it is asserted, continued to access the application area throughout his life). Reference is made on several occasions to the claim group members spending a lot of time at the large camp that was established near the homestead on Mt Denison and also at Cockatoo Creek, which it is asserted, is on the application area. An example is as follows:

Like many of the claimants of his generation, Jack Cook Ngal/Jangala grew up walking with his family between the pastoral stations near to his country: Napperby, Coniston and Mt Denison and has continued to live nearby for the rest of his life. They regularly camped near soakages on the application area getting their food and [sic] from the country near their camp. The extended family often camped around Cockatoo Creek and for a while camped at Brookes Soak when his father was working for the policeman there—Schedule F at [2].

[113] Each of the people who comprise the applicant have affirmed an affidavit. Each affidavit provides a great deal of information relevant to my consideration at s 190B(5)(a). I understand from the affidavits that each deponent is an Anmatyerr person and a senior member of a landholding group with which they are affiliated and a member of the native title claim group. There are four affidavits in total and the deponents are between them members of three of the five landholding groups that comprise the native title claim group.

[114] In his affidavit Jack Cook Ngal/Jangala states that he grew up travelling around his country including the application area with his father, and that his father taught him how to hunt and

collect food. Further, Jack states that he continues to live close to the application area, and he now teaches his sons about hunting and collecting food, like his father taught him.

[115] He states:

We always came onto our country on the application area to go hunting. My father taught me about my country walking around with him, hunting and collecting food. He taught me where the rockholes and soakages are on my country. He used to get wood for spears from Mt Denison and resin from the spinifex from that country.

I still go hunting out there and I live close to the application area at Mt Allan with my sons. I go hunting with my sons with a gun today. I have taught them about the places on their country which I learnt from my father – at [10] and [11].

[116] Similarly, Maggie Ross Napaljarri provides information in her affidavit about her family's association with the application area and details of previous generations' presence on the application area. She talks of how she grew up travelling around the application area. An example is as follows:

My father's father had that Kangaroo Dreaming and that dreaming came to Cockatoo Creek. We have that Dreaming through him. My mother and big brother told me that my father was born at Cockatoo Creek there at Mt Denison. He grew up walking around on the application area around Cockatoo Creek, they lived down there.

I was born around 1940 on Coniston Station. [name removed] was a big boy then. My family were walking around between Coniston, Napperby and Cockatoo creek. We camped at Yanarilyi for a long time. We walked around to Mt Allen as well and I grew up there too. We walked around the application area when I was growing up but mainly around my country around Cockatoo Creek and Brookes Soak area – at [8] and [9].

[117] Maggie also talks of how she continues that association and how she passes that knowledge and spiritual information to younger generations now:

My mother, father and my father's sister taught me about the Altyer/Jukurrpa and my country/ they taught me taught me [sic] my Dreamings. I teach my granddaughters all about my Dreamings and country...I teach those young women those songs and those dances for my Jukurrpa. When we are going around I tell those girls about those special places on my country – at [12].

[118] Like Jack and Maggie, Peggy Tilmouth Nungarrayi discusses in her affidavit that her parents were born, raised and spent most of their lives walking around their country including the application area. She also talks of her walking around the application area and learning from her grandmother and parents about her country and Dreaming stories at several significant places.

My father was born at Napperby Station and he grew up walking around Coniston, Mt Denison and Napperby Stations, before car, just foot walking...our family grew up walking all around Mt Denison and got water from digging the soakages. My mother, father, aunty and grandmother taught me about those soakages...we use [sic] to camp near where Karrkadu Outstation is today, all around the homestead and right up Cockatoo Creek. My youngest sister, Rhonda Nungarrayi, was born on Cockatoo Creek when we were staying there. I grew up there in the bush walking around, all across the application area— at [8].

[119] It is clear from Teddy Long Jupurrurla's affidavit that he and previous generations, his father's father and father, all grew up walking around their country, including Mt Denison Station. I understand that he has family who are buried on the application area. Teddy states that he was born on Coniston station, and as a young boy spent his time walking all around Coniston and Mt Denison Stations with his father and big brothers. He states that he learnt all about his country from his father and brothers and that they frequently camped all across the application area, hunting and collecting food.

My consideration

[120] Based on the above information I am satisfied that the claim group as a whole presently has and previously had an association with the application area.

[121] The information contained in the application at Schedules A, F and M is detailed and clearly outlines that the claim group as a whole comprise a single society, united by their understanding of the Dreaming time as the origin of their spiritual association with their country and from which they derive their traditional laws and customs. I understand that this society includes many landholding groups or estates, across a vast region and that anthropological and historical research indicates that there are five (5) relevant landholding groups for the area covered by the native title claim.

[122] I understand that each landholding group is affiliated with certain regions in the application area and that, depending on one's landholding group affiliation, knowledge for an area and the ability to teach younger generations about the significant Dreaming stories associated with that area will vary.

[123] Many of the place names or landmarks discussed in the material, as summarised above, fall within the external boundary of the application area or within close proximity to it. In particular, I understand that Cockatoo Creek, Brookes Soak and several of the camps referred to throughout the material all fall within the application area.

[124] Each applicant person is a member of a landholding group and together three of the five landholding groups that comprise the claim group are discussed in the affidavit material. Each of the affidavits, in my view, clearly demonstrates that members of the native title claim group (and

their predecessors) have (and had) an association with the application area. This association has been passed to them through generations and the material asserts this transmission of knowledge extends back to the creation ancestors, who it is asserted, lived before the time of first European contact. I am of the view that the information can be said to contain geographic particularity, which supports the assertion of an association held by the claim group members and their predecessors with locations across the whole claim area.

[125] It is clear that the claim group have a strong physical association with the application area through, for example, visiting the application area for hunting and camping trips, being born on, walking all across and working on Coniston, Napperby and Mt Denison Stations to be 'on country'. These three stations either comprise the application area (Mt Denison) or are in close proximity to it (Napperby and Coniston). It is clear that senior members of the claim group take responsibility for protecting their country and are charged with continuing the knowledge and social norms of their society by teaching younger generations.

[126] The material demonstrates that the claim group also have a strong spiritual association with the application area. I understand that the claim group derive their belonging to country and the traditional laws and customs from their belief in a creation period and spiritual ancestors who travelled the earth in a creation or Dreaming time. Schedule F states that:

The term Dreaming covers a range of attributes including cosmogony, spiritual ancestors and accounts of their exploits and travels, spiritual power, religious laws and objects, places, ritual, designs and songs and explicit and implicit events and directives of both a 'sacred' and 'everyday' nature which provide an ongoing foundation for the current exercise of rights and interest in relation to land and water and associated spiritual beliefs—at [6].

