National Native Title Tribunal

Registration test reasons

Application name	Aileron Pastoral Lease
Name of applicant	Tony Scrutton Ngwarray, Dorothy Ross Mpetyan, Gerard Rice Ngal, Paddy Bird Ngal, Edmund Rubuntja Penangk
NNTT file no.	DC2014/002
Federal Court of Australia file no.	NTD8/2014
Date application made	21 March 2014
Date of Decision	**26 June 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 accepted this claim for registration on 26 June 2014 pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of Reasons: 4 July 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 Aileron Pastoral Lease claimant application to the Registrar on 26 March 2014 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 21 March 2014 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 s 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 22 April 2014.

[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 April 2014, the case manager with carriage of this matter wrote to the Northern Territory Government 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. This application is future act affected and as such the timeframe is within the four month date of the s 29 notice issued over the application area, being 26 June 2014. I have therefore used best endeavours to test the application within that date.

[15] On 29 April 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] There is a description of the claim group at Schedule A of the application.

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

Name and address for service: s 61(3)

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

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

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

[24] 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].

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

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

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

[27] The application is accompanied by five affidavits, each affirmed by one of the persons who comprise the applicant.

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

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

Details required by s 62(1)(b)

[30] 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)*

[31] 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.

[32] 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)*

[33] Schedule C refers to Attachment A which is a colour map produced by the Central Land Council (CLC) dated 19 March 2014.

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

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

[35] Details of searches conducted by the applicant are included in Schedule D. The results of those searches are attached at Attachment B of the application.

[36] 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)*

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

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

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

[39] 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].

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

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

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

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

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

[43] Schedule H of the application states '[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.'

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

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

[45] Schedule HA states '[n]ot applicable', which I take to mean that the applicant is not aware of any notifications given under s 24MD(6B)(c) in relation to the application area.

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

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

[47] Schedule I also states '[n]ot applicable'. Again, I take this to mean that the applicant is not aware of any s 29 notices given in relation to the application area.

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

Conclusion

[49] The application contains the details specified in ss 62(2)(a)–(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.

[50] 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.

[51] 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 on the Register at the date of the decision to Register this application. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

[52] The Tribunal's Geospatial services prepared a Geospatial assessment and overlap analysis (Geospatial assessment) of the application area dated 22 April 2014, which states that no applications as per the Register of Native Title Claims overlap the external boundary of this application. As such, there is no 'previous overlapping application' for the purposes of this requirement.

[53] 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.

[54] 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.

[55] 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.

[56] Schedule R of the application includes a certification from the Central Land Council (CLC). The certificate is signed by the Director of the CLC. I have had regard to the Geospatial assessment dated 22 April 2014 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.

[57] 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)

[58] 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.

[59] The certificate contains the required statements.

Section 203BE(4)(b)

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

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

- The CLC has provided representation to the Anmatyerr and Arrernte people since the CLC was established.

- A meeting of the native title claim group was held on 3 December 2013 in Alice Springs. 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 landholding groups that comprise the claim group. The meeting was attended by the CLC legal and anthropology 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 persons 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.

[62] 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 Arrernte people, including specifically the 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.

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

Section 203BE(4)(c)

[64] 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.

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

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

My decision

[67] 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).

[68] 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.

[69] A description of the application area is provided at Schedule B of the application.

[70] Schedule B is divided into two parts. Part (a) describes the application area as comprising 4 Northern Territory (NT) Portions being:

- that part of NT Portion 703 held under Perpetual Pastoral Lease 1097 that is not included in Aileron native title application NTD20/2007. A metes and bounds description is included to further describe this area making reference to cadastral boundaries, road corridors, and coordinate points to six decimal places;
- NT Portion 1281 being Reserve 1346;
- NT Portion 1282 being Reserve 1343; and
- NT Portion 5014 held under Crown Lease Term 1877.

[71] Part (b) specifically excludes various NT Portions and roads.

[72] Schedule C of the application refers to Attachment A. Attachment A is a colour map entitled 'Aileron PPL Native Title Determination Application' produced by CLC and dated 19 March 2014. The map includes:

- the application area depicted by a bold green outline and hatched fill;
- cadastral boundaries colour coded and labeled;
- roads and railways shown and labeled;
- coordinate point labels for various locations;
- four insets
- scalebar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[73] 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.

[74] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 22 April 2014. 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.

[75] 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.

[76] 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.

[77] 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

[78] The native title claim group is described as comprising members of the 'Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringke, Ntyerlkem/Urapentye and Tywerl 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;
- succession.

[79] Paragraph 7 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 ancestors in respect of each landholding group are included. In respect of each of the landholding groups a number of named and unnamed descendants from each ancestor are also listed]

[80] Paragraph 9 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. The non-descent connections considered relevant in the recruitment of a particular individual are:
>
> (a) spiritual identification with and responsibility for an estate;
>
> (b) conception and/or birthplace affiliation with an estate;
>
> (c) long term residential and/or historical connection to an estate;
>
> (d) shared section/subsection and/or moiety affiliation;
>
> (e) more distant ancestral connections to an estate, for example, mother's father's mother;
>
> (f) possession of secular knowledge and traditional spiritual knowledge, authority and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology;
>
> (g) authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate;
>
> (h) seniority in traditional matters concerning the landholding group and/or the estate;
>
> (i) ceremonial knowledge acquired through participation in ceremony.

