National Native Title Tribunal

Registration test decision

Application name	Mount Jowlaenga Polygon #2
Name of applicant	Rona Charles, Nathan Lennard, Preston Manado, Marie Manado, Rosemary Nunju, Francesca Ishiguchi
NNTT file no.	WC2014/005
Federal Court of Australia file no.	WAD331/2014
Date application made	7 November 2014
Date of Reasons	19 December 2014

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

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: 12 December 2014

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Lisa Jowett

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 8 August 2014 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Mount Jowlaenga Polygon #2 native title determination application (WAD331/2014) to the Native Title Registrar (the Registrar) on 10 November 2014 pursuant to s 63 of the Act[1]. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C. The Mount Jowlaenga Polygon #2 (Mount Jowlaenga) claimant application was made on 7 November 2014. As this is not an application where the claim has been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[3] I have reached the view that the claim satisfies all of the conditions in ss 190B and 190C and pursuant to ss 190A(6) and (6B), the claim in the application must be accepted for registration. This document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act.

Application overview and background

[4] The area covered by the Mount Jowlaenga application is located fully within the Mount Jowlaenga pastoral lease and lies to the north west of the Nyikina Mangala determination area (WAD6099/1998). Some of the members of the native title claim identify as Nyikina.

[5] The application has been filed in response to the issuing under s 29 of a future act notice by the State of Western Australia in relation to the grant of mining lease application, M04/459. The notification date for the notice is 13 August 2014. The Mount Jowlaenga application was filed within the statutory three month time period over the area affected by the future act notice and I have used my best endeavors to finish considering the claim by the end of 4 months after the notification date (13 December 2014)—see s 190A(2).

[1] 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.

Information considered when making the decision

[6] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[7] As required by s 190A(3)(a), I have had regard to information in the application. I have also considered additional material provided by the applicant to the Registrar on 17 November 2014 as well as correspondence in relation to the nature of its confidentiality:

- Submission—*Applicant's Additional Material provided to the Native Title Registrar for the purposes of deciding whether to place the claim on the Register of Native Title Claims*
  —Appendix A: Information about apical ancestors
  —Appendix B: Affidavit of [Deponent]
  —Map: BC-1
- emails of 17 and 21 November 2014 to the Tribunal case manager from the legal representative for the applicant regarding the confidential nature of the additional material.

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[8] I note that there is no information before me of the kind identified in s 190A(3)(b).

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[9] The State of Western Australia has not provided any submissions in relation to the application of the registration test. However, correspondence was received from the State Solicitor's Office (SSO) in respect of its receipt of the afore mentioned additional information provided by the applicant:

- letters dated 27 November and 4 December 2014 to Tribunal case manager from SSO, regarding the request for confidentiality undertaking.

Section 190A(3): other information to which the Registrar considers it appropriate to have regard

[10] I have considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 17 November 2014 (the geospatial report). I have had regard to maps I have produced from the Tribunal's geospatial data sets illustrating native title claims and determinations and pastoral leases that overlap or lie in the vicinity of the area covered by this application. I have had regard to extracts from the Tribunal's Registers in relation to claims and determinations surrounding the area covered by the application.

Procedural fairness steps

[11] As noted above, the applicant provided additional material to the Registrar on 17 November 2014. The applicant advised that the material was submitted on a confidential basis and requested that it be subject to a confidentiality undertaking should it be provided to the state government. I reviewed the material and the applicant's request and formed the view that the

material was inherently confidential because, although it also contained factual information, it contained, as a whole, personal, sensitive and cultural information. On 20 November 2014, after I formed the preliminary view that the claim may meet the requirements for registration, the case manager for the matter wrote to the state government advising that I intended to have regard to the additional material in my making my registration decision. The state government was advised that should it wish to consider the material (with a view to making any submissions) it would be provided to them on the basis that it would be subject to a confidentiality undertaking to be executed prior to the material being released to it for comment. The conditions required of the undertaking were: that the information be treated as confidential; that the use of the information be limited to the purposes of s 190A(3)(c) and any relevant judicial review of the Registrar's decision; terms under which the material may be copied and that the applicant may enforce any breaches of any of these conditions.

[12] The state government through its State Solicitor's Office (SSO) questioned the need for such an undertaking to be given. The SSO requested further information on the nature of the additional material such that the delegate required such an undertaking by the state government. On 25 November 2014 I wrote, through the case manger, to the SSO, to explain why I had formed the view that the additional material is inherently confidential, outlining the nature of the material submitted by the applicant.

[13] The SSO replied on 27 November 2014 expressing its view that it was not apparent why the entirety of the additional material is considered confidential or why a confidentiality undertaking is the only option available to the state government in electing to receive the material. It was the view of the SSO that the substance of the undertaking was 'significant and far reaching'.

[14] On 1 December 2014 I provided the SSO with the applicant's additional material in a sealed envelope. I did so on the basis that the Registrar is empowered to impose confidentiality conditions upon the State regarding such information: *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*). In the covering letter to the SSO I included a further explanation as to my views that:

- the material has been prepared solely for the purposes of the registration testing of this application;
- the details in respect of the area covered by the application is not information that is in the public domain; and
- the submission and its appendices *as a whole* is of an inherently confidential nature, although it also contains details that would not normally be considered to be so.

[15] I advised that by opening the sealed envelope, the state government would agree to be bound by the confidentiality conditions attached to the correspondence (the same as first provided). I provided the state government a further opportunity to review and comment on the additional material. I also advised that should it not wish to be bound by the imposed conditions, it should return the sealed envelope unopened to the case manager. I confirmed that if the

envelope was returned unopened, I would still consider the additional material in making my registration decision.

