National Native Title Tribunal

Registration test decision

Application name	Maryvale Pastoral Lease
Name of applicant	Desmond Jack, Reggie Kenny, Jeanette Ungwanaka on behalf of the Imarnte landholding group
NNTT file no.	DC2015/005
Federal Court of Australia file no.	NTD35/2015

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

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

Date of decision: 9 September 2015

Heidi Evans

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 08 August 2014 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 Federal Court) gave a copy of the Maryvale Pastoral Lease amended application to the Registrar on 27 August 2015 pursuant to s 64(4) 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] This is the first time the application has been amended. The original application was filed on 24 June 2015 and a delegate of the Registrar appointed to consider the claim made in that application. Prior to the delegate making a decision regarding registration of the claim, on 21 August 2015 it was amended. The purpose of this amendment was to allow the applicant to make a minor alteration to the map and description of the application area. This is the application before me.

[5] I am satisfied that neither ss 190A(1A) nor ss 190A(6A) apply to the amended application as the claim in the original application (also the previous application) had not been considered by the Registrar pursuant to s 190A(6) before the claim was amended.

[6] Therefore, in accordance with ss 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.

[7] A notice pursuant to s 29 of the Act has been issued in relation to the application area. This is Mineral Lease Application 30612 (MLA 30612), with a notification date of 3 June 2015. I understand, therefore, that I am to use my best endeavours to apply the conditions of the registration test to the amended application by 2 October 2015 (see s 190A(2)(f)).

Registration test

[8] 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.

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

Information considered when making the decision

[10] 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.

[11] 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.

[12] The information and documents that I have considered in reaching my decision are set out below:

- amended application filed 21 August 2015, including the Form 1 and accompanying material;
- geospatial assessment and overlap analysis dated 31 August 2015 (GeoTrack: 2015/1698);
- previous application filed 24 June 2015, including the Form 1 and accompanying material;
- geospatial assessment and overlap analysis dated 6 July 2015 (GeoTrack: 2015/1118);
- letter from the Solicitor for the Northern Territory Government (the NTG), sent by email on 31 July 2015;
- email of 2 September 2015 from the NTG to the case manager;
- email of 2 September 2015 from the applicant's legal representative to the case manager.

[13] 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.

[14] 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

[15] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication – *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are set out below.

[16] On 28 August 2015, I caused the case manager to write to the NTG, advising of receipt by the Registrar of the amended application, and setting out the proposed date by which a registration test decision would be made. The case manager had written to the NTG in relation to the original application on 29 June 2015, providing it with a copy of the application and an opportunity to make submissions in relation to that application.

[17] By letter sent by email on 31 July 2015, the NTG advised the case manager that it would not be making submissions. Consequently, the letter sent to the NTG of 28 August 2015 regarding the amended application, sought confirmation from the NTG by 1 September 2015 that it did not wish to make a submission in relation to this application. Nothing was received from the NTG within this timeframe.

[18] On 2 September 2015, I had the case manager contact the NTG to confirm their position regarding whether it sought to make a submission. The NTG emailed the case manager in response that same date, stating that it would not be making submissions.

[19] Also on 28 August 2015, I caused the case manager to write to the applicant, advising of receipt of the amended application, and requesting that the applicant advise by 1 September 2015 if the applicant sought to provide additional material in relation to the application. In addition, the letter of 28 August 2015 set out the date by which the delegate intended to make a decision regarding registration of the application.

[20] By email to the case manager of 2 September 2015, the applicant's legal representative confirmed that no additional material would be provided in relation to the registration testing of the amended 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.

[21] 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.

[22] 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] to [39]. In other words, does the application contain the prescribed details and other information?

[23] 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.

[24] 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)

[25] My understanding of the requirement at s 61(1) for the purposes of s 190C(2) is that it is only where, on the face of the application itself, it appears that the native title claim group described is a subgroup, or part only of the persons comprising the native title claim group, that the condition will not be met – *Doepel* at [36] and [39].

[26] A description of the native title claim group appears in Schedule A of the application. Having considered this information, I do not consider that there is anything indicating that the group described is a subgroup of the native title claim group, or that persons have been excluded from the group.

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

Name and address for service: s 61(3)

[28] Part B of the application contains the address for service of the applicant persons, who are named immediately above Part A of the application.

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

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

[30] My consideration at s 61(4), for the purposes of s 190C(2), is a matter of procedure, and does not require me to consider whether the description of the group is sufficiently clear, but merely that one is provided – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. As above, a description of the native title claim group appears in Schedule A of the application.

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

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

[32] The application is accompanied by three affidavits, sworn by each of the persons comprising the applicant. Each of those affidavits contains the same first four paragraphs, setting out the statements required by s 62(1)(a)(i) to (iv). The statement required by s 62(1)(a)(v) is addressed in the remaining paragraphs of the affidavits.

[33] Each of the affidavits is signed, dated and has been competently witnessed.

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

Details required by s 62(1)(b)

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

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

[36] Information about the boundaries of the application area, and those areas within the external boundary that are excluded from the application area, is contained in Schedule B.

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

[37] A map showing the external boundary of the application area is contained in Attachment A.

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

[38] Schedule D contains information relating to searches undertaken by the applicant.

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

[39] A description of the native title rights and interests claimed appears at Schedule E.

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

[40] A general description of the factual basis on which it is asserted the native title rights and interests exist is set out in Schedule F.

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

[41] The activities currently undertaken by the native title claim group in relation to the land and waters of the application area are set out in Schedule G.

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

[42] Details regarding other applications are provided in Schedule H.

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

[43] Schedule HA states that the requirement for this information is not applicable.

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

[44] Information about s 29 notices relating to the application area are set out in Schedule I.

Conclusion

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

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[46] My understanding of the task at s 190C(3) is that it is only where all three criteria set out in subsections (a) to (c) of the provision are satisfied, that the requirement to consider whether there are common claimants is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[47] Section 190C(3)(a) refers to a previous application that covers the whole or part of the current application area. The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services in relation to the map and description that accompany the application (GeoTrack: 2015/1698, dated 31 August 2015) provides that there are no applications as per the Register of Native Title Claims that overlap the area of the current application.

[48] As this first criterion is not satisfied, therefore, I have not turned to consider the remaining criteria. I am satisfied that no person included in the native title claim group for the current application is also a member of the native title claim group for any previous application.

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

Subsection 190C(4)
Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> 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.

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

[51] A statement at the top of Schedule R refers to a copy of the certificate where the application has been certified by each representative Aboriginal/Torres Strait Islander body. I consider, therefore, that it is s 190C(4)(a) that prescribes the relevant requirement for this condition of the registration test regarding the application before me.

[52] The document contained in Schedule R is entitled, 'Certification of Native Title Determination Application'. It is dated, and has been signed by David Ross of the Central Land Council (CLC).

[53] In *Doepel*, regarding the requirement at s 190C(4)(a), Mansfield J held that the role of the delegate is limited to being 'satisfied about the fact of certification by an appropriate

representative body' – at [78]. I am not permitted to consider the basis of the applicant's authority, as that is the test imposed by s 190C(4)(b) – *Doepel* at [80] and [81].

[54] It is my understanding, therefore, that there are primarily two matters to which I must turn my mind in reaching the required level of satisfaction at s 190B(4)(a). Firstly, whether there is an appropriate representative body that can certify the application, and secondly, whether the certificate before me complies with the requirements of a valid certification pursuant to s 203BE(4).

[55] As above, the certificate has been provided by the CLC. The geospatial assessment confirms that there is only one representative body for the area covered by the application, and that it is the CLC. Paragraph [1] of the certificate provides that the CLC is 'the representative Aboriginal and Torres Strait Islander body responsible for the land and waters covered by this application'. From this statement, I understand the certificate to assert that the CLC is a recognised representative body pursuant to s 203AD of the Act. With reference to the Tribunal's national 'Representative Aboriginal/Torres Strait Islander Body Areas' map (dated 30 June 2015), I have verified that the CLC is such a body. I accept, therefore, that the CLC performs all of the functions of a representative body, including certification of native title determination applications, for its area of responsibility, which includes the application area.

[56] Paragraph [2] of the certificate states that the certification power has been delegated to the Director of the CLC under a specific resolution of the representative body. As above, the certificate has been signed by David Ross of the CLC. The certificate does not state the position held by David Ross at the CLC, however, through my own research, I am satisfied that Mr Ross was the Director of the CLC at the date the certification was provided.

[57] Consequently, I consider that there is an appropriate representative body who can certify the application, namely the CLC, and that it is the CLC that has provided the certificate before me.

[58] Turning then, to whether the certificate complies with the requirements of a valid certification, s 203BE(4) provides that:

> 4) A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met;
>
> (b) briefly set out the body's reasons for being of that opinion; and
>
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

[59] Paragraph [3] of the certificate is entitled, 'Statement [s 203BE(4)(a)]', and includes the relevant statement that the CLC is of the opinion that the requirements set out in s 203BE(2)(a) and (b) have been met.