[81] finally, paragraph 10 of Schedule A describes the succession rules that form part of the claimants' system of traditional laws and customs and have been used to form parts of the claim group as follows:

Succession rules form part of the claimants' system of traditional laws and customs and are directed to ensuring the maintenance of both knowledge and connections to land, and its spiritual properties. The land and identity of the original group is safeguarded and re-established in accordance with traditional laws and customs, a process which commonly includes transmission of interests, entitlements and cultural knowledge to descendants of the succeeding group. The following elements usually form the basis for succession:

(a) increased role for existing *kwertengerl* when there are no or reduced numbers of *apmerek-artwey*;

(b) activation of interests and entitlements based on descent connections other than through one of the four grandparents, that is, through a great grandparent;

(c) shared Dreaming track or other spiritual affiliations;

(d) acquisitions of interests and entitlements in *atywerreng* (such as through spiritual conception);

(e) other personal history factors such as ceremonial bestowal, initiation, adoption, intermarriage, conception/birth place affiliation;

(f) shared section/subsection and moiety affiliation.

Traditional succession processes have been documented in relation to land in the region of the application area (see Elliott, C. 2004. *Pine Hill Native Title Application: Consent Determination Report*. pp 58-60) and these processes have informed recruitment of the members of the Kwaty landholding group whose descent based membership is limited to Archie Glenn Angal, Charlie Glenn Ngal (FM) and Huckitta Lynch Penangk (MM) who act as *kwertengerl* for the estate.

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

[82] 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].

[83] 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).*

[84] 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 7 of the extract from Schedule A above) is sufficient for the purposes of s 190B(3)(b).

[85] 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 9 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.

[86] Finally, for the same reasons, being an objective reference point and the availability of some factual inquiry, I am satisfied that the criteria for membership to the claim group through the traditional laws and customs relating to succession meet the requirements of s 190B(3)(b).

[87] 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.

[88] 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.

[89] 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].

[90] 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].

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

1. 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 of 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 waters 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 enjoyments 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.

2. All the rights and interests listed in paragraph 1 existed and continue to exist in relation to the application area as a whole.

3. 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 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 goverened 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 Schedule G and M were and are undertaken in the exercise of the native title rights and interests set out in paragraph 1.

[92] 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.

[93] 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)

[94] 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].

[95] 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].

[96] 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].

[97] 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]*[1], 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].*

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

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

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

[100] 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)

[101] 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].

[102] 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].

[1] See *Gudjala FC* [90] to [96]

The applicant's factual basis material

[103] Schedule A of the application states that there are seven landholding groups that comprise the native title claim group. Those seven groups are the Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringke, Ntyerlkem/Urapentye and Tywerl landholding groups. According to Schedule A, the application area is located in Central Anmatyerr, Eastern Anmatyerr and Northern Arrentre territory respectively. Each of the landholding groups for the application area are associated with these territories and they share a common body of traditional laws and customs which 'govern how rights and interests in land are acquired and who holds them in particular parts of this territory, including the application area.' It is asserted that the society to which the claim group belong is a broad group that encompasses many different landholding or estate groups, those groups that form the claim group are those which have rights and interests in the land the subject of the application.

[104] Further, Schedule A explains that each estate group is affiliated with certain areas or regions of the application area, as follows:

> The term "estate" is used to describe the land and waters associated with a landholding group. The landholding groups are named after their respective estate areas and are affiliated to the following parts of the application area:
>
> (a) Alhankerr – eastern;
>
> (b) Atwel/Alkwepetye – south-eastern;
>
> (c) Ilkewarn – north-eastern;
>
> (d) Kwaty – central;
>
> (e) Mpweringke – central;
>
> (f) Ntyerlkem/Urapentye – south western;
>
> (g) Tywerl – north-western—at [3].

[105] Schedule A asserts that the landholding groups in the northern region of the application area are associated with the Eastern and Central Anmatyerr languages, and those in the southern part of the application area are associated with the Northern Arrente language. All of these are members of the Arandic group of languages. I note however that Schedule A asserts that according to the traditional laws and customs of the society to which the claim group belong, language group affiliation does not determine, and has no particular bearing on the acquisition of rights in land or a person's connection to particular land or waters.

[106] Schedule F includes some general assertions about the association of the claim group and their predecessors with the application area. In particular Schedule F states:

> 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—at [2].

[107] Schedule F goes on to assert that the ongoing association and connection of the claim group, with the application area, arises as a result of a communally held belief system in a period of creation or the Dreaming. It is asserted that the laws and customs to which the claim group adhere were established in this Dreaming period and have been passed to each successive generation since the Dreaming time. This is described as follows:

> 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 for their continuity, were all produced by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed Altyerr in Anmatyerr (Altyerre in Arrente). It is glossed as the "Dreaming" or "Dreamtime" in English. The claimants' system of laws and customs- the "Law"- has its foundation in the 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—at [5].