[16] On 4 December 2014, the SSO returned the sealed envelope unopened, accepting my decision in relation to the requirement for the undertaking but declining to agree to be bound by the confidentiality conditions.

[17] In my view the state government has been given reasonable opportunity to comment on the application and to view the additional material and respond to it before a registration decision was made. Prior to my receipt of the additional material, the state government was afforded an initial opportunity to make any submissions in relation to the application of the registration test[2], of which it did not avail itself. The state government was provided the opportunity to comment on two occasions in relation to the additional material provided by the applicant. It chose not to avail itself of the opportunity to review the additional material on the basis that it would not agree to a confidentiality undertaking because it did not 'understand such information necessarily answers the requirements of confidential information'—SSO correspondence of 4 December 2014.

[18] Based on my reasons outlined above it is my view that it was reasonable and appropriate in this case to protect the information in the manner the applicant requested. I am also of the view that I afforded sufficient opportunity to the state government to consider the additional material within the constraints before me.

[2] Correspondence sent by the case manager pursuant to s 66(2) enclosing a copy of the application, in this case on 10 November 2014, which allows the state government a timeframe in which to make a submissions in relation to the registration of the claim.

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

[19] In assessing the current application against s 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention— *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 *(Doepel)* at [16] and [122].

Description of the area covered by the application

[20] Schedule B at paragraph 1 describes the area covered by the application by seven (7) geographic coordinate points. Paragraphs 2 to 3 provide general exclusion statements to describe those areas not covered by the application. Schedule C refers to Attachment C which contains a colour map including:

- the application area depicted by a bold green outline and fill;
- surrounding native title determinations depicted by a bold orange outline, orange hatching and label;
- surrounding native title determination applications depicted by a bold pink outline, pink hatching and label;
- topographic features labelled;
- cadastral boundaries colour coded and labelled;
- scalebar, northpoint and legend.

Consideration

[21] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[22] The geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary is identifiable and, along with the general exclusions that set the internal boundary, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[23] 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.

[24] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b).

[25] I note the comments of Mansfield J in *Doepel* that the focus of s 190B(3)(b) is:

(a) whether the application enables the reliable identification of persons in the native title claim group—at [51]; and

(b) not on 'the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—[37].

[26] Carr J in State of *Western Australia v Native Title Registrar* was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[27] The description of the native title claim group at Schedule A is as follows:

> The members of the native title claim group comprise the descendants (including by adoption as a child) of the following persons:
>
> - Balbararr and his wife Nani
> - Bundangurru
> - Dim (aka Dima), father of Lulu
> - Gurupirin, father of Tommy Langilangi
> - Jidnyambala, mother's father of Bobby Ah Choo
> - Jinarib
> - Narcis Yumit, Peter Biyarr, Anselem and Patrick (all brothers)
> - Otto Kelly (aka Otto Gilley)

[28] I note that the description provides that descent from an ancestor includes 'by adoption as a child'. The application does not provide any qualification that indicates whether adoption is according to traditional laws and customs, Australian law or otherwise. In my view, I can accept a description that provides for membership of the group by adoption without specific criteria to define the process. I do not believe that it is for me to question the means by which adoption criteria is applied by the group. It is sufficient for me to understand that a person is a member of the claim group if he/she falls within the principle outlined above, which may include adoptive descent.

[29] In my view, the description of the group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. Based on the information provided at Schedule A, I understand that a person will be a member of the native title claim group based on descent through the eight ancestral lines listed.

[30] I am therefore satisfied that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group. It may be that some factual inquiry is required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[31] 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.

[32] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

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

[33] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s 62(2)(d):

> **Native title where traditional rights are wholly recognisable**
> 1. In every part of the claim area (if any) where there has been:
> (a) no extinguishment to any extent of native title or where any extinguishment is required to be disregarded; and
> (b) which is not subject to the public right to navigate or the public right to fish,
> the right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.
>
> **Native title where traditional rights are partially recognisable**
> 2. In all other parts of the claim area, the right possessed under traditional law and customs is properly interpreted as the right of possession, occupation, use and enjoyment of land and waters as against all others, but the native title rights and interests recognised by the common

law of Australia are the rights to do all such things as may be done under the right referred to above, save for controlling the access to or the use of land or waters by others; being the (non-exclusive) rights to:

(a) have access to, remain on and use the land and waters;
(b) access and take the resources of the land and waters; and
(c) protect places, areas and things of traditional significance on the land and waters.

[34] The remainder of the description sets out qualifications to which the claimed rights and interests are subject, including rights created under State or Commonwealth laws.

[35] When read together with the exclusion statements in the description of the area covered by the application (at Schedule B), I am of the view that the native title rights and interests claimed can be 'properly understood'. I understand that the application claims possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims only the 3 listed non-exclusive rights where the exclusive right cannot be recognised. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[36] 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

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

[38] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

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

> the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[39] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticize generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*, including his Honour's assessment of what was required of the factual basis to support each of the assertions at s 190B(5). Justice Dowsett's approach in *Gudjala 2009* was consistent with the approach his Honour took in *Gudjala 2007*.

[40] Arising from these decisions are principles which guide the Registrar when assessing the sufficiency of a claim's factual basis. In summary, they are:

- 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—*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel at* [47].