[60] Paragraph [4] of the certificate is entitled, 'Reasons [s 203BE(4)(b)]' and contains various information about the authorisation of the applicant persons to make the application, and information about the efforts undertaken to describe all of the persons in the native title claim group. This includes details of the meeting of the native title claim group held for the purposes of authorising the applicant, the process of decision-making employed by the group for that purpose, and information about the anthropological and historical research undertaken by the CLC regarding the persons who hold native title in the area covered by the application. In my view, this information is sufficient in 'briefly setting out' the CLC's reasons for being of the opinion stated in paragraph [3] of the certificate.

[61] Regarding the requirement at s 203BE(4)(c), paragraph [5] of the certificate states that the CLC is 'not aware of any other application or proposed application that partly or wholly covers the application area'. I consider this statement sufficient in addressing the matter prescribed by s 203BE(4)(c).

[62] Consequently, I consider that the certificate before me in Schedule R of the application is a compliant certificate and meets the requirements of s 203BE(4).

[63] For the reasons set out above, I am satisfied that the requirement at s 190C(4)(a) is met because the application has been certified by each Aboriginal/Torres Strait Islander representative 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.

[64] The wording of s 190B(2) directs my attention to the written description and map contained in the application. I understand, therefore, that I am restricted to the information within the application in my consideration at this condition of the registration test.

[65] As above, a written description of the boundary of the application area, and those areas within the boundary that are excluded, is contained in Schedule B. Part (a) of Schedule B describes the application area as a list of three NT Portions, and refers to a map at Attachment A. Part (b) of Schedule B describes those areas not covered by the application as a list of five NT Portions, three sections of road, and lists general exclusions. I do not consider that there is anything problematic in the use of general exclusion clauses to describe those areas not covered by the application for the purposes of s 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 at [50] to [55].

[66] Schedule C speaks to a map of the application area in Attachment A. Attachment A is a colour copy of a map entitled 'Maryvale Native Title Determination Application', prepared by the Central Land Council and dated 19 November 2015. The map includes:

- the application area depicted by a bold green outline and green hatching;
- land tenure colour coded and labelled;
- topographic features shown and labelled;
- scalebar, northpoint, coordinate grid and inset map; and
- notes relating to the source, currency and datum of data used to prepare the map.

[67] The geospatial assessment provides that the map and the description are consistent and identify the application area with reasonable certainty. I have considered the information before me about the application area, and subsequently, I agree with this assessment. I am satisfied that the information and the map contained in the application 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.

[68] 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.

[69] At s 190B(3), I understand that my focus is to be upon the reliable identification of the persons in the native title claim group. I am not to consider the correctness of that description, or whether all of the persons described do, in fact, qualify as members of the group – *Doepel* at [51] and [37]. It is my view that the requirement directs my attention to the particular description of the group contained in the application, and subsequently that I am limited in my consideration to that information – *Doepel* at [51].

[70] As above, Schedule A of the application contains a description of the persons comprising the native title claim group. Consequently, the relevant requirement at this condition is that I must be satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[71] Schedule A contains various information about the traditional laws and customs by which the members of the native title claim group possess rights and interests in the area subject of the application. While I consider this information to have relevance to the description of the group, I do not consider that it forms part of the description itself.

[72] Paragraph [1] of Schedule A appears as follows:

> The native title claim group comprises the members of the Imarnte landholding group ("the landholding group"). Those persons according to the traditional laws acknowledged and customs observed by them:
>
> (a) have spiritual, physical and/or historical associations with the area described in Schedule B ("the application area") and are traditionally connected to the area through:
>
> (i) descent from ancestors (including adoption) connected with the application area as described in paragraph 7(a) below; or
>
> (ii) non-descent based connections as described in paragraphs 7(b) below;
>
> (b) hold the common or group rights and interests comprising the native title in the application area.

[73] Further information regarding membership of the native title claim group is contained in paragraph [7]. Paragraph [7] provides:

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 Imarnte landholding group ("the ancestors"):

[list of named male and female ancestors]

(b) accepted as members of the landholding group by the senior descent based members of the landholding group on the basis of non-descent connections to the estate.

[74] The list of ancestors following paragraph [7(a)] is arranged under three 'segments', with the names of the individuals of the uppermost generation appearing in bold. Paragraph [8] explains that 'the ancestors identified in paragraph [7(a)] are the uppermost generation of the known ancestors of members of the native title claim group'. While the description in subparagraph [7(a)] refers to un-named ancestors, I note that none of the persons comprising the uppermost generation of ancestors is labeled 'un-named'.

[75] From the information provided in Schedule A about membership of the native title claim group, it is my understanding that there are two rules or two criteria by which an individual is a member of the group. Firstly, pursuant to subparagraph [7(a)], a member of the native title claim group is a person who is descended from one of the named ancestors listed in that paragraph. Descent can be biological, or by means of adoption. Secondly, pursuant to subparagraph [7(b)], a member of the native title claim group may be accepted by senior descent-based members of the landholding group on the basis of non-descent connections to the estate.

[76] The operation of this second criterion explained in further details provided in paragraph [9] of Schedule A. That paragraph provides that the senior descent-based members of the group have regard to specific factors when considering the recruitment of a particular person to the native title claim group. These factors include spiritual identification with and responsibility for an estate, close kinship ties including intermarriage, and long-term residence in an estate.

[77] I do not consider that there is anything controversial surrounding the first criteria by which persons are identified as members of the group. While the identification of the biological and adopted descendants of the named ancestors may require some factual inquiry, I do not consider that this prevents the sufficient clarity required of the description – *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [67]. In *WA v NTR*, Carr J considered a similar description whereby three rules or criteria were used to describe the native title claim group. This included criteria involving biological and adopted descendants of named ancestors. His Honour held that the description was sufficiently clear, and that through the application of the three rules,

entailing some factual inquiry, it could be ascertained whether a particular person was a member of the group – at [67].

[78] Having considered the information before me regarding the second criterion by which the group is described, in the same way, I consider that it is sufficiently clear for the purposes of s 190B(3)(b). It is clear that some factual inquiry would again be necessary to identify the individuals meeting this criterion. It is my understanding, however, that the senior descent-based members of the group who make decisions regarding the recruitment of such non-descent members could be approached, and questioned as to who such persons are. One is also guided in the process of identifying these persons through the factors set out in paragraph [9] of Schedule A.

[79] In addition to the two criteria discussed above, I note that the introductory paragraph to the description in Schedule A makes clear that the persons comprising the group, being persons who satisfy that criteria, are members of the Imarnte landholding group.

[80] In light of my view regarding each of the criteria specified in Schedule A that define membership of the native title claim group, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[81] 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.

[82] In discussing the task of the Registrar's delegate at s 190B(4), Mansfield J in *Doepel* held that it 'was a matter for the Registrar to exercise his judgment upon the expression of native title rights and interests claimed' – at [123]. His Honour approved an approach where the test of identifiability was whether the claimed rights and interests were understandable and have meaning. This included a requirement that the rights and interests claimed are able to be identified as native title rights and interests, with reference to s 223(1) – at [99].

[83] The description of the native title rights and interests claimed appears in Schedule E. At paragraph [1], that description includes a broad claim to possession, occupation, use and enjoyment as against the whole world, however I do not see this as problematic in the description satisfying the requirement at s 190B(4) – see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [60].

[84] Paragraph [2] of the description sets out a list of non-exclusive rights and interests. Following paragraph [2], are a number of paragraphs containing qualifications on the rights and interests claimed. In *Doepel*, Mansfield J held that it was 'open to the Registrar to read the contents of Schedule E together so that, properly understood there was no inherent or explicit contradiction in Schedule E' – at [123].

[85] I have approached the description in Schedule E using this method, and, in reading the contents of the Schedule together, including the stated qualifications, I consider that the description is clear and easily understood, and that it readily identifies native title rights and interests.

[86] 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.

[87] Mansfield J, in *Doepel*, explained the approach to be adopted by the Registrar's delegate at s 190B(5) in the following way:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17].

[88] This approach was affirmed by the Full Court of the Federal Court in *Gudjala People #2 v Native Title Registrar* [2009] FCAFC 157 (*Gudjala 2008*) – at [83] to [85]. The Full Court then elaborated further on the nature of the material required at s 190B(5), finding that 'it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true', but that the general description provided 'must be in sufficient detail to

enable a genuine assessment of the application by the Registrar under s 190A […] and be something more than assertions at a high level of generality.

[89] In light of these statements of the law, I understand that I am to accept the asserted facts as true, and to consider whether those facts support the claimed conclusions. I am not to approach the factual basis as if it were evidence furnished in proceedings.