[108] That this association has been ongoing and dates back to, at least, the time of first European contact and by inference, sovereignty, is further emphasised in Schedule F with reference to a series of ethnographic and historical sources:

> Ethnographic and historical sources confirm that at the time of contact and settlement of the region, and continuing to the present day, Eastern Anmatyerr and Northern Arrente 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—at [19(c)]

[109] A bibliographical list of sources are then provided, however no further information or detail from these sources are included with the application.

[110] Schedule M also provides information relevant to the association of members of the claim group with the application area. In particular Schedule M details that many of the claim group members were born on or near the application area, one as long ago as 1927. Information about the Dreaming tracks with which the claim group members are affiliated and that traverse the application area are provided. As well as information about how the claim group members would spend time on the application area with their families throughout their childhood,

undertaking traditional cultural activities and continue to access the application area today for activities like protecting sacred sites, hunting and collecting bush foods. An example is as follows:

> Tony Scrutton's mother [name removed] was born and grew up on Aileron station. Her father was Eric Penangk and so she grew up walking across the application area, hunting and gathering bush food and being taught all about her country by him. They were camped at a big camp near the Aileron homestead at the time. Tony was also born on Aileron station and grew up living near the Aileron dam with his mother and grandfather. His grandfather took him hunting and camping all over the application area so he learnt about his country. He grew up mainly eating bush food that his grandfather had caught, such as kangaroo, emu, turkey, porcupine and other bush foods. Tony has lived close to the application area for most of his life and has continued to hunt and be instructed by his grandfather into the Law—at [3].

[111] As well as the information regarding association included in the application at Schedule M, each of the persons who comprise the applicant have sworn an affidavit. These affidavits provide a great deal of information about the cultural practices, the current association of members of the claim group and of the process of transmission and learning between generations employed by the claim group. These rules and customs passed through the generations, it is asserted, have their origin in the Dreamtime, and continue to be passed on and undertaken, in the application area, today.

[112] In his affidavit Tony Scrutton Ngwarray states that he was born in Aileron in 1971. He discusses growing up at a camp near Aileron Dam and learning about bush food and hunting from his grandfather Eric. He talks of Eric and his mother growing up on the application area and possessing the cultural knowledge for their landholding group. An example is as follows:

> Growing up we used to camp out in the bush when we were hunting on the application area with my grandfather. Eric grew me up as a young fella. We used to go hunting and got kangaroo, emu, turkey, goanna, porcupine, perentie and plenty of bush tucker like bush banana. We mainly ate bush food that my grandfather caught during that time with just a little bit from the station. We used to camp at [location 1], [location 2] and [location 3] and we used to make windbreaks. Sometimes we got water from the rockholes there. We used to cook our food on the fires and bring food back to share with everyone back at camp. There was no fridge at the camp then. After I moved to [location 4] which is not very far from the application area I've stayed there ever since, but I always come back to visit Eric and go hunting down there on the application area—at [12]

[113] Similarly Dorothy Ross Mpetyan speaks of her and her family's association with the application area. She speaks in particular about her father, about how he travelled regularly between Napperby (a pastoral station which adjoins the application area) and Aileron stations and camped all around his country, collecting bushfood and water. She states:

> My father, Kwaty Jim was born on Tywerl country, on his country. As a young child he grew up at Napperby station because his father was working there chopping wood. The whole family used to

> walk backward and forwards between Aileron side and Napperby side. They had family living on Aileron side. They walked across this country, Tywerl on Aileron. They used hunting all the time catching kangaroo, goanna, perentie and euro with a spear and he used to get porcupine. All that food and sugarbag. His family used to camp all across that country when they were talking walking around. They would also camp all around the Aileron station homestead where all his family were living. They used to build shelters and cook their food on fires. They used to get water from the soakages all along there. He also used to get water from Boundary Bore. We used to get water there too, dig it out or sometimes there was enough water there to swim. He knew all the country. He was a mailman and he took mail between Aileron and Napperby station. He used to carry the mail in a swag on his back and camped all along that country. He used to camp half way on Aileron station—at [8]

[114] Like her father, Dorothy discusses having grown up walking all around her country and camping across Napperby and Aileron stations. She speaks of her association as a child and continuing today with the application area. Dorothy speaks of the Dreaming stories for her country, mentioning the significance of the area to the rain Dreaming, a men's Dreaming for which her father was responsible, as well as the Carpet Snake Dreaming and Sugarbag Dreaming for which she is now responsible and is passing the knowledge of those Dreaming stories to younger generations of women—see Dorothy's affidavit at [15] and [16]. Dorothy speaks of the places she visited and learnt about as a child, stating:

> As a young girl my family camped at [location 6] just north of the application area on Pine Hill station. [location 6] is where the Sugarbag man finished up. Sugarbag is my Dreaming through my father and Rain Dreaming.
>
> As a child when we were walking around between Napperby and Aileron Stations, my parents told me about my country. Tywerl is my father's country, my father's father's country, and it is my country. We used to camp al [sic] lot near [location 7]. That place is just west of the western boundary of the application area. Women are not allowed to go to [location 7] because it is a men's place. My father got his name Kwaty Jim from [location 7] because it [sic] his country and Rain Dreaming (Kwaty) runs through that place—at [11] and [12].