[41] The Full Court in *Gudjala FC* held that a 'general description' (as required by s 62(2)(e)) 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala FC* at [92]. Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

Information considered

[42] Schedule F of the application provides six statements that in my view are sufficient to meet the requirements of s 62(2)(e), the procedural requirement corresponding to this merit condition. Whilst they are brief, they are statements that do not merely restate the claim but assert the basis on which the native title claim group is said to possess rights and interests in relation to the area covered by the application. Although the general description must be in enough detail to enable a genuine assessment of the application, I note that it does not need to be sufficient to satisfy the merit condition at s 190B(5)—*Gudjala FC* at [90]. Information going to the factual basis of the claim is found in the additional material provided by the applicant and forms in most part the information on which my assessment of the factual basis requirement is based.

[43] The test in s 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. Nor is it the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country as that is a judicial enquiry—*Doepel* at [16]; *Gudjala FC* at [94] to [96].

[44] The material I have considered that goes to the factual basis of the claim is found at Schedules A, F and G of the application and in the additional material provided by the applicant on 17 November 2014, which included an affidavit affirmed on 11 November 2014 by a member of the native title claim group, [Deponent].

The area of the application

[45] The area covered by the application is the extent of a 45.43km² mining lease application. The applicant's additional material provides information on the geographical context in which the claim is made, including details about the claim's location relative to other native title claims and determinations in the vicinity:

- the claim area is located wholly within (but does not cover the entirety of) the Mount Jowlaenga pastoral lease;
- the Bindunbur native title claim overlaps the northern part of the pastoral lease ;
- the Nyikina Mangala determination area lies to the east and south of the pastoral lease;
- the Rubibi determination area lies to the south of the claim area; and
- a 'polygon' claim lies approximately 10km south of this claim area—at [7].

[46] The additional material states that the native title claimants identify their connection to 'Mount Jowlaenga' with the Mount Jowlaenga pastoral lease, particularly the north western portion of the pastoral lease south of the Fraser River. Mount Jowlaenga itself is in this part of the pastoral lease. It is submitted that the claim area is encompassed by the 'Mount Jowlaenga' area and that the native title claim group's connection is one that spans this broader area and is not confined to the limits of the claim boundaries.

[47] My search through the Tribunal's geospatial datasets confirms that the 'Mount Jowlaenga' area and Fraser River lies outside of and to the north of the area covered by this application and south of the Bindunbur claim area. The application area is not covered by any other native title claim or by any determination. By way of explanation, discussed further in these reasons below, the additional material states that 'the claim area lies within an interface between areas of country associated with languages including Yawuru, Nyikina, Nyul Nyul and Nimanbur'—at [14].

[48] An examination of the description of the claim group in the Bindunbur claim to the north reveals, on the face of it, possibly two descent lines in common with that of the Mount Jowlaenga claim group. The description of Nyikina Mangala native title holders for the area adjacent to the Mount Jowlaenga claim includes four descent lines in common with the claim group. The native

title claim group for the polygon claim to the south (WAD359/2013—Mount Jowlaenga) identifies as Nyikina. In my view, these commonalities indicate support for the applicant's contention that the area of the claim 'lies within an interface' of a number of groups.

[49] In my view, this context is relevant to my consideration of the applicant's factual basis for the claim. The applicant contends there is a core or wider society in relation to the area covered by the application, one whose traditional laws and customs are acknowledged and observed by the native title claim group for this application. It is therefore, in this way that I understand that rights and interests are asserted to be held by the members of the native title claim group.

Reasons for s 190B(5)(a)

[50] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. It is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary that the material before the Registrar shows cumulatively an association between the whole group and the whole area of the claim—*Gudjala (2007)* at [51] and [52]. Further, Dowsett J also observed:

> Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

[51] In *Corunna v Native Title Registrar* [2013] FCA 372, Siopis J referred to the need for the facts in relation to s 190B(5)(a) to be in sufficient detail such that they enable a genuine assessment of the factual basis. His Honour held that a factual basis which lacked geographically specific facts going to association of the predecessors and the native title claim group would not be sufficient for the purpose of s 190B(5)(a)—as [45].

Association of the predecessors of the native title claim group with the application area

[52] Schedule F makes the general assertion that 'the native title claim group and their ancestors have, prior to and since the assertion of British sovereignty, possessed, occupied, used and enjoyed the claim area'. It is asserted that possession, occupation, use and enjoyment is held pursuant to the claim group's traditional laws and customs and vested in members of the group 'on the basis of descent from ancestors' connection to the area'.

[53] As explained above, my consideration at this condition has proceeded on the basis that the applicant asserts that an association with 'Mount Jowlaenga' is one with the claim area, as well as, and importantly, one with areas beyond the boundaries of the claim.

[54] The applicant's additional material states that the claim area is part of an area regarded by the native title claim group, as well as native title holders in the surrounding area, as being a 'meeting place' or 'trading ground'. It is described as a ''corner post' of the extents of language associations with country' and considered by senior claimants as a shared area, not an area

associated with simply one group or body—at [12]. It is submitted that in accordance with traditional laws and customs, rights to the area are possessed by virtue of descent from the apical ancestors and earlier inhabitants from the area—at [13]. The applicant asserts that at the time of effective sovereignty the Mount Jowlaenga area had 'been governed by a system of laws and customs shared by people of different or multiple language identities' (including [text removed]) and that the community and society today reflects this 'multiplicity of language group identities'—at [15] to [18].

[55] The applicant's submission asserts that the basis for these traditional laws and customs in relation to the claim area lies in those acknowledged and observed by its apical ancestors and their ancestors before them. These ancestors are said to have belonged to a number of language identities, observed particular kinship systems, held a set of beliefs and cultural rules specifically in respect of the area covered by the application and shared a common acknowledgement of ritual practices and traditions also specific to the Mount Jowlaenga area.