[90] Further, noting the finding of the Full Court in *Gudjala 2008* set out above, it is my view that general or formulaic statements that do not appear to relate to the particular native title claimed by the particular native title claim group over the land and waters subject of the application, will not be sufficient to satisfy the requirements of s 190B(5) – see also *Gudjala 2007* at [39].

[91] 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)

[92] Where the factual basis material addressing the assertion at s 190B(5)(a) consists only of very broad statements that lack geographical particularity to the land and waters of the application area, it is my view that it will not be found sufficient to support the assertion – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]. Further, I consider that the material should speak to the nature of the association, be it physical and/or spiritual – *Martin* at [26].

[93] In *Gudjala 2007*, Dowsett J's comments indicate that the factual basis for the purposes of s 190B(5)(a) may be required to address the following:

- how the native title claim group as a whole presently has an association with the application area, although it is not a requirement that all members must have such an association at all times;
- an association of the predecessors of the whole group and the area over the period since sovereignty – at [52].

[94] I have summarised below the factual basis material that I consider speaks to the assertion at s 190B(5)(a):

- pursuant to their system of traditional laws and customs, the native title claim group are the owners of the land and waters of the application area – Schedule F at [1];
- the *Imarnte* landholding group whose members comprise the native title claim group, have inherited rights and interests in the application area through descent from recognised ancestors – Schedule F at [4];
- knowledge of descent connections is transmitted orally and individuals beyond the grandparent level are rarely remembered – Schedule F at [17];

- under the traditional laws and customs of the native title claim group, the ancestors named in Schedule A of the application were entitled to possess, occupy, use and enjoy the land and waters of the application area since prior to British sovereignty – Schedule F at [17];
- the native title rights and interests claimed have been exercised in accordance with laws and customs acknowledged and observed by the native title claim group and their ancestors since time immemorial – Schedule F at [2];
- members of the group have a communal belief that the physical and cultural landscape were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *Altyerre*, or the Dreaming – Schedule F at [5];
- the sites associated with a predominant Dreaming/s form 'countries' or 'estates' and the application area comprises one country or estate which is affiliated with the *Imarnte* landholding group – Schedule F at [7];
- members of the native title claim group are jointly responsible for looking after country and perform various roles in relation to ceremonies and land management – Schedule F at [14];
- while traditional laws and customs of the group recognise succession of rights in land where a group or descent line is severely depleted, no instances of succession have occurred in relation to the rights and interests of the native title claim group in the application area – Schedule F at [16];
- the application area has been identified as being associated with the Pertame (or Southern) Arrernte language – Schedule F at [19];
- ethnographic sources confirm that at the time of contact and settlement of the region, and continuing to the present day, people affiliated with a dialect of the Arrernte language, including members of the native title claim group and their ancestors, maintained physical, spiritual and cultural associations with the application area, including occupation and use of the area – Schedule F at [19];
- many members of the native title claim group have had an on-going physical association with the application area throughout their lives – Schedule F at [19];
- members of the group have a connection with the area based on knowledge received from ancestors, personal experience and continuing acknowledgement and observance of laws and customs – Schedule F at [19];
- in particular, continued observance of customary and spiritual practices by members of the group reaffirms their connection with the spiritual properties of the land and waters of the area – Schedule F at [19];
- members of the native title claim group have maintained their connection with the application area despite the presence and activities of non-Aboriginal people in the region – Schedule F at [20];
- in the past, no other Aboriginal landholding group has asserted rights in the area, nor has another group occupied the area – Schedule F at [21].

[95] In addition to the information contained in Schedule F, the affidavits that accompany the application pursuant to s 62(1)(a), sworn by each of the applicant persons, also contain information that speaks to an association of the members of the group and their predecessors with the application area. Below, I have excerpted a number of statements from those affidavits that are examples of this type of material.

[96] One of the applicant persons states that:

> My father was born on *Imarnte* country at Mt Burrell Bore on the application area, where the old homestead was by the waterhole. My father grew up at Mt Burrell, and he used to walk all over Maryvale station (the application area), hunting and camping. He would walk from water hole to water hole, up and down the Hugh River. He learnt where those waterholes were from his mother and all them family. There was no bore back in those days, so he used to get his water from the water holes – affidavit of Reggie Kenny at [9].

[97] And also states that:

> When my father was a young fella, the Afghans used to cart goods up from Oodnadatta to Alice Springs. On the way from Alice Springs, they would pick my father up from Mt Burrell. My father would travel with the Afghans across the application area – over *Imarnte* country. The Afghans would drop my father off at Horseshoe Bend and he would sit there with his other family. When the Afghans were on their way back from Oodnadatta, they would pick my father up from Horseshoe Bend, travel back across the application area and drop him back off at Mt Burrell where his mother was living – affidavit of Reggie Kenny at [10].

[98] And also states that:

> My father's mother, [name removed], was born on the application area, on *Imarnte* country. She was a proper *Imarnte* woman. [name removed] father was an *Imarnte* man. I am *kwertengerle* through my father and my grandmother. My father used to tell me stories about how he used to walk with [name removed] all over the application area, all the way along the Hugh River to Jay Creek. They would live off the land, hunting and camping as they went – affidavit of Reggie Kenny at [8].

[99] Another applicant person states that:

> I still live on *Imarnte* country, at Titjikala, which is a Community Living Area located in the middle of the application area. I go out on the application area all the time, hunting and camping. I have two older sons, [name removed] and [name removed], and we go out together. We are always hunting, for kangaroo, goanna. You can't just camp in open country, so we have to build a windbreak, a little humpie. We light a fire to cook our food. We do it proper way. I've taught my sons how to cook kangaroo properly I learnt to do all these things from my three grandfathers and my mother, and now I teach my sons. We're always slowly learning – affidavit of Desmond Jack at [16].

[100] And the applicant person also states that:

> My country, my mother's country and my grandfather's country is *Imarnte* country. My mother's father, [name removed], was born on the application area, on *Imarnte* country. My grandfather used to tell me a lot of stories about when he was a young fella walking all over the application area, hunting and camping and looking after sites – affidavit of Desmond Jack at [8].

[101] And also states that:

> When I was about 10 years old, we moved from Finke [100 km south east of the application area] to Maryvale Station, because my father got a job there as the Station Manager. My mother worked on Maryvale Station too, as a cleaner. I started going out on the application area all the time – sometimes with my grandfather, sometimes my mother and the old ladies and other times with [name removed], my other brother, [name removed], and my cousins. We would hunt for wild cats, kangaroo and rabbit and we would camp out. My "other grandfather", [name removed], was a cheeky fella, and he would trick us, and tell us that we were eating rabbit, when really we were eating wild cat. Once we'd finished eating, he'd show us the cat carcass and laugh. We had a real good time when the old people were here. When we camped out if it were cold, we would build a wind break. We would travel all across the application area – sometimes through to Rainbow Valley – which is *Imarnte* country, but not on the application area. We also had "my uncle", [name removed], living with us for a long time, and he knew the country and the stories real well. He would take us onto the application area, and show us the country. All those old men would say "don't get married, be a man first. You gotta look after country, learn about culture". My grandfather and the other old men used to teach us to stay away from important sacred men's sites on the application area. I would say "can I go swimming down there?" and my grandfather would say "nah, you can't go down there, you gotta be a man to go down there". So we wouldn't put our foot there until we were a man, until we did ceremony – affidavit of Desmond Jack at [12].

[102] Another applicant person states that:

> My mother's father, [name removed], was born on the application area, on *Imarnte* country. He was a proper *Imarnte* man, and grew up walking all around the application area, hunting and camping and looking after the men's sacred site. My mother's father's main dreaming was the gecko dreaming, which travels Deep Well Station to Chamber's Pillar. He used to look after the sites, including near Mt Burrell – affidavit of Jeanette Ungwanaka at [8].

[103] And she also states that:

> My mother was born on Horseshoe Bend Station, adjacent to the application area, where her father worked as a stockman. When she was a little kid, she moved back to Maryvale Station (on the application area), and that's where she grew up. She used to travel all over the application area on camels with the old people – including her father and her mother. They would get bush tucker and hunt for goanna, then build a fire to cook them. She used to go with the old people and collect bush medicine, like between the two hills, before all the new houses for the Community Living Area were built. They would camp all over *Imarnte* country, and when it was cold, they would build windbreaks – affidavit of Jeanette Ungwanaka at [8].

[104] I note that these statements are merely examples of the type of information in the application before me addressing an association of members of the claim group, their families, and their predecessors, with the land and waters of the application area.

My consideration – s 190B(5)(a)

[105] The requirement at s 190B(5)(a) is that I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area. The application area is located in the central and southern part of the Northern Territory, not far north of the border with South Australia.