[115] These and many other examples throughout the affidavit material, including affidavits sworn by other deponents that include a similar amount of geographic particularity, speak to the ongoing and previous association of current and previous generations of the claim group with the application area and their surrounding country.

My consideration

[116] It is clear from these examples and others like them in the affidavits, that many members of the claim group, affiliated with a range of different landholding groups, grew up on or near the application area. I understand that members of the claim group spent a great deal of time walking around, and camping on the application area with their parents and grandparents. Indeed much

of the affidavit material provides quite a bit of detail about the lives and in particular the association of the applicant person's parents and grandparents with the application area. The affidavits, as shown in the examples above, discuss the significance of Dreaming stories that run through the application area and how the association of particular landholding groups derive from the Dreaming stories and the significant places associated with them.

[117] 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.

[118] 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 seven (7) relevant landholding groups for the area covered by the native title claim.

[119] 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.

[120] Many of the place names or landmarks discussed in the material, as mentioned above, fall within the external boundary of the application area or within close proximity to it

[121] Each applicant person is a member of a landholding group and together six of the seven 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.

[122] 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 living on Aileron stations and nearby stations such as Napperby. 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.

[123] 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].

[124] 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 and protecting sacred sites. 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 1960s and 1970s, though I note it is possible to infer some deponents were born much earlier, and in many cases speak of their parents and grandparents, who I infer, were likely on the application area around the very early 1900s. Gerard Rice Ngal, for example, states that his grandfather was born in 1910 and similarly Tony Scrutton Ngwarray states that his grandfather, Eric, who I understand is still living, was born in 1927. The affidavit evidence suggests in many cases that the grandparental generation were present on the application area in a time prior to or during the early stages of dominant European contact in the area, and further, each of the deponents of the affidavits, or in some cases their parents and grandparents are listed as a close descendant of one of the apical ancestors, used to describe the claim group at Schedule A.

[125] It is 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.

[126] 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.

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

Reasons for s 190B(5)(b)

[128] 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].

[129] 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.

[130] 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 applicant's factual basis material

[131] Schedule F asserts that the claim group derive their identity, and in particular their laws and customs from a communally held belief in the Dreaming time, and the Dreaming ancestors from whom the group believe they are descended and who inhabitated the land in a period of creation.

[132] It is asserted that it is from this understanding of the Dreaming and the rules, laws, customs and beliefs that are said to stem from the Dreaming time that the claim group members derive their rights in land and their social and kinship systems. Schedule F asserts that there is an

ongoing process of intergenerational oral transmission of laws and customs that sees the continuation of these systems passed through the generations, from time immemorial. Schedule F states:

> 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].

[133] Schedule F also speaks to the current continuing connection of the claim group with the application area, that arises as a result of their belief in the Dreaming. Schedule F states that the continuing practice of cultural activities on the application area reaffirms the spiritual connection that has been passed through the generation since the Dreaming time. It also provides details of the significant Dreaming tracks associated with the landholding groups and sites across the application area:

> 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 waters in the application area. Such practices often, but not always, relate to Dreaming tracks and associated sites of significance. The main Dreaming tracks associated with sites and places on the application area are: *Arntetherrke* (Carpet Snake), *Antywempe/Arreperlp* (King Brown Snake), *Itnwey* (Woma Snake), *Arrwekety/Anthep* (Dancing Women), *Ngwarray Ather/Arelh Atherr* (Two Women), *Kwaty* (Rain), *Inap* (Echidna), *Kwarlp* (Spectacled Hare-Wallaby? [sic]), *Irrety* (Wedgetail *Eagle*), *Atyelp* (Western Quoll) and *Yerramp* (Honey Ant)—at [19(f)].

[134] The affidavits of the applicant persons provide information regarding the traditional laws and customs which they continue to practice today, were taught by their preceding generations and continue to teach to younger generations. In particular each of the applicant persons discusses how they learnt to hunt and collect bush foods from across the application area, this includes information about camping, cooking, collecting water and lighting fires. Some examples are as follows:

[135] Paddy Bird Ngal states that he learnt about bush tucker and travelled across the application area with his father:

> My father used to take me down to [location 8] on the application area and show me all that country. We used to go hunting down there, walking, no car then. We got kangaroo, perentie, emu, turkey, goanna and echidna. We used to get bush banana, bush tomato, bush sultanas, mistletoe, mulga seed, sugarbag and bush plum. We used to walk around down Aileron and he used to show me all that country. We used to stay down there camping. We made windbreaks and little fires to keep

> warm and cook our dinner. We grew up on bush tucker. There was no fence there then, we just walked through—at [9].

[136] Like Paddy, Gerard Rice Ngal, speaks of collecting food and hunting and camping across the application area. He talks also of the significance of Dreaming stories to his family visiting the area:

> We used to go out to [location 9] when I was a young fella and visit our family living up there at Ti Tree and Aileron. My father took a photo of us with our grandfather at [location 9], near one of the ghost gum trees that belong to our Dreaming, Snake Dreaming. He used to take us all there for weekends and we would go hunting and we would camp there near the hill at [location 9]. We would camp and hunt all through our country all the way up to [location 9]. My father would check up on his country and talk to the old men who lived up there like old Eric Penangk. When we camped there we built a wind break and cooked our dinner on a fire. We used to get kangaroo, cut it up and take it back to share with our family. All the family used to go hunting through there. No shortage of meat—at [10].