[56] Appendix A of the submission provides information about the apical ancestors, including their approximate birth dates and areas of birth and association; their descent relationships to some members of the claim group and their identification with landholding groups and estates. The majority of the apical ancestors are identified as [text removed], one as [text removed], one as [text removed] and one as [text removed]. All were born between 1843 and 1915. Their areas of association are listed against each of them, with the *buru* and *range* (estate, country) for most identified as including the areas of Mount Jowlaenga, Fraser River and Yeeda Station (the location of Yeeda Station relative to the claim area is discussed below). Those apical ancestors not identified as [text removed] include at least the area of Mount Jowlaenga in their areas of association.

[57] For example,[Person 1] , born in 1900, is said to have worked all around Yeeda Station; 'his country went all round there and back up to Mount Jowlaenga' where he was able to speak to the spirits and so able to travel through country. [Person 2] is said to have been born in the late 1870s or early 1880s and [Person 3] was born and believed to have gained his spiritual essence (*ray*) at a site four (4) kilometers east of the claim area boundary and died at Yeeda Station. [Person 4] , born 1855, is identified as [name removed] and remembered as a senior ritual practitioner for Mount Jowlaenga, his *buru* and *range* also extended to the surrounding country. The submission identifies for each of the apical ancestors reference to one or more other persons in the ancestral line and their connection to the claim area and surrounding country.

[58] Yeeda pastoral lease is contiguous with the eastern and half of the southern boundaries of the Mount Jowlaenga pastoral lease. It is overlapped by the Nyikina Mangala determination[3] and within that area lies the Aboriginal community of Pandanus Park – referred to in [Deponent]'s affidavit as *Yurmulun*, being on Nyikina country.

[3] *Watson on behalf of the Nyikina Mangala People v State of Western Australia* (No 6) [2014] FCA 545

[59] The submission speaks to the basis on which rights and interests are held in relation to the 'Mount Jowlaenga' area (including the claim area). It is the *buru*, the fundamental unit of land holding, for the native title claim group and [text removed]—at [20] and [32]. It is stated that current recognition of the area as being a trading ground or meeting area shared by the groups in the area has been transmitted from generation to generation. Ritual practices, songs and stories of law-giving mythic figures and spiritual teaching in relation to sites within the claim area and more generally in the 'Mount Jowlaenga' area were part of the system of law and custom acknowledged and observed by the ancestors of the native title claim group—[26] to [31]. It is believed that they continue to have a supervisory role in the observance of traditional laws and customs today—at [34].

[60] [Deponent]'s affidavit attests to the association of his predecessors with the claim area and the surrounding country, including the pastoral stations of Mount Jowlaenga and Yeeda:

[61] [text removed] [Deponent] attests also to the recent finding of 'old grinding stones of the old people at Mount Jowlaenga which were used to make flour from spinifex and to sharpen sticks, and make knives out of rocks and sharpen out spear heads'—at [49]. [Deponent] states that the Mount Jowlaenga area is his *buru* because that is what he was taught by his grandmothers, uncles and grandmothers' brothers; that it is his country because it was his ancestors' country—'[f]or as long as we know they lived in that country and I inherit that country'—at [10].

Current association of the native title claim group with the application area

[62] Schedule F makes the assertion that the native title claim group has, in accordance with its laws and customs, a continuing association with the land and waters of the claim area. As referred to earlier in these reasons, the native title claim group regards the claim area and the encompassing Mount Jowlaenga area as a trading area, meeting place and shared area, not an area 'just for one group or body'—at [12].

[63] The applicant's additional material provides information about members of the claim group who are recognised senior ritual practitioners in relation the Mount Jowlaenga area as well as those who know the mythologies associated with the area. The material asserts that the native title claim group has inherited its rights to country from its ancestors and that the claimants are the right people for the Mount Jowlaenga area. As such the native title claim group continues to acknowledge and observe the system of law and custom in relation to the area in which the claim lies and to teach the laws and customs in relation to that and the claim area to their children and grandchildren.

[64] This is illustrated in [Deponent]'s affidavit, which sets out his and the claim group's connection to, and the history of the group's association with, the claim area and surrounding areas:

> [Text removed] – at [9]

[65] [Deponent] refers to the map attached to his affidavit attesting to the land shown on the map to be part of his *buru*. The area includes the claim area, the boundaries of which are shown in yellow:

> [Text removed] — at [13].

[66] [Deponent] refers to this area specifically as a place [text removed] and identifies a dreaming place [text removed] within the claim area. He describes its geography and topography and water courses. He speaks of growing up and visiting Pandanus Park (outside, but proximate to, the claim area); of being taken by the 'old people' to be shown country and taught about hunting and the seasons and how to look after country. [Deponent] provides details about working on the pastoral stations in the area with his uncles and grandparents, hunting, fishing, camping and looking after his country, including the area covered by the application. He has rights and responsibilities in relation to the claim area taught to him by his family and through his ancestors. [Deponent] attests to members of his family and to members of the claim group hunting and camping in the Mount Jowlaenga area and to conducting heritage surveys and protecting country.

Consideration

[67] In *Gudjala 2007* Justice Dowsett considered that in assessing the factual basis material, it was necessary for the Registrar to address 'the relationship which all the members claim to have in common in connection with the relevant land'—at [40]. Further to this, the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—at [39]. The factual basis material should therefore provide information that pertains to the identity of the native title claim group, the predecessors of the group and the nature of their association with the area of the application.