[127] I therefore understand that the Dreaming time is central to the identity of the native title claim group and the wider society, which is united by and bound by rules established as a part of the Dreaming. It is asserted in the information before me that a strong tradition of oral transmission of cultural knowledge including with respect to significant places on the application area continues to be a foundation of the claim group's traditional laws and customs. The affidavit material demonstrates a strong pattern of teaching laws and customs such as hunting and collecting food. It is my view that this pattern of teaching paired with an understanding of the spiritual origins of the claim group's societal identity demonstrates that the claim group and their more immediate predecessors have (and had) an association with the application area. On this point, I note that the deponents of the affidavits predominately state that they were born in the 1930s and 1940s, and in many cases speak of their grandparents, who I infer, were likely on the application area around the mid 1800s. The affidavit evidence suggests in many cases that the grandparental generation were present on the application area in a time prior to dominant European contact in the area, and further, each of the deponents of the affidavits is listed as a close descendant of one of the apical ancestors used to describe the claim group at Schedule A.

[128] It is, therefore my view that there is an available inference that the pattern of oral teaching would have continued in much the same way beyond the generations remembered by the deponents of the affidavits, such that the pattern of teaching, extends to the generations who were present on the application area in a time prior to sovereignty, and, according to the spiritual beliefs of the claim group, back to the Dreaming time.

[129] On this basis, I am of the view that the material supports an assertion that there is an association of the whole claim group and their predecessors over the area throughout the period since sovereignty.

[130] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(a).

Reasons for s 190B(5)(b)

[131] Dowsett J in *Gudjala [2007]* linked the meaning of ‘traditional’ as it appears in s 190B(5)(b) with that at s 223(1) in relation to the definition of ‘native title rights and interests’. This idea of ‘traditional’ necessarily requires consideration of the principles derived from *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (Yorta Yorta)*. This aspect of Dowsett J’s decision was not criticised by the Full Court on appeal—*Gudjala FC* at [90]–[96].

[132] Dowsett J’s examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact—*Gudjala [2007]* at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

[133] Dowsett J stated in *Gudjala [2007]* that the facts necessary to support this aspect of the factual basis must address:

- 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]; and see also at [66] and [81]; and
- the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve ‘identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage’—at [66] and see also at [81].

The applicants' factual basis material

[134] As outlined above, Schedule F provides a great deal of detail, much of which is also relevant to my consideration at s 190B(5)(b). In particular, Schedule F explains the significance of the Dreaming time to the traditional laws and customs of the claim group, and outlines that the claim group understand their social norms and identity as a united society to be derived from their common belief in the Dreaming time.

[135] As outlined at [109] above, it is asserted that, Dreaming time gives rise to a range of attributes associated with the society to which the claim group belong. These attributes include traditional laws and customs of both a spiritual and 'everyday' nature; rules around songs, travel and sacred laws and objects as well as the exercise of rights and interests in the land are all encompassed by the claim group's belief in the Dreaming.

[136] Further, it is asserted that the rules and traditional laws and customs that are held to be unchanged since that time have been passed from generation to generation via traditional modes of oral teaching:

Knowledge of traditional laws and customs has been passed from generation to generation by traditional modes of oral transmission, teaching and common practice. This continues today amongst the current generation who are members of the native title claim group. Knowledge of descent connections is transmitted orally although individuals beyond the grandparental level are rarely remembered and earlier ancestors are ultimately believed to be spiritually descended from the Dreaming ancestors—at [17].

[137] Schedule F also specifically links the perceived spiritual properties or the Dreaming tracks associated with the application area with the continued observance of traditional laws and customs by the claim group today:

Continued observance of customary secular and spiritual practices by members of the native title claim group reaffirms their connection with the perceived spiritual properties of the land and water in the application area. Such practices often, but not always, relate to Dreaming tracks associated with sites of significance—at [19(f)].

[138] Many examples of the kinds of laws and customs that are acknowledged and observed by the claim group, in the application area today, are provided in the affidavits of the people who comprise the applicant. Each of them talk of camping throughout the application area and, in particular, hunting and gathering food across the application area. Jack Cook explains that he learnt about these customs; how to do things like hunt and build fires when camping, from his father and other relatives.

We used to camp anywhere on our country, might be soakage or anywhere on the application area. We used to go hunting and got kangaroo, emu, turkey. My father was number one with the spear

and he used to hunt with the spear then. No dogs, just spear. We got the water from the soakage or rockholes, like Cockatoo Creek. We camped at Rrkewer or Brookes Soak when the policeman was camped there because my father was working for him for a while. We got bush food and got water from there. No flour then. We [sic] bush sultana, bush plum, and all that bush medicine from the grass. We used to make windbreaks and humpies, no tin then. No blankets so we had to light fires to keep warm, traditional way, fires on both sides and boot side as well. We used to cook our food on those fires. The yams, goannas, bush onions and witchetty grubs. Plenty sugarbag around there and possum and porcupine—at [9].

[139] Similarly, Maggie Ross Napaljarri talks of camping and hunting across the application area when she grew up and of how she continues to do that today:

As a young woman I was living in Yuendumu and that's where I got married. From Yuendumu we went back to Mt Denison to camp. We always camped at that same place where I grew up. We went for weekends and stayed there camping and hunting. We taught our children about my country. We still dug those soakages down there at Cockatoo Creek and got our water and from Atapit, the rockhole near the southern boundary of Mt Denison, all around that Wangarla area on the application area.

Sometimes we still go collecting food on [the] application area. Sometimes at Christmas time we go camping down there on my country. When Business is on at Mt Allen we go and camp down there with my grandchildren. We make windbreaks and fires for cooking, still go hunting and getting bush tucker. I taught my children all about my country—at [10] and [11].

[140] Many of the affidavits talk of Business or Young Men's Business as a significant time in their lives or the lives of young men. I understand that this is a significant ceremonial time and serves as a teaching mechanism for young men to learn about the many sacred and other laws and customs associated with responsibility for land and culture. Teddy Long Jupurrurla explains his experience of being put through Business as follows:

I went through Young Man's Ceremony on Coniston, in the bush, but today it is done in the communities. My kwertengerl put me through Business. After I had gone through the law I spent time walking around and learning about my country every day. My father took me around and showed me all the soakges. He told me the songs and showed me the dances. This is how I learnt and I never forget. We stayed out there on my camping [sic] all along that river. I stayed out there for about 12 months, I didn't see my mother that time. I learnt the proper way. The right ones have to be there to teach us while we learn. Got to learn that kwertengerl side as well, We [sic] need to learn that one in privacy, other mob can't come in and listen, they have their own business—at [19].