[106] Turning to whether the factual basis speaks to an association of the predecessors of the group with the area at European settlement (discussed in *Gudjala 2007* at [52]), the application does not assert a particular date or period during which settlement of the region took place. In my view, however, there is information within the factual basis material that gives some indication of when this may have been. For example, the claimants speak of their parents and grandparents walking everywhere, or travelling with camels and donkeys. A claimant also speaks to the Afghans transporting goods between Oodnadatta and Alice Springs using carts. I consider, therefore, that the factual basis asserts that the grandparents of the members of the native title claim group occupied and were using the land and waters of the application area prior to a time where cars were a common form of transport in the area. Another claimant refers to his grandfather accessing water from water holes before bores were established in the area.

[107] The claimants' statements indicate that they are all senior persons of authority within the native title claim group. The date of birth of one of the claimants is stated as 1953. On this basis, I consider it reasonable to infer that the grandparents of these members of the group would have been *Imarnte* persons who occupied the application area around the late 1800s and early 1900s, where each generation is 30 to 40 years apart. Schedule F states that ethnographic sources confirm that at the time of contact and settlement of the region, people affiliated with a dialect of the Arrernte language occupied and used the application area. This statement is followed by a list of sources, the earliest of which is the journal of one of the first explorers to the region dated 1865. It is my understanding, therefore, that first contact was around this time.

[108] It is also my understanding that European settlement in the area primarily involved the establishment of pastoral leases and homesteads in the region. I am mindful of the fact that the area subject of the claim to native title is in a remote part of Australia, and that as a result, settlement in the area is likely to have taken place a considerable amount of time after the assertion of British sovereignty on the east coast in 1788. Based on the information contained in the application regarding the ethnographic sources, and noting the remote location of the application area, in my view it is reasonable to infer that settlement did not take place until some 20 or so years following first contact. In making this inference, I have also considered the statements about the lifestyle of the grandparents of the claim group members, which, in my view, suggest that they continued to occupy and use the area unaffected by any settlement activities. I consider, therefore, that the factual basis asserts the grandparents of the members of the native title claim group to be *Imarnte* persons who were born on the application area around

the late 1800s and early 1900s, and that this was approximately the time at which settlement in the region occurred.

[109] In light of my reasoning above, therefore, it is my view that the factual basis material is sufficient to support an assertion of an association of the predecessors of the group with the area at European settlement.

[110] The statements excerpted above include references to various place names. Using the Tribunal's iSpatial database, and with the assistance of the Tribunal's Geospatial Services, I have mapped these place names and consider that they are all located within, or adjacent to the application area. Members of the claim group and their predecessors travelling along the Hugh River is mentioned numerous times in the material and I note that the Hugh River travels right through the application area, from the north-western boundary diagonally across to the south-eastern boundary. It is clear from my research regarding the paths of travel and dreaming tracks spoken of in the material, that claimants and their predecessors have spent time across the full extent of the land and waters of the application area. In this way, I consider that I can be satisfied that the factual basis is sufficient to support an assertion of a physical association of the members of the group and their predecessors with the entirety of the area.

[111] Claimants in their statements also speak to the knowledge handed down to them by their predecessors regarding dreaming tracks, sacred sites, and ceremonial sites located throughout the application area. They also speak to their understanding of the role of their spiritual ancestors in creating the landscape. Consequently, I consider the factual basis speaks to both a spiritual and a physical association of members of the group and their predecessors with the area.

[112] Section 190B(5)(a) also requires that the factual basis is sufficient to support an assertion of an association of the group and their predecessors over the period since settlement, including a present association. In my view, the information before me is clear in addressing this on-going association. Claimants speak to the stories passed down to them by their grandparents about how those persons used to travel across the application area, hunting and camping and using the resources of the area as they went. They also state their knowledge of the physical presence of their parents on the area, as young children growing up and being taught about their country, and then as adults, working on Maryvale Station and continuing to use their country and care for their country in accordance with their responsibilities under their laws and customs.

[113] In addition to this, there are numerous statements that, in my view, address the way in which claimants today maintain an association with the area. I note the material provides that many members of the group continue to live on the application area, engage in activities surrounding the protection of their country, and go out on their country with the younger generations to teach them about country, and to show them how to use and care for their country. Consequently, I am satisfied that the factual basis speaks to an association of the members of the

group and their predecessors with the area over the period since settlement, including a present association. I note the material includes references to various other families and persons within the native title claim group, other than the applicant persons, such that I consider the factual basis to address an association of the whole group presently with the area.

[114] It follows, therefore, that I am satisfied the factual basis is sufficient to support an assertion that the members of the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[115] The application satisfies the requirement at s 190B(5)(a).

Reasons for s 190B(5)(b)

[116] The requirement at s 190B(5)(b) is that I am satisfied that the factual basis is sufficient to support an assertion 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'. Noting the focus of the assertion on the claimed native title, it is my view that the task at s 190B(5)(b) should be undertaken with reference to the definition of 'native title rights and interests' at s 223(1).

[117] Pursuant to subsection (a) of that definition, native title rights and interests are those communal, group or individual rights and interests in relation to land and waters where 'the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In light of the similarities between this definition and the terms of s 190B(5)(b), I consider it appropriate that I have regard to the leading authority in relation to s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

[118] In *Yorta Yorta*, the High Court held that not only are traditional laws or customs those that have been passed from generation to generation of a society, usually by word of mouth and common practice, but the meaning of the word 'traditional' in the context of the Native Title Act carries with it two other elements. Firstly, the origins of the laws and customs must be found in the normative content of the laws and customs acknowledged and observed by a group of Aboriginal people prior to sovereignty – at [46]. Secondly, the system of laws and customs under which native title rights are possessed, must have had a continuous existence and vitality since sovereignty – at [47].

[119] In *Gudjala 2007*, Dowsett J sought to apply the principles enunciated by the High Court in *Yorta Yorta* to the task of the Registrar's delegate at s 190B(5)(b). In doing so, His Honour held that the following types of information may be required to address the particular assertion:

- information that speaks to the existence at the time of European settlement of a society of people living according to identifiable laws and customs of a normative content – at [65], [66] and [81];

- information addressing how the laws and customs currently observed have their source in the laws and customs of a pre-sovereignty society – at [63];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve identification of a link between the apical ancestors and the society existing at sovereignty or settlement – at [66] and [81].

[120] Dowsett J returned to the task at s 190B(5)(b) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). His Honour's comments suggest that the factual basis may also need to address the following:

- who the persons of the pre-sovereignty society acknowledging and observing the laws and customs of a normative character were – at [37];
- an explanation of how the current laws and customs can be said to be traditional, that is, laws and customs rooted in those of a pre-sovereignty society relating to rights and interests in land and waters, and more than a mere assertion that laws and customs are traditional – at [72];
- details of the claim group's acknowledgement and observance of the traditional laws and customs relating to the land and waters of the application area – at [74].

The applicant's factual basis material – s 190B(5)(b)

[121] I have summarised below the information from the factual basis material that I consider relevant to the assertion at s 190B(5)(b):

- the *Imarnte* landholding group (the native title claim group) is part of a regional society which includes all Pertame Arrernte landholding groups, namely their south-eastern and central Arrernte neighbours and western Arrernte neighbours – Schedule F at [3];
- the *Imarnte* landholding group has a close association with these neighbours, for example through intermarriage, ceremonial connections and mutual estate recognition – Schedule F at [3];
- members of this society acknowledge and observe a common body of traditional laws and customs – Schedule F at [3];
- the traditional laws and customs of the native title claim group have been acknowledged and observed by the group and their ancestors since time immemorial, including at the time at which British sovereignty was asserted, and at the time of first contact with non-Indigenous people in the area – Schedule F at [1];
- there is a communally held belief amongst the members of the regional society that the physical and cultural landscape, and the legal, social, kinship and religious systems, were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *Altyerre*, or the 'Dreaming' or 'Dreamtime' – Schedule F at [5];
- the system of traditional laws and customs acknowledged and observed by the group has its foundations in the *Altyerre* and is held to be unchanged from the time of its creation and to have been passed down to each succeeding generation unchanged, by the ancestors – Schedule F at [5];