[68] The factual basis that supports an association of the native title claim group and its predecessors with the area covered by the application is somewhat broad and not always specific to the actual claim area. Information that goes to the physical association of the group's predecessors is largely limited to the table at Appendix A for detail, and that of the claim group is illustrated principally in the affidavit of [Deponent] and is predominantly about his own family connections. However, such association is not limited to physical presence alone—*Martin v Native Title Registrar* [2001] FCA 16 at [26] and *Corruna* at [39]. The applicant's submission refers to the spiritual association of the native title claim group with the 'Mount Jowlaenga' area (including the claim area itself) which has its origin in and is governed by its ancestral links to its predecessors.

[69] The overarching system of traditional law and custom as it relates to the' Mount Jowlaenga' area is set out in the submission and supported, in my view, by the statements in [Deponent]'s affidavit. Given the extent to which the native title claim group's current association with the area is governed by its ancestral links to the predecessors of the group, it is clear to me that the group

has a previous association with the area of the application. The group's current association is evident to the degree it is because that connection has been passed down through the generations – something to which [Deponent] attests and which is clear in the overview of law and custom described in the submission as being acknowledged and observed by the apical ancestors. Particularly, this is demonstrated by the ancestral links and rules that govern the ownership and responsibility of the *buru* of which the area covered by the application is a part. These principles of descent are what currently relate the claimants to their *buru* and *range*, evident in the connection [Deponent]'s attests to throughout his affidavit – a connection he has through his ancestors with its consequent rights and responsibilities.

[70] I am therefore satisfied that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

[71] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

[72] Justice Dowsett considered the requirements of s 190B(5) for a second time in *Gudjala 2009* when he addressed the adequacy of the factual basis underlying an applicant's claim. Relevant to assessing the application's assertions in relation to s 190B(5)(b), in Dowsett J's view, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters—at [29]. Therefore, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs that give rise to the claim to native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty. This is the proposition that emerged from the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (*Yorta Yorta*), and was relied on by Dowsett J in his *Gudjala 2007* decision—at [26].

[73] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate[4]:

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and

[4] This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96].

- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

[74] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala (2007)* at [62] and [63].

[75] In my view, there is sufficient factual account in the additional material to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

[76] Schedule F of the application makes the following assertions:

- Such possession, occupation, use and enjoyment has been pursuant to and under the laws and customs of the claim group, comprising rights and interests in land and waters which the traditional laws and customs vest in members of the native title claim group on the basis of descent from ancestors connected to the area;
- Such traditional laws and customs have been passed down from older generations to younger generations by traditional teaching, through the generations of persons comprising the native title claim group preceding the present generations to the present generations of persons comprising the native title claim group;
- The native title claim group continues to acknowledge and observe those traditional laws and customs; and
- The native title claim group by those laws and customs have continuing connection with the land and waters in respect of which the claim is made.

[77] These are extrapolated on in the applicant's submission and illustrated by statements made by [Deponent] in his affidavit.

The relevant society

[78] The applicant submits that the basis for the system of laws and customs in relation to the claim area is not limited to language defined boundaries— that the 'claim area lies within an interface between areas of country associated with languages including Yawuru, Nyikina, Nyul Nyul and Nimanbur'—at [14]. The community of people said to share these laws and customs reflects 'a multiplicity of language group identities' and this is characteristic of the inhabitants of the area at and before sovereignty—at [15].

[79] The submission refers to the apical ancestors identified at Schedule A, stating that they are 'recognised as holding various language identities, including [text removed]. These identities are detailed against each ancestor at Appendix A to the submission. The applicant submits, further, that the 'descendants of those ancestors similarly hold to these language identities'—at [16]. The submission asserts that since sovereignty the area in which the application lies has been 'governed by a system of laws and customs shared by people of different or multiple language

identities'—at [18]. The submission puts forward the view that this is not a 'novel' circumstance – it is a system 'where different language group identities merge in conjunction with a shared system of laws and custom'—at [17]. Members of the claim group retain this knowledge of languages through their descent links to the apical ancestors identified at Schedule A.

[80] The applicant submits that the native title claim group constitutes a 'localized society' and members belong to the area through 'sets of relationships' and 'cultural commonalities' inherited from their predecessors and connected through that descent to the claim area in particular but also to the country encompassing it. It proposes that they may also be regarded as members of one or more broader society or societies, referring to the determination in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 which found the claim was established but that the relevant society may not be constituted by the claim group alone—at [9] to [10].

[81] In my view, the factual basis material supports the proposition that the claim group belongs to a broader society—four language identities are attributed across the ancestral lines and the claim area is said to be located in an area regarded by members of the group as one that is shared. However, I agree with the applicant that there is no necessity to resolve the nature or geographic extent of this broader society (or societies) for the purpose of assessing the claim—at [19]. This is a much wider and complex question which, in my view, is one dealt with by the Court rather than in the context of a registration decision.

Traditional laws and customs of the native title claim group

[82] The *buru* is 'the fundamental unit of land holding' – rights and interests are held in relation to these areas of country (estates): 'A person is entitled to access and freely utilise their *buru* estate, as well as an area surrounding the core of the estate (sometimes referred to as a range)'. The geographic extent of a person's *buru* is relative to the nature and extent of surrounding *burus*; can cover large tracts of land; rights in which are gained by descent or in some cases by adoption. The applicant submits that this element of law and custom finds its source in pre-sovereignty law and custom and remains fundamentally traditional, preserving the principle of recruitment to the group by descent. Changes to modes of descent or the emphasis on certain modes of descent are acknowledged, with rights gained through each parent now generally accepted mode of transmission—at [20] to [24].