[141] Teddy also talks about teaching his sons and nephews about their Country after Business and how the claim group members continue to conduct the Young Men's Business ceremony today:

Today I teach all my sons and nephews, they have got to learn from me. We still take them out to their country after Business and teach them all the Law the right way. We do that in privacy All [sic] my sons have been through the law. They are all men now. I gave them a lot of knowledge. Same as my father gave to me.

When we do ceremony, such as young men's initiation ceremony, we must let each other know that ceremony is going to take place. We must make sure that all the right people are there when the ceremony takes place. In the olden days they walked to let people know that but today we use a motorcar or the telephone—at [20] and [21].

[142] Many of the deponents of the affidavits discuss the Dreaming stories which run through the application area, the responsibility they have to the sacred sites and places associated with those stories and how they are responsible for protecting those sites for future generations. An example from the affidavit of Teddy Long Jupurrurla is as follows:

There are a number of Dreamings that go through the application area. I have the ceremonies and songs for the Perentie, Women, Kangaroo, Bilby, Water or Rain Dreamings and also Frog, Emu, Sugar Bag and Moon Dreamings. I am kwertengerl for that Kangaroo Dreaming and I am merehartwey for that Perentie and Women Dreamings. That Kangaroo Dreaming is a men's dreaming and there are sites on Mt Denison which women must not visit. If women go near these areas, it is bad news. Mt Denison homestead is right on my deraming area, Ngapa Dreaming.

I go out and protect country, and look after those sacred sites. I always go around every week to check up on them in case someone has damaging [sic] our sites. I go around and visit all those sites. I go out on country with Central Land Council all the time to look after those sacred sites, checking everything is still there and not damaged—at [24] and [25].

[143] There is also a great deal of information throughout the affidavits that speak to the deponents learning a variety of traditional customs and activities from their parents and other older people. Activities like how to make windbreaks, how to make fires, the importance of sharing foods, collecting and using bush medicines and how to make boomerangs and spears are some examples. Other activities like collecting ochre and resin and wax to make knives and other tools for hunting and collecting food are all discussed. An example from the affidavit of Peggy Tilmouth Nungarrayi of some of this information she has learnt is as follows:

When we camp, we make windbreak and humpies using branches and leaves, the same way as my mother and father taught me. We make fire and cook what we hunt in the fire. We often bring the cooked meat back to the community to share with family. I also like to look for bush medicine which can be found all over Mt Denison. There are two main types of bush medicine: the first one is a plant which we boil the leaves and mix with butter or water and then we rub it all over the body. The other one we drink and it helps your chest. We also collect beans from the bean tress on Mt Denison near Karkadu outstation to make necklaces—at [13].

My consideration

[144] The information provided in the application and the affidavits does not assert when European contact was likely to have first occurred in the application area. I note that many of the persons who have provided affidavit material state that they were born around the 1930s and 1940s and they are able to link themselves, through family members, to either the listed apical ancestors or some of the earlier descendants of the apical ancestors who are also listed in Schedule A as part of the claim group description. As outlined above at my reasons for s 190B(5)(a), I have inferred from the information before me, that some of the ancestors discussed by the applicant persons in their affidavits were likely living around the mid 1800s.

[145] Some of the affidavits speak of the deponents themselves or their parents and grandparents living on the application area before or around the time of significant white settlement. The affidavits include several statements such as '[m]y father was born at Napperby Station and he grew up walking around Coniston, Mt Denison and Napperby Stations, before car, just foot walking' and;

My father was born around Mt Denison on his country and he grew up walking around there with his father. They also walked around Coniston, walking backward and forward, before station time. They were getting all their food from that country there, no rations. He was getting his meat with a spear and boomerang. They were getting kangaroo and all that bush meat. No roads then. My father and his family were getting water from the creeks and the soakages. From those creeks from Coniston, all around there and in his country – affidavit of Teddy Long Jupurrurla at [9].

[146] Phrases like these and others in the affidavit material lead me to understand that the persons the deponents are speaking of occupied the application area prior to significant European settlement. I note that most of the deponents of the affidavits state that they were born in the 1930s or 1940s and, as stated above, I have therefore inferred that their more immediate ancestors, parents and grandparents, were likely occupying the application area around the mid 1800s. Given the remote location in the Northern Territory of the claim area, and the inclusion of information like the above statements, I understand that sustained European contact could likely have occurred in the area much later than the assertion of sovereignty. I therefore infer that the apical ancestors and their close descendants (in many cases the grandparents, parents and even deponents themselves), listed at Schedule A of the application, were likely occupying the application area around this time largely uninterrupted by European settlement.

[147] It is clear from the examples extracted above and other information in the application and affidavits that the society to which the claim group belong rely on a very rich and ongoing tradition of oral transmission of cultural information. Each of the deponents speak at length about having learnt about their country, about the Dreaming stories relevant to it, and the sacred sites and cultural practices like collecting bush medicine and hunting, from older generations,

specifically parents, grandparents and adult siblings. Each of the deponents also speak of transmitting this knowledge to today's younger generations, and in particular they talk of continuing ceremonial practices like Dreaming songs and dances, and teaching their children and grandchildren how to protect their country, about restrictions regarding access to some places like women and men's only places, and about how to undertake cultural activities, like making windbreaks, camping and hunting.

[148] A particularly prevalent example of the continuation of traditional law and custom is highlighted by the deponents when they speak about their role in the Young Men's Business time, and of how they experienced this same initiation time in their own lives in varying capacities (depending generally on the gender of the deponent). I understand that Young Men's Business is a ceremonial learning time that occurs every year and plays a significant role in the cultural life of the native title claim group and their wider society. I understand that this is one significant example of the transmission of traditional laws and customs from older generations to younger generations, when stories, responsibilities and customary practices are shared, taught and learnt. It is clear from the affidavit material that in many instances the people who comprise the applicant have been taught their traditional laws and customs from either the apical ancestors themselves or close descendants of them.

[149] The material demonstrates a factual basis supporting a rich, continuous system of normative rules or laws and customs, which are acknowledged and observed, by the claim group members, in the application area today. I understand the factual basis to say that these laws and customs are rooted in a spiritual belief system which has at its core the concept of the Dreaming, a time of creation when spiritual ancestors travelled across the land long ago. It is asserted that it is from the belief in this creative time that the claim group's traditional laws and customs originate, and it is asserted that it is these same laws and customs to which the native title claim group continue to abide today. It is asserted that the claim group are descendants of the apical ancestors listed at Schedule A, and that those ancestors are in turn descendants of those people who, bound by the same laws and customs, occupied the territories that the claim group are affiliated with when the country was created in Dreaming time.