[137] There are many examples in the affidavits of the deponents talking about the oral transmission of cultural knowledge through the generations. One such example, which is mentioned by several of the deponents is Young Men's business time or ceremony. This is a significant period of initiation for Young men when key cultural knowledge is passed from the older knowledgeable claim group men to the younger generations. It is an important ceremonial time in the claim group society and the practice of Young Men's ceremony is one that the affidavits indicate has been passed itself through the generations. An example of Young Men's Business time playing a central role in the oral cultural transmission of knowledge in the claim group from the affidavit of Tony Scrutton Ngwarray is as follows:

> After I went through Young Man's ceremony at [location 4], when Eric was still living there, those old men and Eric took me onto country and taught me songs and ceremony for Kwaty and for Atwel. Eric and Ken Tilmouth taught me all that knowledge for Atwel. They made sure I knew all that so I could take over after the old man passes away. We have to carry on that knowledge. We stayed out there camping while they showed me the sacred sites for Atwel and Kwaty on the application area and taught me those stories. Eric is still teaching me that Law, handing on all his knowledge. We must learn our culture in the bush, on our country in private—at [16].

[138] A further example of the importance of carrying on cultural knowledge through the generations is explained by Tony below:

> I am also learning that Law for Kwaty country through my grandfather, Eric Penangk. We are looking after that country and that Law for that country. Eric's father, Tommy Pengart was given the knowledge and that ceremony for Kwaty a long time ago from that old man George Yerramp because there was no-one in his family to take over the knowledge, so he gave that knowledge for Kwaty to old Tommy. George got that knowledge from old Quartpot that rainmaker. Tommy was

like an apmerek-artwey for that country and he helped out looking after it. He passed that knowledge onto his son, Eric, my grandfather. My grandfather has also lived in that Kwaty country all his life. Eric is now passing that knowledge onto me so I can help look after that country and have the knowledge. Andrew Glenn he is learning too. Eric had no sons, so I'm the next one that can take that knowledge. We are still caretakers to make sure that knowledge gets passed on. Old Quartpot was a rain maker and now old Eric is the rainmaker, he can do that ceremony. When he makes that rain he goes out onto that Rain place and does the ceremony—at [17]

[139] The deponents of the affidavits often speak of the Dreaming stories that they have learnt and pass on to younger generations. An example from the affidavit of Dorothy Ross Mpetyan speaking of the Dreaming stories she has learnt is as follows:

> Rain Dreaming was my father's dreaming (Kwaty Dreaming) but that story can't be spoken about in front of women as it is a men's story. My father taught me the open stories for my country such as Emu Dreaming, Sugarbag Dreaming and Carpet Snake Dreaming which pass through my country. They are my Dreamings through my father. Old ladies taught me about those Dreamings.
>
> I teach Carpet Snake Dreaming and Sugarbag Dreaming to the younger women. I pass on that knowledge to the younger generation so they know that country and those stories. During young men's ceremony I used to dance with other women, I'm getting too old now. The men do the ceremony and the women dance afterwards, while the men are singing—at [15] and [16].

[140] As mentioned above many of the deponents speak of the experiences and lives of their immediate family members from preceding generations, especially parents and grandparents. Some of these immediate family members were on the application area in the early 1900s and the information indicates that they spent time using the application area substantially unencumbered by European settlement. The deponents speak of their lives and the cultural practices they undertook. An example from the affidavit of Tony Scrutton Ngwarray, speaking about his grandfather Eric is as follows:

> My mother's father, Eric was born at [location 10] on the application area in 1927 as his father was living there at the time drawing water with horses and carting logs. A bit later they moved up to where the old Aileron homestead is now and he grew up walking around Aileron station. He told me that he watched them build the old Aileron Homestead. When he was old enough to work, he worked in the stock camp and he dug the well at the Aileron Homestead and helped build the workshop, mixing the cement with a shovel. During war time he worked on the road gang building the road but he was still living at Aileron on my country. After the war he came back and worked on Aileron Station again. He has lived around Aileron all his life. Now he lives at Alyuen.
>
> Eric walked all across this country on foot and on horses when he was mustering stock. He went hunting and camped on all those creeks on the application area. When he was young they used to walk around just in the bush, staying one week and then move to another place for huting. They used to build bush shelters and cook their food on fires. They used to stay at [location 11] at the big camp there. They used to get their water from soakages in the river. He knows all that country. He

still goes hunting out there with us sometimes, but he's a bit old now. He still looks after that country Atwel and Kwaty country. He used to come with us to show the young kids the country and checking up on those sacred sites—at [8] and [9].

My Consideration

[141] 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 1960s and 1970s and speak of their older family members, especially grandparents being present in the application area in the early 1900s. For example Tony Scrutton Ngwarray's grandfather was born in 1927 and Gerard Rice Ngal's grandfather was born in 1910. Similarly Dorothy Ross Mpetyan talks of meeting her husband and living at Napperby station during the war time, which I infer means she was likely at least a young adult during the 1940s.