[83] [Deponent]'s affidavit includes information that:

- illustrates his kinship relations and the basis on which they are acknowledged and observed;
- provides the basis on which his rights and interests are held;
- demonstrates the nature of the rights and interests held under the group's traditional laws and customs;
- refers to particular and customary locations in the claim area and immediate vicinity along with the stories and cultural beliefs and practices associated with those sites;

- provides details about the laws and customs acknowledged and observed by the claim group, including demonstrating how they have been passed down through the generations.

[84] The submission states that a 'mutual recognition' between the apical ancestors as possessing rights to the claim area has been transmitted through the generations including regard for Mount Jowlaenga as a 'meeting place' or 'trading ground'. The claim group is said to have inherited rights to country from these ancestors and that they are currently the right people for it—at [25] and [37]. As described by [Deponent] in his affidavit:

> (Text removed) — at [39].

[85] The system of kinship relations, passed down through previous generations, is said to be understood and observed by members of the claim group. [Deponent] speaks to these in his affidavit – that he was taught that the Mount Jowlaenga area was his country by his grandmothers, uncles and grandmother's brothers, that other families share his *buru* and [text removed]—at [11] and [41] to [43]

[86] The submission outlines aspects of the claim group's spiritual beliefs, ritual practices and cultural knowledge. The system of belief in the 'existence and ongoing presence of mythic creatures and people … who gave the world its form, instituted important cultural rules, and remain powerfully imbued in areas of country today'. Ritual practices are also said to be part of the native title claim group's system of law and custom inherited from the apical ancestors. [Text removed]. The claim group includes 'senior ritually qualified persons who are 'regionally recognised as responsible for the maintenance of this Law today and the ongoing conduct of initiations', knowledge of which has been passed on to them by their ancestors. The submission provides an example of one of the members who practices ritual traditions specifically in relation to the Mount Jowlaenga area – at [25], [28] and [30].

[87] The claim group believes, as did their ancestors, that Mount Jowlaenga is inhabited [text removed] who have a role in protecting country. [Text removed]. This system of beliefs and traditions is said to have been passed down from the claim groups ancestors whose spirits are considered to be still living on the country … 'you got to talk to them the proper way and then they don't bother you'—at [34].

[88] [Deponent] attests [text removed] in the lives of members of the claim group—in relation to the protection of and access to country. He talks of the rules and responsibilities that pertain to hunting, sharing and cooking food; knowledge of the ceremonial resources to be found and protected in the Mount Jowlaenga area; and the claim group's adherence to the traditional laws and customs that govern the exercise of their rights and interests in the claim area and surrounding areas.

Consideration

[89] The application and additional material provides, in my view, sufficient support for the contention that there was at sovereignty a society constituted by the apical ancestors (or some of

their antecedents) in respect of the claim area, defined by the recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived (*Gudjala 2009* at—[66]). The statements made in [Deponent]'s affidavit demonstrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*—showing an inter-generational transmission of traditional law and custom from the predecessors of the claim group. This, along with the information in the submission, illustrates aspects of the group's traditional law and custom, in respect of the area of the application, and surrounding country, pertaining to family and ancestors, rules of affiliation to country, special places and stories, hunting and gathering and the passing on of traditional and cultural knowledge.

[90] [Deponent]'s affidavit does not include any examples in support of the applicant's submission that the area existed or continues to exist as a meeting place, trading ground or shared area. His affidavit and the application do not specifically illustrate the shared arrangements that are asserted to exist under the group's traditional law and custom. However, in my view, there is nothing before me that disputes the contention. I find sufficient support in the applicant's explanation about the intersection of language identities in the area of the claim and that this is borne out by the way the apical ancestors are identified and the context of surrounding claims and determinations. Further, the submission provides considerable details to support its proposition 'that the Mount Jowlaenga community reflects a multiplicity of language group identities is a characteristic of those who inhabited the area around the time of effective sovereignty and before'—at [15].

[91] On the basis of the information in the applicant's submission I am prepared to accept that there is likely a 'shared system of laws and customs' and that this manifested itself in relation to the area in which the claim is located as a meeting ground or trading place.

[92] I am satisfied that the material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Reasons for s 190B(5)(c)

[93] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007* at [63], [65] and [66] (as summarised above).

[94] The additional material and accompanying affidavit contains many statements that assert the continuity of the native title claim group's traditional laws and customs. The affidavit illustrates and, in my view, demonstrates that these laws and customs have been 'passed from generation to generation by traditional modes of oral transmission, teaching and common

practice', and continue to be acknowledged and observed today among the current generations of the claim group—applicant's submission at [42] to [46]. The submission states:

> [Text removed]

[95] The transmission of knowledge from ancestors and predecessors to the current generation is illustrated in [Deponent]'s affidavit:

> [Text removed] — at [41]

[96] The native title claim group continues to acknowledge and observe the same system of law and custom and to teach the laws and customs to their children and grandchildren. [Deponent] refers to this in numerous places in his affidavit:

> [Text removed] [Text removed]—at [50] to [51]

[97] In my view, the additional material sufficiently demonstrates that the native title claim group has continued in such matters as its cultural practices and use of the natural resources of the land and that this knowledge has been passed down from their ancestors and continues to be passed down to successive generations. It is in this way that the claim group continues to acknowledge and observe the traditional law and custom of their ancestors in relation to the area of the application and the country by which it is encompassed.