[150] I am of the view that there is sufficient detail in the factual basis material provided to demonstrate a strong pattern of inter generational transmission of cultural practices and belief systems and rituals unique to a society of people that have been occupying and affiliated with the claim area and beyond for many generations. The factual basis materials supports the assertion that these laws and customs have been orally transmitted in a substantially unchanged manner since at least the time at which the apical ancestors identified in Schedule A were occupying the application area and surrounding affiliated country.

[151] In *Gudjala [2009]* Dowsett J discussed circumstances where it may be possible to infer continuity of the relevant pre-sovereignty society:

In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as pre-sovereignty laws and customs—at [30].

[152] In my view, the factual basis materials are sufficient to support an assertion that there has been strong cultural continuity since the generation of the apical ancestors through to the present generations. This, in my view, is sufficient to support an inference that this cultural vitality and continuity is likely to have been transmitted in much the same way in the period between the mid 1800s and sovereignty.

[153] The information before me discusses a rich, substantially continuous cultural tradition derived from various ancestral lines arising from birth and evidencing a longstanding connection with the application area and its surrounding country. Having regard to all of this information I am satisfied that the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests.

[154] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(b).

Reasons for s 190B(5)(c)

[155] I am of the view that this requirement is also necessarily referable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being that, the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—at [47] and also at [87].

[156] *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 to the current claim group; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

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

[158] In addressing this aspect of the factual basis Dowsett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity—at [33].

[159] As discussed above, I am satisfied that there is sufficient information before me to infer that there existed a society, at sovereignty, that observed traditional laws and customs. In particular, it is my view that the factual basis material demonstrates the existence of an identifiable society with traditional laws and customs in the application area around the mid 1800s and I understand from the information before me, that this is likely to be a time prior to or around first sustained European settlement in the application area. This, along with information that demonstrates a strong pattern of intergenerational teaching, provides sufficient information speaking to the continuity of the observance of those same traditional laws and customs from the time since sovereignty to today. Examples of the continuity in the transmission and practice of traditional laws and customs are extracted and considered in some detail at my reasons above for ss 190B(5)(a) and (b).

[160] The information before me links the current claim group, through the people who comprise the applicant, directly to some of the named apical ancestors for the group. It is my view that the strong link between the apical ancestors and the current claim group members and the pattern of intergenerational transmission of key cultural practices, back to a generation present on the application area at the time of first European contact, demonstrates a sufficient factual basis for the assertion that that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Conclusion

[161] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

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.

[162] The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel*, discussed what ‘prima facie’ means stating that, ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’—at [135]. It is accepted that the Registrar may be required to undertake some ‘weighing’ of the material or consideration of ‘controverting evidence’ in order to be satisfied that this condition is met—at [127].

[163] In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

- exist under traditional law and custom in relation to the land or waters in the application area;
- 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.

[164] The ‘critical threshold question’ for recognition of a native title right or interest under the Act ‘is whether it is a right or interest’ in relation to land or water’—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering ‘[t]hat the words ‘in relation to’ are of wide import’—(*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*)).

[165] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

[166] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

To the extent that any extinguishment of native title rights and interests must be disregarded the native title rights and interests that are claimed in relation to the application area are possession, occupation, use and enjoyment to the exclusion of all others.

[167] In *Ward HC* the majority considered that the ‘expression “possession, occupation, use and enjoyment...to the exclusion of all others” is a composite expression directed to describing a particular measure of control over access to land’ and conveys ‘the assertion of rights of control over land’—at [89] and [93].

[168] Further, it was held that:

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 all others—at [88].

[169] The Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) examined the requirements for proving that the right to exclusive possession is vested in the native title claim group, finding that:

... the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.—at [71].

[170] The affidavits of each of the persons comprising the applicant contain information that in my view supports the right of the claim group, according to traditional law and custom, to control access to their country, including the application area. The following excerpt is an example:

I can speak for my country with my brother and we can make those decisions with our kurtungurlu. It must be the right kirda and kwertengerl for that country to speak for country. I have the right to talk about my country and make decisions for my country because I am kirda. We must know that country before anyone can speak for country and make decisions—affidavit of Maggie Ross Napaljarri at [14].

[171] Many of the affidavits also provide information about the importance of being asked permission to enter country and the right people with the ability to speak for country being consulted before other people go onto country. An example is as follows:

When people are doing research about country they have to ask the right people first, like when the anthropologists did the research for this native title claim. They have to ask the right emrehartwey and kwertengerl for the country. They are the ones who can take them out onto country to show them and tell them the stories. It is our job to take people and show them our country. People who are not merehartwey or kwertengerl and do not have the knowledge of our country do not have the right to take people onto our country and tell them about it—at [27].

[172] These and other examples in the affidavit material demonstrate that the claim group, prima facie, have a traditional right to ‘speak for country’. The examples highlight that only the right people can ‘speak for country’ or give permission for people to access their country and use their land such that, in my view, this right can be established, prima facie, on the basis of the information before me.

[173] **Outcome:** established, prima facie.

(a) the right to access and travel over any part of the land and waters

(b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;

[174] There is a great deal of information in the affidavits regarding the claim group members growing up and spending their lives travelling across their country, especially the application area. It is clear that many of the people who comprise the applicant, and their more immediate predecessors, were born on or proximate to the application area and have lived all or most of their lives on or near it.

[175] Many deponents of the affidavits speak in detail about having lived, camped and erected shelters across the application area, and their country more broadly, throughout their lives. They also talk of how many claim group members continue to camp, especially at Young Men's Business time, and of how they have taught younger generations how to travel and camp and erect shelters across the application area. An example of the kind of information in the affidavits that speak to this, taken from the affidavit of Teddy Long Jupurrurla, is as follows:

As a young boy I grew up walking all around Mt Denison and Coniston, all over that area, just like my father. He told me all about that creek and my country. He showed me where my country was... We camped all around the claim area but the main place for camping was Brookes Soak south eastern boundary of the application area. We also use [sic] to camp right up the Lander River and through Yinjirrpikurlangu. It was ration days then—at [11].

[176] Peggy Tilmouth Nungarrayi also talks of camping across the application area. She states: 'We used to camp everywhere in the bush and get all our food from the bush—at [10]. She also talks of how she builds shelters when camping, like her parents taught her: '[w]hen we camp, we make windbreaks and humpies using branches and leaves, the same way as my mother and father taught me—at [13].