[142] Each of the deponents of the affidavits 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 mentioned above, I understand that for some of the deponents their granparental generation were present in the application area in the early 1900s and I therefore infer, that some of the apical ancestors, who Schedule A makes clear were close descendants of the grandparental generation of some of the applicant persons, were likely living on the application area around at least the mid 1800s.

[143] Some of the affidavits speak of the deponents grandparents living on the application area before or around the time of significant white settlement. An example from the affidavit of Gerard Rice Ngal is as follows:

> 'My father's father, Willy Rice was born about 1910 and grew up walking around in the bush around his country with his family and his two younger brothers. They grew up in the bush around [location 9] area, that's their country, everywhere. They used to get most of their food and water from the bush but maybe they also got some rations too—at [8].

[144] Similarly Tony Scrutton Ngwarray explains in his affidavit that he has been told by his grandfather Eric about his living on Aileron prior to the time the old homestead was built, about using horse and cart to draw water and cart logs and mixing cement with a shovel and walking around bush getting food predominately from across the application area in the bush—at [8].

[145] Examples 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 or during the very early stages of significant European settlement. I note that the grandparents being discussed in the affidavits were occupying the application area during the early 1900s and I therefore infer that the apical ancestors, from whom the grandparental generation seem to be close descendants, as

detailed in Schedule A, were occupying the application area at least 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 of the deponents themselves), listed at Schedule A of the application, were likely occupying the application area around this time largely uninterrupted by European settlement.

[146] 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 food and hunting, from older generations, specifically parents, grandparents and other knowledgeable older claim group members. 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 men's only places, and about how to undertake cultural activities, like making fires, camping and hunting.

[147] 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 ceremony 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 ceremony is a ceremonial learning time that occurs regularly 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 parents and grandparents who, in many instances are close descendants of the apical ancestors listed at Schedule A.

[148] 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 creation time that the claim group's traditional laws and customs originate, and further, 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.

[149] 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 practises and belief systems, including 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 material 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.

[150] 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].

[151] 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 apical ancestors presence in the area and sovereignty.

[152] 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.

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

Reasons for s 190B(5)(c)

[154] I am of the view that this requirement is also necessarily referrable 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].

[155] *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].

[156] 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].

[157] 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].

[158] 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 time of the applicant persons' grandparental generation in the early 1900s and by inference the time of the identified apical ancestors from whom the grandparents are close descendants in Schedule A, which I infer was, in many instances, at least around the mid 1800s. 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).

[159] 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 the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Conclusion

[160] 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.

[161] 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].

[162] 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.

[163] 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 Wlyawayy, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005]* FCAFC 135 (*Alyawayy FC*).

[164] 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.

Consideration

(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;

[165] The information in the affidavits provided by the persons who comprise the applicant include a great deal of information about themselves and the claim group more broadly accessing the application area. This includes travelling across the application area and in doing so camping and erecting shelters, such as windbreaks, across the application area.

[166] It is clear that many of the applicant persons and their immediate predecessors were born on or near the application area and have spent most of their lives living on or near to it. Many of the deponents of the affidavits speak of learning about the Dreaming stories, sacred sites and cultural practices like hunting while travelling and camping across the application area with their family as children and that they continue to access and camp on the application area today in order to carry out these same cultural activities and teach the younger generations about the sites and places across Aileron station.

[167] **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;

[168] There are many examples throughout the affidavit material of claim group members hunting and gathering food and resources from across the application area. Paddy Bird Ngal talks of having travelled across the application area hunting and collecting food:

> We used to go hunting down there, walking, no car then. We got kangaroo, perentie, emu, turkey, goanna and echidna. We used to get bush banana, bush tomato, bush sultanas, mistletoe, mulga seed, sugarbag and bush plum—at [9].

[169] Tony Scrutton Ngwarray talks of his grandfather having hunted and collected water across the application area as well as growing up himself also hunting and collecting water with his family. He states, about his grandfather:

> Eric walked all across this country on foot and on horses when he was mustering stock. He went hunting and camped on all those creeks on the application area. When he was young they used to walk around just in the bush, staying one week and then move to another place for hunting. They used to build bush shelters and cook their food on fires. They used to stay at [location 11] at the big camp there. They used to get their water from soakages in the river—at [9].

[170] Additionally speaking of his own childhood Tony states:

> We used to camp out in the bush when we were hunting on the application area with my grandfather. Eric grew me up as a young fella. We used to go hunting and got kangaroo, emu, turkey, goanna, porcupine, perentie and plenty of bush tucker like bush banana. We mainly ate bush food that my grandfather caught during that time with just a little bit from the station. We used to camp at [location 1], [location 2] and [location 3] and we used to make windbreaks. Sometimes we got water from the rockholes there—at [12].

[171] 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.

[172] **Outcome:** Established, prima facie

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

[173] There are many examples in the affidavit material of the deponents speaking of lighting fires for the purpose of cooking or when they are camping. I have already extracted some of these examples above when condsidering other claimed rights and interests, such as hunting and collecting resources. Like the examples extracted in my reasons above Gerard Rice Ngal speaks of lighting fires for cooking saying '[w]hen we camped there we built a wind break and cooked our dinner on a fire—at [10]'. Similarly Dorothy Ross Mpetyan, when speaking about camping across the application area with her family today she states '[t]hey can go camping and go hunting all the time. They make fires for cooking—at [13]'.