- *Altyerre* covers a range of attributes including cosmology, spiritual ancestors and accounts of their exploits and travels, spiritual power, religious laws and objects, places, ritual, designs and songs – these attributes provide an on-going foundation for the current exercise of rights and interests in relation to land and waters – Schedule F at [6];
- the sites associated with a predominant Dreaming or Dreamings form "countries" or "estates" – the application area comprises one country or estate which is affiliated with the *Imarnte* landholding group – Schedule F at [7];
- there is a dominant kinship system pursuant to the laws and customs of the group, which has the following key features: recognition of common spiritual and human ancestors; common and interdependent familial ties; the classification of relatives into lines of descent from each of the four grandparents; recognition of sanctions relating to relationships; recognition of joint responsibilities to the country associated with particular landholding groups; and affiliation with Dreaming beings associated with particular landholding groups – Schedule F at [9];
- the land tenure system of the native title claim group provides for rights and interests to be held by members of a landholding group and inherited through descent (including adoption) from recognised ancestors, or conferred upon persons recruited to a landholding group by senior descent members of the group – Schedule F at [12];
- other important features of the land tenure system include: fulfilment on a group and individual basis of spiritual obligations towards country; the observation of restrictions imposed by gender, age, ritual experience and other status; the observation of restrictions imposed by the presence of the Dreaming and/or sites of significance on the land and waters; and the recognition of traditional processes of succession – Schedule F at [15];
- 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 – Schedule F at [17];
- knowledge of descent connections is transmitted orally – Schedule F at [17];
- individuals beyond the grandparent level are rarely remembered and earlier ancestors are ultimately believed to be spiritually descended from the Dreaming ancestors – Schedule F at [17];
- the application area is part of Pertame Arrernte territory and affiliated with the *Imarnte* landholding group – Schedule F at [19];
- the application area is identified with the Pertame (or Southern) Arrernte language – Schedule F at [19];
- ethnographic sources confirm that at the time of contact and settlement of the region, people affiliated with a dialect of the Arrernte language, including the ancestors of the native title claim group, maintained physical, spiritual and other cultural associations with the application area – Schedule F at [19];
- these sources provide that first exploration of the area took place in 1865 – Schedule F at [19];
- continuity of spiritual and ancestral connections to the application area is founded on a communally acknowledged belief that spiritual ancestors created both the land and ongoing human relationships with it – Schedule F at [19];
- claimants' connection with the spiritual properties of the land and waters in the application area is confirmed through the continued observance of customary secular and spiritual practices by members of the group – these practices often relate to Dreaming tracks and associated sites of significance – Schedule F at [19].

[122] In addition to this information contained in Schedule F, the affidavits sworn by members of the claim group also speak to the matters prescribed by s 190B(5)(b). I have provided excerpts of the affidavits as examples of the material I have relied upon in reaching the required level of satisfaction at this condition, in my consideration below.

My consideration – s 190B(5)(b)

[123] The requirement at s 190B(5)(b) is that I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group giving rise to the claim to native title rights and interests. As I understand it, there can be no relevant traditional laws and customs unless there was, at sovereignty or European settlement, a society defined by recognition of laws and customs from which the current laws and customs derive. The starting point, therefore, is the identification of such a society at settlement – *Gudjala 2007* at [66].

[124] As I have explained in my reasons above at s 190B(5)(a), the factual basis material does not speak to a particular date at which European settlement within the region took place, however from my reading of the information before me, noting that first exploration of the area took place in 1865, I consider it reasonable to infer that settlement of the area occurred around the late 1800s. For the purposes of this condition of the registration test, based on the information pertaining to ethnographic and historical records in the material before me, I consider that I can infer that settlement took place around the 1880s.

[125] Also as discussed in my reasons above at s 190B(5)(a), in relying on the birth dates of the deponents of the affidavits provided in the material, I consider it reasonable to infer that the grandparents of the deponents were *Imarnte* persons born on the application area at around the time at which settlement of the region took place. Further to this, from general statements made in the application, I consider that I can infer that the laws and customs of the *Imarnte* people at this time were unchanged from those acknowledged and observed by the group's predecessors at sovereignty in 1788. For example, Schedule F states that '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].

[126] The affidavits contain various information pertaining to the lifestyles and habits of the grandparents of the claimants. For example, one claimant states:

> My mother's father, [name removed], was born on the application area, on *Imarnte* country. He was a proper *Imarnte* man, and grew up walking all around the application area, hunting and camping and looking after the men's sacred site. My mother's father's main dreaming was the gecko dreaming,

which travels [*sic*] Deep Well Station to Chamber's Pillar. He used to look after the sites, including near Mt Burrell – affidavit of Jeanette Ungwanaka at [8].

[127] And another claimant states:

> I remember when I was maybe 7 or 8 years old, I would go out on Maryvale Station (the application area) with my brother, [name removed], and my mother. We used to go out in an old valiant station wagon. We would go hunting for rabbits and then we would stop at the old village on Maryvale Station. I remember, on one of those visits, I saw my "grandfather", [name removed], all painted up for ceremony. I would touch the paint, and my mother would say "you can't touch that" because he had been at ceremony – affidavit of Desmond Jack at [11].

[128] And another claimant states:

> When I was about 15 or 16 years old, I started going out on *Imarnte* country – including Maryvale Station – with my grandfather and [name removed], who is a senior, knowledgeable Law man. [name removed] is not a native title holder for the application area, but he knows *Imarnte* country real well. We would hunt and camp and my grandfather would teach me *Arrernte* and about country. We would get bush tucker, too, like bush tomatoes and bush bananas. That's how I learnt to survive on the land, with just bush tucker. I also used to collect wood from Maryvale and help the old men like [name removed] to make boomerangs – affidavit of Desmond Jack at [13].

[129] From the statements within the affidavits that speak to the grandparents of the claimants, I understand that these persons acknowledged and observed a system of laws and customs that comprised at least the following aspects or elements:

- restrictions on access to particular sacred sites, on the basis of age and/or gender – see for example affidavit of Desmond Jack at [12];
- obligations towards country and caring for country, particularly sacred sites – see for example affidavit of Reggie Kenny at [8];
- observation of patterns of teaching whereby usually the more senior, knowledgeable 'old people' would take the younger generations out on country for the purpose of imparting knowledge about country, including methods for hunting, camping, cooking and gathering bush foods and medicines – see for example affidavit of Desmond Jack at [13];
- knowledge of dreaming tracks and sites on the application area, and an obligation to impart that knowledge to younger generations – see for example affidavit of Desmond Jack at [14];
- knowledge of songs, dances and stories for *Imarnte* country, and participation in ceremonies where those songs and dances were performed – see for example affidavit of Jeanette Ungwanaka at [15];
- use of the resources of the application area for various purposes, including ceremonial, sustenance, shelter, the making of cultural tools and items – see for example affidavit of Jeanette Ungwanaka at [15];
- rights and interests in land as a member of the *Imarnte* landholding group were inherited through one's parents, predominantly one's father – see for example affidavit of Reggie Kenny at [7] and [8].

[130] From this information, therefore, I consider that the factual basis is sufficient to support an assertion that the grandparents of the native title claim group acknowledged and observed laws and customs of a normative content.

[131] Regarding a link between the apical ancestors and the society at European settlement acknowledging and observing those laws and customs, I have set out above the reasons for which I consider that I can infer that the grandparents of the claimants were *Imarnte* persons born in the application area around the time that settlement was taking place. I have turned my mind to the ancestors named in Schedule A, by whom the native title claim group is defined. The names of the grandparents of the claimants spoken of in the affidavits before me, all appear within the genealogies contained in Schedule A. I note that those grandparents are listed as the second or sometimes third highest generation in the genealogies. Paragraph [8] of Schedule A confirms that 'the ancestors identified […] are the uppermost generation of the known ancestors of members of the native title claim group'.

[132] From this information, therefore, I consider that I can infer that the uppermost generations of ancestors named and identified in the genealogies (that is, the parents and grandparents of the claimants' grandparents), were *Imarnte* persons who occupied the application area at the time of first contact and settlement in the area. Noting the information before me about knowledge of laws and customs being passed down through the generations unchanged, I consider that I can also infer that it was this upper generation who were the persons who passed on that knowledge to the grandparents of the claimants, and, flowing from that, that this upper generation comprised a relevant society of persons, at European settlement, acknowledging and observing the same laws and customs of a normative content.

[133] The factual basis provides various information about that society at settlement. This includes that it comprised persons speaking a dialect of the Arrernte language, that they were a distinct landholding group with rights and interests in the particular land and waters of the application area, but that they were part of a broader regional society comprising all the Pertame (Southern) Arrernte landholding groups. The factual basis refers to ethnographic sources at the time of settlement that confirm the presence of Arrernte-speaking people in the application area.

[134] In light of this material before me, and my reasons above regarding the identity of the persons comprising the society in the application area at settlement, I am satisfied that the factual basis is sufficient to support an assertion that there was, at European settlement, a society of people living according to identifiable laws and customs of a normative content. I am also satisfied that the factual basis is sufficient to support a link between the ancestors named in Schedule A and the society occupying the area at settlement.