[177] **Outcome:** established, prima facie.

(c) the right to hunt, gather and fish on the land and waters;

(d) the right to take and use the natural resources of the land and waters;

(e) the right to access, take and use natural water on or in the land except water captured by the holder of a pastoral lease;

[178] As outlined above, there are many examples in the affidavits of the applicant persons that demonstrate the existence of these rights, prima facie. There are many examples of the deponents talking of hunting on the application area and of being taught how to hunt by older generations. It is clear that this cultural knowledge continues to be taught to younger generations today. There are other examples of using resources to make boomerangs, spears and shields as well as collecting resources for bush medicine. There are also many examples of camping near soakages to collect water. Some examples of the kinds of information that speak to the existence of these rights is as follows:

I still go hunting out there and I live close to the application area at Mt Allan with my sons. I go hunting with my sons with a gun today. I have taught them about the places on their country which I learnt from my father. We go camping out there for two or three nights. We still make windbreak and fires for cooking. We go hunting for kangaroo, perentie and bush turkey and witchetty grubs. We take all the children out there so they'll know that country and carry that knowledge on. We used to go camping at Cockatoo Creek and go hunting and get that mulga seed. We go hunting and bring some of that food back to share with the others back at camp—affidavit of Jack Cook Ngal/Jangala at [11].

[179] A further example is:

We walked around the application area when I was growing up mainly around my country around Cockatoo Creek and Brookes Soak area. We camped and got our food from that country. My mother used to get bush onions, bush tomato, bush carrot. We used to get kangaroo and goanna, bush turkey, porcupine and perentie. We got water from rockholes and soakages in Cockatoo Creek. We used to get water from a soakage near where the homestead is now, white man made a bore there. We used fires cook dinner [sic] and to keep warm and windbreaks to keep warm. My family made humpies from mulga trees—affidavit of Maggie Ross Napaljarri at [9].

[180] I am of the view that the material in the application asserts that the right to hunt, take natural resources and water from the land are rights held by the claim group pursuant to traditional laws and customs.

[181] **Outcome:** established, prima facie.

(f) the right to light fires for domestic purposes, but not for the clearance of vegetation;

[182] Many of the deponents speak about lighting fires, particularly to keep warm when camping and to cook food. An example from the affidavit of Jack Cook Ngali/Jangala is as follows: 'No blankets so we had to light fires to keep warm, traditional way, fires on both sides and boot side as well. We used to cook our food on those fires—at [9].'

[183] There are many references like the above to making fires for warmth and for cooking and it is clear that this is a right held by the claim group pursuant to traditional law and custom.

[184] **Outcome:** established, prima facie.

(g) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;

[185] There is information in the affidavits that speak to the existence of this right, prima facie. Many of the deponents speak of being responsible for protecting sacred sites and needing to check up on places across their country, ensuring that no damage is done to them. Teddy Long provides an example in his affidavit as follows:

I go out and protect country, and look after those sacred sites. I always go around every week to check up on them in case someone has damaging [sic] our sites. I go around and visit all those sites. I go out on country with Central Land Council all the time to look after those sacred sites, checking everything is still there and not damaged – at [25].

[186] It is clear that there are many sacred sites and places of significance across the claim group's country and that many members of the claim group, in particular senior members, are charged with protecting them and ensuring they are not damaged.

[187] **Outcome:** established, prima facie.

(h) the right to conduct and participate in the following activities on the land and waters:

(i) cultural activities;

(ii) ceremonies;

(iii) meetings;

(iv) cultural practices relating to birth and death including burial rites;

(v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs,

and, subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land, the right to privacy in the exercise and enjoyment of those activities;

[188] There is extensive material in the affidavits that detail the cultural activities of the members of claim group. It is clear that undertaking activities relating to the physical and spiritual attributes of the traditional laws and customs of the group occurred and continues to occur extensively in both previous and current generations of the claim group. The affidavit material indicates that ceremonial and ritual practices are central to the identity, protection and continuation of the cultural practices of the claim group. Each of the deponents speaks of their knowledge of their country including Dreaming stories and songs as well as cultural practices around burial, protecting sacred sites and other things like making bush medicines. It is clear that all of these cultural activities and ceremonies have been taught to claim group members from their ancestors and that they are now charged with the responsibility of teaching younger generations.

[189] As can be seen in the extracted examples in my reasons above, central to the ritual and ceremonial life of the claim group is the ceremony of Young Men's Business and the importance of senior claim group members teaching the cultural practices of the group to the younger generations.

[190] I am satisfied that these activities are based on the traditional law and custom of the native title claim group and that there is sufficient information before me to establish the existence of this right, prima facie.

[191] **Outcome:** established, prima facie.

(i) the right to speak for country and to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;

[192] The affidavit material provides several examples of the existence of this right, prima facie. It is clear that senior members of the claim group are responsible for arranging the ceremonial Young Men's Business time and that they must ensure that the right people are present for ceremony. It is also clear that some sacred sites and places across the application area are restricted to access by men only, women only, or people who have been through Business only. The right people to speak for country and make decisions about who must be present and which sites have restricted access throughout the application area is discussed in the affidavit material and I understand this to be a traditional right, in that knowledge about the use and enjoyment of the land is passed between the generations. Examples from the affidavit of Teddy Long Jupurrurla include:

There are a lot of men's sites on my country, no women or kids can go. They are free to go everywhere else, but not those sacred sites. They can't come to those sacred sites, they know that. Those old women they taught them that. There would be trouble for them if they went there, they got to go stick to that one track. We teach the young girls and boys where they can't go. Old people know, old men and women, we teach the young ones. Young men who haven't been through business can't go to those men's sacred sites, and there are women's sites where men can't go—at [29].

[193] And;

When we do ceremony, such as young men's ceremony, we must let each other know that ceremony is going to take place. We must make sure that all the right people are there when the ceremony takes place. In the older days they walked to let people know but today we use a motorcar or the telephone—at [21].

[194] These and other examples from the affidavit material demonstrate, in my view, that this right exists, prima facie.

[195] **Outcome:** established, prima facie.

(j) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;

[196] There are several references in the affidavits to sharing resources, in particular the food collected from hunting with other claim group members. An example from the affidavit of Jack Cook Jangala is '[w]e go hunting and bring some of that food back to share with others back at camp—at [11]’.

[197] Teddy Long Jupurrurla, in his affidavit, also talks of exchanging boomerangs for tobacco in the ‘olden time’: [i]n the olden time, old people would walk down to Tilmouth Well to meet the Karinyarra mob and swap boomerang or “block and kill” [no. 7 boomerang] for bush tobacco—at [13].’