[174] It is my view that these and other similar examples demonstrate, prima facie, that this is a right held by the claim group, pursuant to traditional laws and customs.

[175] **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;

[176] Each of the deponents of the affidavits speaks of their responsibility to maintain and protect sites of significance across the application area. Each of them talk about having learnt about significant and sacred places from their older family members, especially for the men, after Young Men's Ceremony time. I understand that the deponents, though often still learning the Law from older generations, are themselves senior claim group members now charged with passing on the cultural knowledge about protecting sacred sites and maintaining them today. By way of example Tony Scrutton Ngwarray states:

> I go out and protect my country and look after those sacred sites. There are no fences but we know where the places are and make sure that cattle and others not wrecking those sites. Sometimes I go out with Eric when Central Land Council or Sacred Sites mob come out to protect those sites from mining exploration. I am taking over from Eric now as he's getting old. When we go out and enter those special places we introduce people to our country and those places. We call out and do a little ceremony. We clean out those sites and make sure everything is in the right places—[19].

[177] It is my view that the factual basis material before me indicates that the right to acces and maintain and protect sites and places across the application area is one held, prima facie, by the claim group and has been passed through the generations.

[178] **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;

[179] There are many examples of the claim group members conducting and participating in ceremonies and cultural activities throughout the affidavit material. As already detailed in my reasons above Young Men's ceremony time is a key cultural ceremonial time in the society to which the claim group belongs. Additionally the deponents of the affidavits speak of conducting ceremonies when visiting sacred sites, as above, of meeting with other old people to make decisions about cultural matters, and of other ceremonial occasions such as rain ceremonies and those conducted upon the death and burial of a family member. Dorothy Ross Mpetyan talks about her father being responsible for the Rain Dreaming and the rainmaking ceremony he would conduct:

> My father was boss for that Rain Dreaming and he used to be a rainmaker. He used to take those men, no women allowed, and go up to that hill just near Aileron roadhouse and make that rain. They used to do that ceremony to make rain. At Aileron Station [name removed] would sometimes pay my father to do rain ceremony. He got paid in rations to make it rain on Aileron. My father he could sing up that rain—at [9].

[180] Dorothy also speaks about the ceremony conducted when her father died when she was a young girl:

> My father died when little I [sic] was a little girl and he is buried at [location 7] just west of the application area because that is his country. When he passed away they did a little ceremony and closed that country up and no-one could go there. They brushed it away and people could go there—at [17].

[181] There are also many examples in the affidavit material of the deponents speaking about teaching the spiritual attributes of sites and places on the application area to younger generations. Some examples regarding teaching, especially around Young Men's Ceremony time are discussed and extracted in my reasons above.

[182] Many of the deponents also talk about the importance of privacy when undertaking ceremony and teaching young people about the spiritual and cultural practices of the claim group society to younger generations, in particular. Paddy Bird Ngal states:

> After I went through Young Man's ceremony my father and [name removed] took me onto my country and showed me all that country. They taught me the songs and ceremony for my country. They took me to Ilkewarn sacred sites on the application area, including [location 12], only men who have been through the Law can go there. No women, no kids, they taught me all that. When we learn about our sacred sites and our Law it must be done in private. We have to have the right people there, not open for everyone. After Business, we still take those young men onto their country and teach them, same way. I know that countryside and I teach them—at [10].

[183] It is my view that conducting ceremonies, and teaching the spiritual attributes of the application area to young generations is central to the society which the claim group are part of. Often these ceremonies involve, for example, burial rites or the conduct of other significant cultural activities, like songs and dances relating to the Dreaming stories in an area. Further, it is clear that the affidavit material supports the assertion that many of these ceremonies and cultural activities are required to be carried out in private, according to traditional law and custom. The examples extracted above and the affidavit material generally demonstrate, in my view, the existence of this right, prima facie.

[184] **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;

[185] Many of the deponents of the affidavits talk of the senior claim group members being able to speak for country and make decisions about country for those Aboriginal people who recognise themselves to be governed by the traditional laws and customs of the claim group.

There are many examples of certain place on the application having restricted access, for example being men's only areas. Edmund Rubuntja Penangk discusses this as follows:

> We make decisions about where other aboriginal people can go on our country. There are rules about where people can go onto country and so other aboriginal people must listen to us if we say they can't go to a certain place. No women or kids can go to those men's sites on my country. They are free to go everywhere else, where its open. There would be trouble for them if they went there. 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 [15].

[186] Similarly Dorothy explains that she can speak for her country and that other aboriginal people must listen to her when she tells them where on their country they can and cannot go:

> I can make decisions about where other aboriginal people can go on our country. There are rules about where people can go onto country and so other aboriginal people must listen to us if we say they can't go to a certain place. 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—at [19].

[187] These and other examples in the affidavit material demonstrate, in my view, that this right is established, prima facie.

[188] **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;

[189] There are several examples in the affidavits of the deponents speaking of the importance of sharing resources. In particular several of the applicant people speak about sharing food, especially after going hunting, bringing food back for everyone at a camp and sharing with family members.