Conclusion

[98] 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.

[99] For the application to meet this merit condition, I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in Doepel about the nature of the test at s 190B(6):

- it is a prima facie test and '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 involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

[100] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

- exist under traditional law and custom in relation to any of the land or waters under claim;

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

Consideration

[101] In my view, as set out above at s 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests. What follows is my consideration of each of the rights and interests claimed in the application as to whether they can be prima facie established to exist under the native title claim group's traditional laws and customs.

Exclusive right

1. In every part of the claim area (if any) where there has been:
(a) no extinguishment to any extent of native title or where any extinguishment is required to be disregarded; and
(b) which is not subject to the public right to navigate or the public right to fish,
the right possessed under traditional law and customs is properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.

[102] I understand this statement to be a claim to the right of possession, occupation, use and enjoyment of land and waters of the claim area as against all others, but only where it can be recognised or sustained. I note that the claim is made over a pastoral lease, the grant of which could potentially extinguish such an exclusive claim unless there is a basis on which it is required to be disregarded. In my view, there is not the information before me to make an assessment as to whether such a claim can be sustained or not, and I have therefore taken account of what the applicant has to say in relation to the particular right and considered whether it is sufficient to support the claim such that it can be established prima facie.

[103] The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he 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' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[104] The applicant's additional material asserts that the native title claim group and its predecessors have continually practiced their rights to exclusively possess (whether or not that

right is capable of recognition under Australian law), take resources from, stay on, and protect the land and waters of the claim area—at [39]:

> [Text removed] — at [41].

[105] Such rights would appear to be implicit in the connection members of the claim group have to their *buru* – to speak for it, protect it and access it and its resources—at [9] to [13] of [Deponent]'s affidavit. [Deponent] states in his affidavit that it is his responsibility to look after and protect his country, that the claim group has the right to take anything from its country and that this has been taught to him by his elders.

[106] Schedule G of the application states that controlling the access and use of the claim area by others is an activity (amongst others listed) undertaken by members of the claim group.

[107] In my view, the right to exclusive possession (where it can be recognised) is evidenced in the material before me such that I consider that it can be established, prima facie, over areas covered by the application if and where it can be recognised.

Non-exclusive rights

2. In all other parts of the claim area, the right possessed under traditional law and customs is properly interpreted as the right of possession, occupation, use and enjoyment of land and waters as against all others, but the native title rights and interests recognised by the common law of Australia are the rights to do all such things as may be done under the right referred to above, save for controlling the access to or the use of land or waters by others; being the (non-exclusive) rights to:
(a) have access to, remain on and use the land and waters;
(b) access and take the resources of the land and waters; and
(c) protect places, areas and things of traditional significance on the land and waters.

[108] These rights are evidenced in the affidavit of [Deponent] and in the additional material, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[109] The following matters have been referred to in my discussion above of the factual basis material provided in support of the assertions at s 190B(5) and are relevant to my consideration that this right is prima facie established. The applicant's additional material asserts that members of the claim group and their predecessors have hunted and gathered resources from the claim area since sovereignty to the present. [Deponent] illustrates in his affidavit the group's traditional laws and customs in relation to the use of resources with stories and examples, referring to the map annexed to his affidavit and referring to both the claim area and surrounding country.

[110] For example, [Deponent] states that [text removed]—at [29] to [30]. He and other members of the claim group participate in the conduct of heritage surveys to protect country because of their connection to their *buru* as they have a responsibility to their ancestors to do so at [24] to [38]. Mount Jowlaenga is respected and protected by members of the claim group as an area of traditional significance—at [13] to [17].

[111] I consider that these rights can be established, prima facie.

Conclusion

[112] 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.

[113] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

[114] In *Doepel*, Mansfield J also considers the nature of the Registrar's task at s 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at 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—at [18].

[115] The application provides no information at Schedule M but in my view the requisite information can be found in the additional material and the evidence provided by [Deponent] in his affidavit. Sufficient material is provided to show that he has a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in my consideration for both ss 190B(5) and 190B(6), above.

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

[117] 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.

[118] 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)

[119] 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. The geospatial report dated 17 November 2014 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area

Section 61A(2)

[120] 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. Schedule B provides the relevant statements that the application excludes any area where a previous exclusive possession act was done in relation to the area.

Section 61A(3)

[121] 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.

[122] Schedule E provides a statement that in my view meets the requirements of this section which qualifies the applicant's claim to exclusive possession, by stating that it is claimed:

(i) in every part of the claim area (*if any*) (emphasis added); and

(ii) where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded…'—at 1.

[123] I note that the area of the application is located wholly within the Mount Jowlaenga pastoral lease and to this extent the claim in the application is made over a previous non-exclusive possession act. I note that the applicant has sought the benefit of ss 47, 47A or 47B, however, should these provisions not apply in this case, it may be that the applicant's claim to exclusive possession cannot be sustained, but the way the claim to the exclusive right is framed meets the requirements of this condition of the test.

Conclusion

[124] In my view the application does not offend 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.

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

Section 190B(9)(a)

[126] Schedule Q contains the requisite statement that no claim is made of ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[127] Schedule P provides the requisite statement that no claim to exclusive possession is to any offshore place.

Section 190B(9)(c)

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

Conclusion

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

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.

[130] Section 190C(2) is a procedural condition which simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)—*Doepel* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[131] In my view 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. 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.