[135] In the affidavits sworn by members of the claim group, and in the material at Schedule F, I consider that I have a relative amount of detail regarding the laws and customs currently observed by the native title claim group in relation to the land and waters of the application area. For example, one claimant speaks to his obligations surrounding care and protection of his country in the following way:

> These days, I often go out with anthropologists and CLC people because I am *kwertengerle* and I live close by at Walkabout Bore. When we were doing the research for this native title claim, I went out with Desmond Jack, [name removed], [name removed] and lots of other people to show them the country. Sometimes I go out with CLC when we need to protect sites. My brother [name removed] went with the Aboriginal Areas Protection Authority when they needed to protect sites around Horseshoe Bend. Someone must always go with them. When I was working with Parks and Wildlife and CLC within the Rainbow Valley Conservation Reserve as an assistant ranger, I also used to clear out weeds and care for sites and other places on *Imarnte* country – affidavit of Reggie Kenny at [24].

[136] Another claimant speaks to the way in which he passes on knowledge about country, including the location of sacred sites used for ceremonies and initiation, and the rules and practices surrounding initiation, to his kids. He states:

> There are sacred men's sites on the application area that are used for initiations and big ceremonies. I taught my sons about the country and about sacred sites, same way as my grandfather. I'd say "you can't go that way, that's for men". I have to pass on the knowledge. We still do Young Men's Business on the application area. Both my older sons went through the Law at Titjikala. That's how we pass on the *Imarnte* Law to the younger generations. Then the old men took them out on the application area and taught them the stories and the sites for our country. I didn't put my boys through the Law, that's for the "grandfather" generation. The fathers, we stay home and we cook for the young men – affidavit of Desmond Jack at [17].

[137] I note that these statements refer to laws and customs being acknowledged and observed by members of the group in relation to certain places on the application area, such that I consider I can be satisfied that the factual basis supports traditional laws and customs giving rise to native title rights and interests in the particular land and waters of the application area.

[138] Having considered the information before me that speaks to the laws and customs currently acknowledged and observed by the group, and the information before me that speaks to the laws and customs acknowledged and observed by the grandparents of the claimants, it is my view that the current system of laws and customs possesses all of those elements of the system of laws and customs acknowledged and observed by the grandparents of the claimants. I accept, therefore, the statement in Schedule F that laws and customs have been transmitted unchanged through the generations, to the members of the native title claim group – at [5]. In this way, I am satisfied that the factual basis is sufficient to support an assertion of 'traditional' laws and customs, that is,

laws and customs rooted in those of a society at settlement, relating to rights and interests in land and waters.

[139] I am satisfied that the factual basis is sufficient to support an assertion 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 interests.

[140] The requirement at s 190B(5)(b) is met.

Reasons for s 190B(5)(c)

[141] The assertion at s 190B(5)(c), which I must be satisfied the factual basis is sufficient to support, is that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'. It is my understanding that the phrase 'those traditional laws and customs' is a direct reference to the laws and customs that the factual basis was required to address in answering the assertion at s 190B(5)(b) – see *Martin* at [29]. Consequently, where the factual basis is not sufficient for the purposes of s 190B(5)(b), I am of the view that it cannot be sufficient to meet the requirement at s 190B(5)(c).

[142] I consider that the requirement at s 190B(5)(c), in dealing with continuity of native title, can be equated with the second element of the meaning given to the term 'traditional laws and customs' by the High Court in *Yorta Yorta*. The requirement, therefore, is that the factual basis address the way in which the native title claim group have continued to hold their native title rights and interests by acknowledging and observing laws and customs rooted in those of a pre-sovereignty society, in a 'substantially uninterrupted' way – see *Yorta Yorta* at [47] and [87].

[143] In *Gudjala 2007*, Dowsett J's comments suggest the factual basis may need to address the following in order to satisfy the requirement at s 190B(5)(c):

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

[144] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied that the factual basis is sufficient to support an assertion of traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claim to native title rights and interests. In reaching the required level of satisfaction, those reasons explain my view that the factual basis is sufficient to support an assertion of a relevant society at European settlement in the area, namely the *Imarnte* landholding group, acknowledging and observing laws and customs of a normative content, from which the current laws and customs are derived.

[145] As discussed above at s 190B(5)(b), it is my understanding that there has been little or no change in the system of laws and customs acknowledged and observed by the native title claim group and their predecessors over time, including back to sovereignty. In this way, I am also of the view that the factual basis speaks to a system of laws and customs that has continued substantially uninterrupted.

[146] An example of the type of material that I have relied upon in forming this view is statements made by claimants explaining the acknowledgement and observance of particular laws and customs by their grandparents, and then further statements explaining the way in which claim group members today acknowledge and observe those same laws and customs, in essentially the same way. I have explained above my understanding of the material before me, that the parents of the claimants' grandparents were the members of the relevant society occupying the application area at first contact and settlement, and who were consequently acknowledging and observing those laws and customs that they then passed onto their children.

[147] I consider the following statements made by the same member of the claim group demonstrate this continuity of laws and customs across the generations. The claimant talks about his grandfather teaching him about sacred sites and dreaming tracks on the application area in the following way:

> My grandfather taught me about the Eagle Dreaming and the Bat Dreaming on the application area. He told me "you can't go there, you gotta be a man first". Those are sacred sites where women and children can't go there. I couldn't go for a long time. Once I went through Law, the old people told me I could go there and see the country and those sites and learn the culture and everything – affidavit of Desmond Jack at [14].

[148] The claimant then goes on to explain the way he continues to pass this knowledge onto his own children. He states:

> There are sacred men's sites on the application area that are used for initiations and big ceremonies. I taught my sons about the country and about sacred sites, same way as my grandfather. I'd say "you can't go that way, that's for men". I have to pass on the knowledge. We still do Young Men's Business on the application area. Both my older sons went through the Law at Titjikala. That's how we pass on the *Imarnte* Law to the younger generations. Then the old men took them out on the application area and taught them the stories and sites for our country. I didn't put my boys through the Law, that's for the "grandfather" generation. The fathers, we stay home and we cook for the young men – affidavit of Desmond Jack at [17].

[149] In my view, these statements also address the way in which traditional patterns of teaching, involving knowledgeable and senior members of the group taking the younger generations out on country for the purpose of imparting knowledge about country to them, is an essential element of the system of traditional laws and customs. As discussed above, it is my

understanding of the factual basis material that this pattern of teaching has facilitated laws and customs being passed down through the generations since the time of the group's ancestors at settlement and sovereignty, largely unchanged. I consider, therefore, that the factual basis speaks to laws and customs of a system that has had a 'continuous existence and vitality since sovereignty' – *Yorta Yorta* at [47].

[150] In light of this material before me, therefore, I am satisfied that the native title claim group have continued to hold their native title in accordance with their traditional laws and customs.

[151] The requirement at s 190B(5)(c) is met.

Conclusion

[152] 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.

[153] The standard which forms the basis of the test at s 190B(6) is 'prima facie'. Consequently, I consider that the meaning to be applied to that phrase is central to my understanding of the task at this condition of the registration test. In *Doepel*, Mansfield J approved the meaning that the High Court had adopted in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, being the ordinary meaning of the phrase, 'at first sight; on the face of it; as appears at first sight without investigation' – see *Doepel* at [134]. Further to this, Mansfield J held 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].

[154] Noting that the focus of s 190B(6) is 'native title rights and interests', it is my view that in my consideration at this condition, I must have regard to the definition of that term in s 223(1). That definition provides that:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognized by the common law of Australia.

[155] In light of this, I consider that the material must demonstrate how the rights and interests claimed are rights and interests held pursuant to traditional laws and customs, are rights and interests held in relation to land and waters, and that they are rights and interests that have not been extinguished over the entirety of the application area.

[156] In my consideration I note that the wording of s 190B(6) makes clear that it is not a barrier to the application satisfying the condition where not all of the rights and interests can be, prima facie, established – see *Doepel* at [16].

[157] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Consideration

The right to exclusive possession

[158] The nature of a native title right to exclusive possession was discussed in some detail by the High Court in *Western Australia v Ward* [2002] HCA 28 (*Ward HC*). In that case, it was held that:

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

[159] In *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), the Full Court of the Federal Court found that it was incorrect to approach the question of exclusive possession with concepts of proprietary rights in mind. The Full Court held that:

> [T]he question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights" – at [71].

[160] Further in *Griffiths*, the Full Court held that what is required in order to prove exclusive rights is that the applicant show how, under traditional law and custom, the group may effectively 'exclude from their country people not of their community', as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – at [127].

[161] Information regarding the right of claimants under their traditional laws and customs to speak for, and make decisions about their country may also provide a prima facie case for the

existence of a right of exclusivity. In *Sampi v State of Western Australia* [2005] FCA 777, the Court held that:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

[162] Schedule F states that pursuant to the laws and customs of the native title claim group, the members of the group are the owners of the land and waters comprising the application area. I accept this statement to be in support of a clear assertion that the native title claim group has a right to exclusive possession of the application area.