[190] When speaking about camping and hunting with his family Gerard Rice Ngal states:

> My father would check up on his country and talk to the old men who lived up there like old Eric Penangk. When we camped there we built a wind break and cooked our dinner on a fire. We used to get kangaroo, cut it up and take it back and share with our family. All the family used to go hunting all through there. No shortage of meat—at [10].

[191] Edmund Rubuntja Penangk also refers to the practice of bringing food back from hunting to share with family; '[w]e go hunting and bring some of that food back to share with others back at camp—at [11]'. In addition to the sharing meat from hunting Tony Scrutton Ngwarray discusses making boomerangs and getting ochre for exchanging with others at ceremony time:

> People still get wood for making boomerangs from mulga and bean tree wood for making shields from my country. We use them for ceremony. We still get red and white ochre from [location 9] and use it for ceremony. We share that ochre with others who don't have that ochre during ceremony—at [14].

[192] It is clear that the sharing of resources like ochre and meat from hunting has been taught to the claim group members by the older generations and is a practice that has been passed through the generations. It is my view that these examples establish, prima facie, that the right to share or exchange resources is one held by the claim group pursuant to traditional law and custom.

[193] **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 assit in, observe, or record traditional activities on the areas.*

[194] Many of the deponents of the affidavits speak of taking researchers, such as anthropologists and Central Land Council on to country to assist with protecting sacred sites and conducting surveys for mining activity, or undertaking research for things like putting together this native title claim. As an example of this Paddy Bird Ngal explains:

> 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 apmerek-artwey and kwertengerl for the country. They are the ones who can take them out onto country to show them and tell them the stories—at [14].

[195] I also understand from the affidavit material that it is necessary, especially during ceremony time, to bring other non-native title holder people onto country for ceremonial purposes. Tony Scrutton Ngwarray speaks about bringing people onto country for ceremony:

> During ceremony senior men who are not native title holders come onto this country around Aileron for ceremony I have the right to take them onto country and show them around, My [sic] younger brother, eldest son and Andrew Glenn can do that as well. Old Eric still goes down for ceremony and takes those senior men around—at [23].

[196] 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.

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

Conclusion

[198] 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.

[199] 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].

[200] 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].

[201] 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].

[202] 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 Dorothy Ross Mpetyan.

[203] Both Schedule M of the application and Dorothy Ross Mpetyan's affidavit detail that Dorothy grew up with her family on neighbouring Napperby station and spent her childhood

walking between Napperby and Aileron stations hunting and camping along the way. I understand that Dorothy has spent all her life living on or near the application area and continues to reside at Alyuen community, an Aboriginal community situated on Aileron station wholly within the external boundary of the application area.

[204] As a child Dorothy and her family regularly camped on the application area, specifically they would camp at places significant to her Dreaming affiliations on the application area and its immediate surrounds. Her family regularly camped at [location 6] which I understand to be just north west of the application area. [location 6] is a Sugarbag Dreaming site that travels across the application area and belongs to both Dorothy and her father.

[205] Dorothy continues to access the application area to gather bush foods and medicines and to visit the sacred sites which she is responsible for protecting. She states that she teaches the Carpet Snake Dreaming and Sugarbag Dreaming to the younger women in her family and the claim group. She is responsible for passing that cultural knowledge on to the younger generations. Dorothy also talks about Young Men's Ceremony time, where the women dance as part of the ceremony. She talks of how she is getting too old to dance but has taught the other women the stories and dances for ceremony.

[206] I understand that Dorothy is one of the senior claim group members who can make decisions about her country and can tell other claim group members about how to use the country and which sites they can visit. She is responsible for protecting the application area and showing the right people the stories and teaching them about country.

[207] It is clear from the information provided in Dorothy's affidavit and at Schedule M of the application that she 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 Dorothy has with the area and the laws and customs she acknowledges and observes in relation to the area have been taught to her by her father and other older claim group members, 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 Dorothy understands were taught to her and that she teaches to the younger generations in the claim group. For these reasons I am satisfied that the material is sufficient to support an assertion that Dorothy Ross Mpetyan currently has, and previously had, a traditional physical connection with the application area.

[208] 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.

[209] 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)

[210] 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.

[211] 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.

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

Section 61A(2)

[213] 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.

[214] Schedule B states 'subject to Schedule L, any 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'.

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

Section 61A(3)

[216] 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.

[217] Schedule E states that [t]he native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others'.

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

Conclusion

[219] 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.

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

Section 190B(9)(a)

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

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

Section 190B(9)(b)

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

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

Section 190B(9)(c)

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

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

Conclusion

[227] 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]

Information to be included on the Register of Native Title Claims

Application name	Aileron Pastoral Lease
NNTT file no.	DC2014/002
Federal Court of Australia file no.	NTD8/2014

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cth), 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:

21 March 2014

Date application entered on Register:

26 June 2014

Applicant:

Tony Scrutton Ngwarray, Dorothy Ross Mpetyan, Gerard Rice Ngal, Paddy Bird Ngal, Edmund Rubuntja Penangk

Applicant's address for service:

As per the extract from the Schedule of Native Title Applications

Area covered by application:

As per the extract from the Schedule of Native Title Applications

Persons claiming to hold native title:

As per the extract from the Schedule of Native Title Applications

Registered native title rights and interests:

(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.

[End of document]