[198] These and other examples like them are sufficient, in my view, to establish this right exists, prima facie, pursuant to traditional law and custom.

[199] **Outcome:** established, prima facie.

(k) the right to be accompanied on the land and waters by persons who, though not native title holders, are:

(i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the land and waters;

(ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;

(iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.

[200] Each of the affidavits speak of the deponents being accompanied onto the claim area by anthropologists or other people from the CLC in order to do research, for things like research relating to this native title claim as well as to ensure the protection of sacred sites. An example from the affidavit of Maggie Ross Napaljarri is as follows:

When people are doing research about country they have to ask the right people first, like when the anthropologists did the research for this native title claim. They have to ask the right kirda and kurdungurlu for the country. They are the ones who can take them out onto country to show them and tell them the stories. It is our job to take people and show them our country. People who are not kirda or kudungurlu and do not have the knowledge of our country do not have the right to take people onto our country and tell them about it—at [15].

[201] Teddy Long Jupurrurla also explains that the claim group have the right to bring other aboriginal people who are not native title holders onto their country, especially at ceremony time:

We have the right to bring other aboriginal people onto our country especially when they are needed at ceremony time and we can show other people who are not native title holders. That’s our job. I am

the person who has to show them the country. Those other people have got to be there for ceremony, I have to show them around even though they have to be there for that ceremony—at [28].

[202] It is my view that these and other examples like them in the affidavit material demonstrate that the claim group have a right, *prima facie*, to bring other people who are not native title holders onto their country for various purposes, including being needed for ceremony and in order to conduct research.

[203] **Outcome:** established, *prima facie*.

Conclusion

[204] The application satisfies the condition of s 190B(6).

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.

[205] I understand the phrase ‘traditional physical connection’ to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed in the High Court’s decision in *Yorta Yorta—Gudjala* [2007] at [89].

[206] Mansfield J in *Doepel* considered the Registrar’s task at s 190B(7) and stated that it requires the Registrar ‘to be satisfied of particular facts’, which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

[207] Mansfield J commented:

The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

[208] As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters covered

by the application, I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely Jack Cook Ngal/Jangala.

[209] Both Schedule M of the application and Jack Cook Ngal/Jangala's affidavit detail that Jack grew up with his family walking all across the application area and his country and that he continues to live nearby. I understand that as a child Jack spent much of his time walking around and camping with extended family, particularly near soakages like Cockatoo Creek, which is on the application area. During this time, Jack learnt many of the traditional cultural activities of the claim group from his older family, including making spears, collecting food, hunting and making bush medicine.

[210] Jack states that he went through Young Men's Ceremony, a significant initiation ceremony in the lives of claim group men, and after the ceremony, he was taken by his father and other older men and taught about his country in detail. This included learning about the sacred sites, songs and Dreamings associated with his country, he states that his Dreamings are the Emu, bushturkey and Water or Rain Dreamings, and that he learnt about them from his father after he went through Young Men's Business.

[211] Jack also states that he continues to teach young men these same Dreamings and passes on the knowledge about his country including sacred sites, especially to his grandchildren. He states that he teaches the young men in the same way as he was taught.

[212] I understand that Jack continues to go hunting across the application area and continues to visit all of the sacred sites across his country to protect them and ensure they are not damaged. He is a senior member of the claim group and has the right to speak for country, he is responsible for teaching younger generations about his country, protecting his country, and deciding who can go onto his country.

[213] It is clear from the information provided in Jack's affidavit and at Schedule M of the application that he has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection Jack has with the area and the laws and customs he acknowledges and observes in relation to the area have been taught to him by his father and other older men, and that they are rooted in a belief in the Dreaming, from which the claim group, and their predecessors, derive the laws and customs, to which they adhere. It is these laws and customs, that have been passed through the generations since the Dreaming ancestors that Jack understands were taught to him and that he teaches to his grandchildren and other young people in the claim group. For these reasons I am satisfied that the material is sufficient to support an assertion that Jack Cook Ngal/Jangala currently has, and previously had, a traditional physical connection with the application area.

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

Subsection 190B(8)

No failure to comply with s 61A

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

Section 61A provides:

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

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

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

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

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

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

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

(4) However, subsection (2) or (3) does not apply to an application if:

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

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

[215] In the reasons below, I look 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.

Section 61A(1)

[216] 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.

[217] The Geospatial assessment and my own searches of the Tribunal's mapping database, confirm that the application area is not covered by an approved determination of native title.

[218] In my view the application does not offend the provision of s 61A(1)

Section 61A(2)

[219] 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.

[220] Schedule B states 'any other area within the boundaries of the area covered by the application in relation to which a previous exclusive possession act under section 23B of the NTA has been done is excluded from the application'.

[221] In my view the application does not offend the provision of s 61A(2).

Section 61A(3)

[222] 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.

[223] Schedule E states that '[u]nless any extinguishment of native title rights and interests must be disregarded the native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.'

[224] In my view, the application does not offend the provision of s 61A(3).

Conclusion

[225] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

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.

[226] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[227] Schedule Q states that '[t]he applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.'

[228] The application does not offend the provisions of s 190B(9)(a).

Section 190B(9)(b)

[229] Schedule P of the application states '[n]ot applicable.' The application does not cover any offshore places.

[230] The application does not offend the provisions of s 190B(9)(b).

Section 190B(9)(c)

[231] The application does not disclose, and I am not otherwise aware, that the native title rights and interests have otherwise been extinguished.

[232] The application does not offend the provisions of s 190B(9)(c).

Conclusion

[233] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Mt Denison Pastoral Lease
NNTT file no.	DC2013/009
Federal Court of Australia file no.	NTD27/20134

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

Section 186(1): Mandatory information

Application filed/loved with:

Federal Court of Australia

Date application filed/loved:

6 December 2013

Date application entered on Register:

4 April 2014

Applicant:

Jack Cook Ngal/Jangala, Teddy Long Jupurrurla, Maggie Ross Napaljarri, Peggy Tilmouth Nungarrayi

Applicant's address for service:

As per the Schedule, except the fax number should read: 08 8958 2807

Area covered by application:

As per the Schedule

Persons claiming to hold native title:

The native title claim group comprises the members of the Rrwerk/Mamp/Arrwek, Yinjirrpikurlangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding

groups ('the landholding groups'). Those persons according to the traditional laws acknowledged and customs observed by them:

- (a) have spiritual, physical and/or historical associations (as described in Schedule F) with the area described in Schedule B ('the application area') and are connected to the area through:
 - (i) descent from ancestors (including adoption) connected with the application area as described in paragraph 8(a) below; or
 - (ii) non-descent based connections as described in paragraphs 8(b) and 10 below;
 - (b) hold the common or group rights and interests comprising the native title in the application area.
2. The application area is located in Warlpiri and Anmatyerr territory respectively. The common body of traditional laws acknowledged and customs observed by members of the native title claim group govern how rights and interests in land are acquired and who holds them in particular parts of this territory, including the application area. The five landholding groups which together comprise the native title claim group constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole.
3. The term 'estate' is used to describe the land and waters associated with a landholding group – which are commonly named after a prominent site or place in the estate concerned. The five landholding groups are named after their respective estate areas and affiliated to the following parts of the application area:
- (a) Rrwerk/Mamp/Arrwek – eastern/south-eastern
 - (b) Yinjirrpikurlangu – north-east
 - (c) Janyinpartinya – northern
 - (d) Yanarilyi/Anerely – south-western
 - (e) Ngarliyikirlangu – western

Some estates extend beyond the boundaries of the application area.

4. The application area is located in Warlpiri and Anmatyerr linguistic territory. However, under the traditional laws acknowledged and customs observed by members of the native title claim group rights in land are not acquired through membership of a language group. Accordingly, linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters.
5. The persons authorised to make the application are members of the following landholding groups:

Jack Cook Ngal/Jangala

Ngarlikurlangu

Teddy Long Jupurrurla Rrkwer/Mamp/Arrwek

Maggie Ross Napaljarri Yanarilyi/Anerely

Peggy Tilmouth Nungarrayi Yanarilyi/Anerely

6. Members of the following landholding groups have been recognised as the traditional Aboriginal owners of neighbouring land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth):

Rrwerk/Mamp/Arrwek

Mount Barkly Land Claim (1981)

Mount Barkly Land Claim, Report No. 22. Report by the Aboriginal Land Commissioner, Mr Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. Australian Government Publishing Service 1985 (pp 29-32).

Yurrkuru (Brookes Soak) Land Claim (1984)

Yurrkuru (Brookes Soak) Land Claim, Report No. 43. Findings, Recommendations and Report of the Aboriginal Land Commissioner, Mr Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. Commonwealth of Australia 1992 (pp 15-17).

Crown Hill (Irrinjinjinjirri) Land Claim (1986)

Crown Hill (Irrinjinjinjirri) Land Claim, Claim No. 106. Report and recommendations of the Aboriginal Land Commissioner Howard Olney to the Minister for Families, Housing, Community Services and Indigenous Affairs and to the Administrator of the Northern Territory. Commonwealth of Australia 2008 (p 10).

Yinjirrpikurlangu

Mount Barkly Land Claim (1981)

Mount Barkly Land Claim, Report No. 22. Report by the Aboriginal Land Commissioner, Mr Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. Australian Government Publishing Service 1985 (pp 4, 24-26).

Yanarilyi/Anerely

Mount Allan Land Claim (1979)

Ngarlu Group. *Mount Allan Land Claim, Report No. 19.* Report by the Aboriginal Land Commissioner, Mr Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. Australian Government Publishing Service 1985 (pp 36-38).

7. Members of the Mamp/Arrwek landholding group are also members of the native title claim group for the Napperby PPL Native Title Claim (NTD4/11).

Membership of the native title claim group

8. In accordance with the claimants' system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:

- (a) descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding groups ("the ancestors"):

RRWERK/MAMP/ARRWEK (Kemarr (N/Jakamarra) – Pwerrerl (N/Jupurrurla))

Group 1

Descendants of three Pwerrerl brothers:

Unnamed Pwerrerl

Jack/Sambo Kemarr: Alice (dcd), Sandy Stafford (dcd) (Pine Joe (Banjo) Patterson), Mary (dcd) (Molly (dcd) and Tim McCormack (dcd)), Peter Stafford (dcd) (Peter Stafford), Myrtle and Leslie Stafford Pwerrerl and descendants.

Billy Tilmouth Kemarr: Leslie Tilmouth Pwerrerl, Elva Pwerrerl and Freddie Tilmouth (dcd) and descendants.

Old Bobby Kemarr: Nellie Pwerrerl (dcd) (Michael Tommy Pengart) and Maria Pwerrerl (dcd) (Patrick, Edgar, Natalie, Kerrie and Christopher McCormack Pengart) and descendants.

Rltwamparwengeny Rrwer-areny Kemarr: Liddy Pwerrerl (dcd) and Leo Pwerrerl (dcd) and descendants.

Paddy Arrwek-areny Pwerrerl

No known descendants.

Unnamed Pwerrerl

Jalkaji Emu Leg Kemarr: Willy Long Pwerrerl, Mary Pwerrerl, Molly Presley (nee Long) Pwerrerl (Davey Presley), unnamed Pwerrerl (dcd), Mary Long Pwerrerl (dcd), May Long Pwerrerl and Bandy Long Pwerrerl, Teddy Long Pwerrerl and descendants.

Long Jack Kemarr: Jack Purlalya Pwerrerl (dcd), Long Sandy Pwerrerl (dcd), David Ross Pwerrerl (dcd), Marlene Pwerrerl (dcd), Bunny Long Pwerrerl and Teddy Long Pwerrerl; Dick Potter Pwerrerl (dcd) and Topsy Butcher Pwerrerl; Tommy Pwerrerl and Topsy Presley and their descendants who include including Teddy Long Pwerrerl/Jupurrurla, Bunny Long Pwerrerl/Napurrurla, Jean Ross Kemarr, Lillian Long Kemarr, Bruce Ross Kemarr, John Ross Kemarr, Topsy Butcher Pwerrerl, Davey Presley and Don Presley.

Kalyingiya Kemarr: Molly Ngwarray and Ruth Ngwarray and descendants.

Arrwekareny Kemarr: Nancy Ross and Tommy Haynes and descendants.

Arrwek Kemarr: Jessica (dcd) and Ruby (dcd) (Lucy Morton, Patsy Morton and Janie Briscoe) and descendants.

Ntyweyamp Kemarr: Johnny Coniston Ngwarray (dcd) (Rita Campbell Peltharr, Donald Campbell Peltharr, Milly Peltharr (dcd), Daisy Campbell Peltharr and Amy Campbell Peltharr) and siblings and descendants.

Kapert Urrperl Kemarr: Short Willy (dcd), Sarah Ngwarray and Jimmy Cole (dcd) and descendants.

Nakawele (Rosy) Kemarr: George Ngwarray (dcd), Edna Cook Ngwarray, Edie Ngwarray, Archie Ngwarray and Teddy Ngwarray (dcd) and descendants.