[163] The affidavits sworn by members of the group provide further insight into the nature of this right of exclusive possession. Each claimant expresses their understanding that they are able to freely access the land and waters of the area and their resources, without the need to seek permission, as it is their country, and belongs to them in accordance with their laws and customs. For example, one claimant states that:

> I have the right to go walking and hunting and camping over *Imarnte* country anytime I like because it's my country. Other Aboriginal people, who are not from *Imarnte* country must come and ask permission before they come onto our land. They know they have to ask first. If they went to go hunting on our country they would have to come and ask Desmond Jack, [name removed], [name removed] and [name removed] (who is a younger fella who has gone through the Law). They are the senior, knowledgeable *kwertengerle* and *apmereke-artweye*. A person must know that country before anyone can speak for country and make decisions – affidavit of Reggie Kenny at [25].

[164] And another claimant states that:

> I have the right to go walking and hunting and camping over Imarnte country, including the application area, anytime I like because it's my country. Other Aboriginal people, who are not from Imarnte country must come and ask permission before they come onto our land. They know they have to ask first. If they want to go hunting or camping or gathering bush tucker on our country they would have to come and ask the senior, knowledgeable people like [name removed], when he's here, or me. A person must know the country before anyone cans speak for country and make decisions. That's the same as my grandfather taught me; you can't go bush in another person's country without asking first. I have to sit down and wait for the old people to tell me. Same too, when they come to Titjikala (and the application area), they gotta do the same thing. Because we got different culture, different sites – affidavit of Desmond Jack at [22].

[165] And another claimant states that:

> Only the people who know have the right to show the CLC and anthropologists about the sites and stories on the application area; the senior, knowledgeable *apmereke-artweye* and *kwertengerle*. Someone from the family needs to go with them – affidavit of Jeanette Ungwanaka at [20].

[166] Further statements made by claimants speak to the way in which they are required to, pursuant to their laws and customs, accompany various non-Indigenous people who seek access to their country onto the area, including anthropologists, mining/exploration companies, and land council staff.

[167] From the statements within the application of this nature, I accept that the members of the native title claim group understand themselves to be the persons with authority to speak for country, and with decision-making authority regarding who can access that country. Further, I accept the understanding of these persons to be that they possess these rights and this authority only in accordance with the traditional laws and customs of the group that have been passed down to them by their predecessors. In this way, I consider that the right is demonstrated as being one held in accordance with the traditional laws and customs of the native title claim group.

[168] While the information indicates that there are specific rules and practices around the particular persons within the native title claim group whose permission must be sought where a non-claim group member seeks to access the application area, I accept that the members of the native title claim group as a whole assert this right to control access to, and to speak for, country.

[169] Having information before me which addresses a right of the claim group to speak for the land and waters of the application area, and to control access to the area, and information that addresses the way in which these rights are held pursuant to the traditional laws and customs of the group, I consider that a right to exclusive possession is, prima facie, established.

The right to access and travel over any part of the land and waters

[170] Noting my view above that a right to exclusive possession is, prima facie, established, and in light of the content and substance of such a right, in my view, it necessarily follows that a right of the claimants to access and travel over the application area is also, prima facie established. Notwithstanding this, there are numerous statements in the material before me that address a right to access and travel over the area. For example, one claimant states that:

> My mother's father, [name removed], was born on the application area, on *Imarnte* country. He was a proper *Imarnte* man, and grew up walking all around the application area, hunting and camping and looking after the men's sacred site. My mother's father's main dreaming was the gecko dreaming, which travels [*sic*] Deep Well Station to Chamber's Pillar. He used to look after the sites, including near Mt Burrell – affidavit of Jeanette Ungwanaka at [8].

[171] Each of the claimants in their affidavits speaks to the way in which they have travelled over and spent the large part of their lives on the application area. As above, their statements also describe the way in which their predecessors accessed and travelled over the area. In light of the material of this nature before me, I consider that the right to access and travel over any part of the application area is, prima facie, established.

The right to live on the land and for that purpose, to camp, to erect shelters and other structures

[172] In the same way, noting my view above that I consider that the right to exclusive possession is, prima facie, established, I consider that it necessarily follows that a right to live on the land and camp on the land is also, prima facie, established. Again, however, the material speaks specifically to this right. For example, one claimant states that:

> My mother was born on Horseshoe Bend Station, adjacent to the application area, where her father worked as a stockman. When she was a little kid, she moved back to Maryvale Station (on the application area), and that's where she grew up. She used to travel around all over the application area on camels with the old people – including her father and her mother. They would get bush tucker and hunt for goanna, then build a fire to cook them. She used to go with the old people and collect bush medicine, like between the two hills, before all the new houses for the Community Living Area were built. They would camp all over *Imarnte* country, and when it was cold, they would build windbreaks – affidavit of Jeanette Ungwanaka at [10].

[173] In addition to this, the material includes statements that the members of the group continue to live and camp on the application area, in the same way that their predecessors did before them. Statements refer to the way in which stories of the claimants' predecessors exercising these rights have been passed down to them. In light of this material before me, I consider that a right to live on the land and for that purpose, to camp, to erect shelters and other structures is, prima facie, established.

The right to hunt, gather and fish on the land and waters

[174] The following statement by a claimant is an example of the material before me that addresses a right of the native title claim group to hunt, gather and fish on the land and waters of the application area. The claimant states:

> My mother and I still always go hunting and camping on the application area, in the sand hill country. Not long ago, we went out and caught three goannas. We also hunt for kangaroo and, if we're lucky, for emu too. We collect all sorts of bush tucker – bush tomatoes, bush onions and, up to the north, we sometimes collect honey ants – affidavit of Jeanette Ungwanaka at [18].

[175] Elsewhere in the application, claimants speak to the way in which they were taught methods for hunting and collecting flora and fauna on the application area by their predecessors, knowledge passed down to them through traditional patterns of teaching pursuant to the laws and customs of the native title claim group. Consequently, I consider that the material speaks to

the right as one held pursuant to the traditional laws and customs of the group, and that it is, prima facie, established.

The right to take and use the natural resources of the land and waters

[176] The statement below is an example of the material speaking to a right of this nature:

> Because I live on *Imarnte* country adjacent to the application area, I still go travelling and hunting and camping all over Maryvale station. I go on horses with my nephews, [name removed], [name removed] and [name removed]. We might go hunting, get a perentie or a goanna or a kangaroo and build a fire and cook our dinner there. We also go out and get bush tucker, like bush tomatoes and bush onions. Sometimes we get bush tobacco, we go straight to the hills and take a bag and fill 'em up. When we need water, we stop at the waterholes on the application area. Those are the waterholes that my father taught me about when I was a young fella. I also get around and check up on sites – affidavit of Reggie Kenny at [20].

[177] From the material of this nature, I consider that the right is asserted as one that has been passed down to the claimants by their predecessors, in accordance with traditional patterns of teaching pursuant to the laws and customs of the group. In this way, and in light of the information within the application before me that speaks to the existence of this right, I consider that the right to take and use the natural resources of the land and waters of the application area is, prima facie, established.

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

[178] All of the claimants speak to the way in which they and their predecessors have accessed and used the water resources of the application area. For example, one claimant states that:

> My father was born on *Imarnte* country at Mt Burrell Bore on the application area, where the old homestead was by the waterhole. My father grew up at Mt Burrell, and he used to walk all over Maryvale station (the application area), hunting and camping. He would walk from water hole to water hole, up and down the Hugh River. He learnt where those waterholes were from his mother and all them family. There was no bore back in those days, so he used to get his water from the water holes – affidavit of Reggie Kenny at [9].

[179] The above statement, in my view, indicates that knowledge about the use of water holes and water resources formed part of the knowledge about country that has been transmitted down through the generations, in accordance with traditional patterns of teaching. I consider, therefore that the right is spoken to as one that is held pursuant to the traditional laws and customs of the native title claim group.

[180] I consider that the right to access, take and use natural water on or in the land is, prima facie, established.

The right to light fires for domestic purposes, but not for the clearance of vegetation

[181] Again, all of the claimants explain the way in which they and/or their predecessors have caught and cooked their food whilst out on country, lighting fires for that purpose. For example, one claimant states that:

> I still live on *Imarnte* country, at Titjikala, which is a Community Living Area located in the middle of the application area. I go out on the application area all the time, hunting and camping. I have two older sons, [name removed] and [name removed], and we go out together. We are always hunting, for kangaroo, goanna. You can't just camp in open country, so we have to build a windbreak, a little humpie. We light a fire to cook our food. We do it proper way. I've taught my sons how to cook kangaroo properly [*sic*] I learnt to do all these things from my three grandfathers and my mother, and now I teach my sons. We're always slowly learning – affidavit of Desmond Jack at [16].