[132] I have come to the conclusion that the application satisfies the requirements of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62. Below I consider each of the particular parts of ss 61 and 62, and set out the reasons for my view that the prescribed details and other information are contained in this application.

Native title claim group: s 61(1)

[133] Section 61(1) sets out who may make a native title determination application:

> A person or persons authorized by all the persons (native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group—at s 61(1).

[134] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. It is the Registrar's task 'to consider whether the application sets out the native title claim group in the

terms required by s 61'; this being 'one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b)—*Doepel* at [35] and [36]. Particularly:

> If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[135] The details relevant to my consideration at this condition are set out in the application at Part A, 1 and 2 and at Schedules A and R. There is nothing on the face of the application that suggests that the application is not brought on behalf of all members of the native title claim group. I am therefore satisfied that the application meets the requirements of s 61(1).

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

Name and address for service: s 61(3)

[137] Part B of the application states on page 15 the name and address for service of the persons who comprise the applicant.

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

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

[139] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[141] Each of the five persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section.

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

Details required by s 62(1)(b)

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

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

[144] Schedule B lists those areas both covered and not covered by the application by reference to metes and bounds and general exclusion statements.

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

[145] Schedule C refers to Attachment C being a map showing the external and internal boundaries of the area covered by the application.

Searches: s *62(2)(c)*

[146] Schedule D provides the statement that no searches have been carried out by the Applicant.

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

[147] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

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

[148] Schedule F provides statements giving a general description of the factual basis for the claim made in the application.

Activities: s *62(2)(f)*

[149] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

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

[150] Schedule H provides the statement 'none' in relation to any other applications seeking determination of native title or compensation made in relation to the whole or part of the area covered by the application.

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

[151] Schedule HA provides the statement 'none' which I take to mean that the applicant is not aware of any such notices.

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

[152] Schedule I provides information in relation to the relevant notice issued under s 29 in relation to the grant of Mining Lease 04/459.

Conclusion

[153] 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.

[154] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described in ss 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[155] The Tribunal's geospatial report confirms that no native title determination applications fall within the external boundaries of the current application.

[156] As the Mount Jowlaenga application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

[157] 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.

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

[158] For the condition of s 190C(4) to be satisfied, I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. *Doepel* discusses the differing functions under the two alternative limbs of s 190C(4):

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar . . . The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group—at [78].

[159] Schedule R refers to Attachment R which comprises a certification made by the Kimberley Land Council (the KLC). As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a).

The nature of the task at s 190C(4)(a)

[160] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body' which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE—*Doepel* at [80] and [81].

[161] Pursuant to s 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s 203BE(2)(a) and (b) have been met;
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3) in relation to any overlapping applications.

[162] Pursuant to s 203BE(2), a 'representative body must not certify ... an application for a determination of native title unless it is of the opinion that':

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- 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.

Identification of the representative body

[163] The Tribunal's geospatial report of 17 November 2014 confirms that the KLC is the only representative body for the whole of the area covered by the application. The certificate states that it is the representative Aboriginal and Torres Strait Islander body for the Kimberley RATSIB area, pursuant to *Recognition as Representative Aboriginal/Torres Strait Islander Body 2013* (No. 3) dated 10 May 2013. It is therefore the only body that could certify the application under s 203BE.

[164] The certificate is dated 6 November 2014 and is signed by the Chief Executive Officer of the Kimberley Land Council Aboriginal Corporation.

Does the certificate meet the requirements of 203BE

[165] For the purposes of s 203BE(4)(a), the certificate contains statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it and this authorisation has been undertaken in accordance with a decision making process which has been adopted and agreed to by the native title claim group; and
(b) all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group.

[166] For the purposes of s 203BE(4)(b), the certificate briefly sets out the reasons for the KLC being of that opinion, namely:

- the KLC has undertaken over a number of years extensive anthropological and genealogical research and conducted community consultations with members of the native title claim group for the purposes of identifying all persons who hold or may hold native title in the claim area and surrounding areas;
- it is that research which has produced the claim group description for this application;
- an authorisation meeting was held in Broome on 6 November 2014 at which only members of the native title claim group participated in decision-making;
- the meeting was widely and publically advertised by post and email, notices in the Broome Advertiser and on radio, display of meeting notices in public and community places and through direct communication with members of the claim group;
- those present at the meeting did not indicate that there existed a traditionally mandated decision-making process and agreed that binding decisions would be made by the native title claim group by majority vote of those present at the meeting;
- a resolution to authorise the applicant to make the application and to deal with matters arising in relation to it was passed by a majority vote of those present at the meeting.

[167] In my view, the statements made in the certificate, as summarised above, briefly set out the reasons for the KLC being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[168] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. In my view, as there are no other applications that cover the area of the Mount Jowlaenga application, (confirmed by the geospatial report) there is no requirement for the certificate to address this provision.

[169] I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s 190C(4)(a).

[End of reasons]

Attachment A
Information to be included on the Register of Native Title Claims

Application name	Mount Jowlaenga Polygon #2
NNTT file no.	WC2014/005
Federal Court of Australia file no.	WAD331/201

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/lodged with:
Federal Court of Australia

Date application filed/lodged:
7 November 2014

Date application entered on Register:
12 December 2014

Applicant:
Rona Charles, Nathan Lennard, Preston Manado, Marie Manado, Rosemary Nunju, Francesa Ishiguchi

Applicant's address for service:
As per Schedule

Area covered by application:
As per Schedule

Persons claiming to hold native title:
As per Schedule

Registered native title rights and interests:
As per Schedule

Lisa Jowett, *Delegate of the Native Title Registrar*