YINJIRRIKURLANGU (N/Japangardi – N/Japanangka)

Descendants of five Japanangkas.

Yaningi Japanangka

Sandy Dixon Japangardi (dcd), Toby Dixon Japangardi (dcd), Molly Beswick Napangardi (dcd) and Maggie Napangardi (dcd) (Kenny Martin) and descendants.

Unnamed Japanangka

Douglas Japangardi (dcd) (Janet Forrest Napanangka), Dick Forest Japangardi (dcd) (Rex Forrest Japanangka), Bob Wood Japangardi (dcd) and Pansy Napangardi and descendants.

Unnamed Japanangka

Linda (Stumpy) Napangardi (dcd), Maudie Napangardi (dcd) and Lilian Napangardi (dcd) and descendants.

Unnamed Japanangka

Jeffrey Small Japangardi (dcd), Margaret Small Napangardi and Peggy Small Napangardi and descendants.

Unnamed Japanangka

Toby Japangardi: Andy Presley: Riley, Leonard, Nancy, Jessie, Robin and Davey Presley; Albie (dcd), Chas (dcd), Norton (dcd), Edna and Jacob Presley and descendants.

JANYINPARTINYA (N/Jungarrayi – N/Japaljarri)

Descendants of four Jungarrayi.

Jack Widala Jungarrayi

Larry Tracker Japaljarri (dcd) (Roy Tracker Jungarrayi (dcd), Ronny Tracker Jungarrayi and Rowina Cook Nungarrayi), Hilda Larry Napaljarri and Lady Morton Napaljarri (Helen Morton and Dominic Morton); Maudie Napaljarri (dcd) (Bandy Long) and descendants.

Unnamed Jungarrayi

Unnamed daughter (dcd) (Dick Walker Jupurrurla) and descendants.

Sandy Turner Jungarrayi

Janie Nelson Napaljarri, Richard Turner Japaljarri (dcd), Jack Japaljarri (dcd), Noeli Napaljarri, Eva Nelson Napaljarri, Roslyn Jones Napaljarri, Margaret Napaljarri (dcd) and Joseph Japaljarri and descendants.

Wakulyarri Jungarrayi

No known descendants.

YANARILYI/ANERELY (N/Jungarrayi (Ngwarray) – N/Japaljarri (Peltharr))

Descendants of two Japaljarri.

Witangurla Japaljarri

Jajirdi Jungarrayi: Jimmy Stockman Japaljarri (dcd) (Peggy Tilmouth Nungarrayi, Una Tilmouth Nungarrayi, Albie Stockman Jungarrayi (dcd) and Rhonda Nungarrayi (dcd)), Cassidy Stockman Japaljarri (dcd) (Basil Stockman), Samson Martin Japaljarri (dcd) (Calvin Martin Jungarrayi and Andrea Martin Nungarrayi) and Clifford Possum Japaljarri (dcd) and descendants.

Jimmy Jungarrayi: Paddy Stewart Japaljarri (dcd) (Queenie Stewart Nungarrayi), Lucy Kennedy Napaljarri (dcd) (Bessie Kennedy, David Kennedy (dcd), Jason Kennedy, Cedric Kennedy and Raylene Kennedy), Ruth Oldfield Napaljarri (Riley Oldfield Jupurrurla and Nancy Oldfield Nupurrurla); Judy Napaljarri (dcd), Dot Napaljarri (dcd), Maggie (nee Stewart) Ross Napaljarri (Victor Ross Jupurrurla, Lingin Ross Jupurrurla, Erica Ross (Patterson) Napurrurla and Marlete Ross Napurrurla) and descendants.

Unnamed father's father of Billy Stockman Peltharr/Japaljarri

Yoyo Jungarrayi: Paddy Gorey Japaljarri (Barbara Gorey Nungarrayi, Kimpika, Dadu, Denise Gorey Nungarrayi and siblings), Billy Stockman Peltharr/Japaljarri (Punata Stockman Nungarrayi, Adrian Stockman Jungarrayi, Gillian Stockman Nungarrayi (dcd) and Abraham Stockman Jungarrayi) and descendants

NGARLIYIKIRLANGU (Ngal (N/Jangala) – Mpetyan (N/Jampijinpa))

Descendants of two brothers.

Unnamed Mpetyan

Yakijirri Ngal: Albert Mpetyan (dcd) (Jack Cook Ngal, Molly Ngal and Mary Ngal; Sandy Ngal (dcd), Charlie Ngal (dcd). Mick Ngal (dcd) and Lennis Ngal) and descendants.

Wanyu Jampijinpa

Unnamed Ngal/Jangala male: Darby Ross Jampijinpa (dcd) (Edward Ross Jangala) and descendants.

- (b) accepted as members of one (or more) of the landholding groups by the senior descent based members of the groups on the basis of their non-descent connections to the estate.
- 9. The named ancestors in paragraph 8(a) are the uppermost generation of the known ancestors of members of the native title claim group.
- 10. Under the claimants' system of traditional laws and customs a person who is not descended from the ancestors becomes a member of a landholding group when accepted by the senior descent based members of the group on the basis of non-descent connections to the estate. The non-descent criteria that senior members of a landholding group have regard to when considering the recruitment of a particular individual are:
 - (a) conception and/or birthplace affiliation;
 - (b) long-term residence in an estate;
 - (c) possession of secular and traditional spiritual knowledge, authority and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology;
 - (d) authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate.
- 11. The claimants' system of traditional laws and customs includes rules about succession. There have been no instances of succession in relation to the application area. Additional material concerning traditional laws and customs relating to succession is contained in Schedule F.
- 12. Under the claimants' system of traditional laws and customs descent is the most important basis for the possession of rights and interests in land. Subject to individual circumstances members of the landholding groups who are descended from one of the ancestors possess and transmit a wide range of traditional rights and interests.
- 13. Under the claimants' system of traditional laws and customs rights and interests in land are inherited through all four grandparental lines. However, members of a landholding group with descent connections through father's father and mother's father are generally able to activate the widest range of rights and interests in relation to the estate.
- 14. Under the claimants' system of traditional laws and customs the range of rights and interests in land possessed by members of a landholding group who are not descended from the ancestors depends on individual circumstances, including the nature and extent of their non-descent connections to the estate. Such rights and interests are usually limited to the individual and are not transmittable.
- 15. A number of members of the native title claim group are members of more than one

landholding group, for example, due to different grandparental links to multiple estates.

Registered native title rights and interests:

As per the Schedule.

[End of document]