[182] This statement, in my view, indicates that the lighting of fires for the purposes of cooking food while out on country is a right that is exercised by the claimants, and one that was exercised by their predecessors. Claimants today teach their children these methods of living off the land in the same way they were taught by their predecessors. I consider, therefore, that the material speaks to the right as one held pursuant to the traditional laws and customs of the group.

[183] I consider, therefore, that the right to light fires for domestic purposes, but not for the clearance of vegetation, is prima facie, established.

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

[184] From the statements made by members of the claim group in the application before me, it is clear that they assert a right to maintain and protect sites and places on or in the application area that are important under their traditional laws and customs. Further, I consider that these statements indicate that claimants understand that this is, in fact, their obligation as the rightful owners of the area, pursuant to their laws and customs. For example, one claimant states that:

> I spend a lot of time out on the application area, protecting sacred sites. I always go out with CLC and the anthropologists, because I know the sites. I am involved in clearances, with the CLC and the Aboriginal Areas Protection Authority, to make sure mining doesn't damage any sites. Just lately, I helped to do a clearance for an exploration company on the application area. I went out with [name removed], [name removed], [name removed] and other people with knowledge. When I am out hunting, I also check the sacred sites, to make sure there is no damage. I have been trying to put a fence up at *Imarnte*, near Gumtree Bore, because the cattle are going through there. That's a really sacred place. All those sacred sites we need to really wake up and do those things; put the fence up and protect those places. Then we can teach our kids about those places. They will be there forever and we have to show our kids because that's our culture. We've been worrying about that fence for a long time now, nearly three or four years – affidavit of Desmond Jack at [18].

[185] In addition to statements of this nature, claimants also speak to the way in which their grandparents used to visit sacred sites across the application area, to ensure that no damage to those places had occurred (see for example, affidavit of Jeanette Ungwanaka at [8]).

[186] With this type of material speaking directly to the existence of such a right before me, I consider that a right to access and maintain and protect sites and places within the application area is, prima facie, established.

The right to participate in certain activities on the land and waters and the right to privacy in the exercise and enjoyment of those activities

[187] The particular activities that make up the substance of this right are set out in Schedule E and include:

- cultural activities;
- ceremonies;
- meetings;
- cultural practices relating to birth and death including burial rites; and
- teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs.

[188] It is my understanding that there are two components to this right. The first encompasses a right to participate in the above activities, and the second encompasses a right to privacy in the exercise and enjoyment of those activities.

[189] Regarding the first component, I consider that there is ample information before me that speaks to a right of the members of the claim group to participate in the activities described. For example, regarding a right to participate in ceremonies, and teaching the physical and spiritual attributes of sites and places on the land and waters, one claimant states that:

> There are sacred men's sites on the application area that are used for initiations and big ceremonies. I taught my sons about the country and about sacred sites, same way as my grandfather. I'd say "you can't go that way, that's for men". I have to pass on the knowledge. We still do Young Men's Business on the application area. Both my older sons went through the Law at Titjikala. That's how we pass on *Imarnte* Law to the younger generations. Then the old men took them out on the application area and taught them the stories and the sites for our country. I didn't put my boys through the Law, that's for the "grandfather" generation. The fathers, we stay home and cook – affidavit of Desmond Jack at [14].

[190] Regarding a right to participate in ceremonies and cultural activities, one claimant states that:

> My mother knows all the songs and stories for *Imarnte* country. She used to dance and sing for culture. She was taught by all the old ladies, [name removed] and [name removed], a long time ago,

> on the application area. [name removed] was [name removed] grandmother. She's passed away now. When they were dancing for ceremony, the ladies would paint themselves up. They would make the white paint from the lime rocks on the application area – affidavit of Jeanette Ungwanaka at [15].

[191] In this way, I consider that there is a prima facie case for the existence of these rights, held by the native title claim group pursuant to their traditional laws and customs.

[192] Regarding the second component of the right, it is my view that a claim to a right to privacy in the enjoyment of certain activities contains elements of exclusivity in its nature. That is, the native title claim group, in asserting the right to privacy, seek to exert control over the application area and an ability to prevent access to certain areas by persons who are not members of the native title claim group. As a result, it is my view that this right as expressed may be problematic when expressed in non-exclusive terms.

[193] As I have explained in my reasons above at s 190B(4), however, following the list of rights claimed in Schedule E, the applicant has set out a number of qualifications on the rights claimed. Paragraph [5] states that: '[t]he 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'. Consequently, it is my understanding that the native title rights and interests claimed are limited, being subject to the rights and interests of the pastoral lessee over the application area. In this way, I do not consider that the right to privacy in the enjoyment and exercise of the particular activities expressed in Schedule E is exclusive in its nature and/or substance. It is further my view that the information contained in the application (that I have excerpted above) speaks to a right of the native title claim group to undertake those activities in private.

[194] Noting the information of the type above that speaks to such a right, and in light of my view regarding a right to privacy, I consider that the right to participate in certain activities on the land and waters of the application area, and a right to privacy in the exercise and enjoyment of those activities is, prima facie, established.

The right to speak for country and to make decisions about the use and enjoyment of the land and waters

[195] This right is further qualified in Schedule E and is stated as 'the right to speak for country and 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'.

[196] The Court has generally been reluctant to recognise a non-exclusive right to speak for country and/or to make decisions about the use and enjoyment of land and waters, noting that these rights are the key elements that have been identified by the Court as comprising exclusive

native title rights and interests (see my reasons above regarding a right to exclusive possession). In *Ward HC*, the High Court held that '[t]he expression "possession, occupation, use and enjoyment… to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land', and that to 'break the expression into its constituent elements is apt to mislead' – at [89]. Following this decision, the Full Federal Court, in *Northern Territory v Alyawarr* [2005] FCAFC 135 found that 'the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world' – at [148].

[197] There have, however, been a number of cases where the Court has been willing to recognise a non-exclusive right of this nature, where the operation of the right is limited only as against the native title holders, and/or the persons who consider themselves governed by the traditional laws and customs of the native title holders. For instance, in *De Rose v State of South Australia (No 2)* [2005] FCAFC 110 (*De Rose*), the Full Court of the Federal Court recognised a right of the native title holders to 'make decisions about the use and enjoyment of the determination area by Aboriginal people who recognize themselves to be governed by the traditional laws and customs acknowledged by the *Ngararitja*' [para 3(1)]. Similarly, in *Mundraby v Queensland* [2006] FCA 436 (*Mundraby*), the Court recognised a non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are governed by the traditional laws acknowledged, and the traditional customs observed by, the native title holders'– at [para 3(c)(ii)].

[198] In my view, the material before me does speak to a right of the native title claim group to speak for country and make decisions about the use and enjoyment of country. For example, one claimant states that:

> I have the right to go walking and hunting and camping over *Imarnte* country, including the application area, anytime I like because it's my country. Other Aboriginal people, who are not from *Imarnte* country must come and ask permission before they come onto our land. They know they have to ask first. If they want to go hunting or camping or gathering bush tucker on our country, they would have to come and ask the senior knowledgeable people, like [name removed], when he's here, or me. A person must know the country before anyone can speak for country and make decisions. That's the same as my grandfather taught me; you can't go bush in another person's country without asking first. I have to sit down and wait for the old people to tell me. Same too, when they come to Titjikala (and the application area), they gotta do the same thing. Because we got different culture, different sites – affidavit of Desmond Jack at [22].

[199] I note that the claimant explains the way in which the laws and customs surrounding who can speak for country have been passed down to him by his grandfather, in accordance with traditional patterns of teaching. Consequently, in light of the material of this nature before me, and my reasoning above, I consider that the non-exclusive right to speak for country and make decisions about the use and enjoyment of country by those Aboriginal people who recognise

themselves to be governed by the traditional laws and customs acknowledged by the native title holders, is, prima facie, established.

The right to share or exchange natural resources obtained on or from the land and waters

[200] The following statement by a member of the claim group is an example of the information before me that I consider speaks to the existence of this right. The claimant states that:

> The younger people come out too, and we teach them how to hunt. My mum also collects *ininti* seeds from the application area to make bracelets and necklaces, and wood from the fruit tree to make coolamons and wooden animals. She sells them in the Art Centre. Sometimes, she gives them as presents, like to say "thank you". We did that when some ladies visited from Melbourne and worked in the Art Centre for a month. When they left, we gave them as presents. We also collected red ochre from the application area, for painting – affidavit of Jeanette Ungwanaka at [19].

[201] From the information in the application, it is my understanding that the claimants and their predecessors have taken natural resources from the application area since at least settlement of the area, in accordance with their understanding that as the owners of that country, they have a right to do so. The information indicates that this understanding and knowledge has been passed down through the generations through traditional methods of teaching under the laws and customs of the group. In light of statements of the type above, I understand that one purpose for the collection of such resources, was so that they might be shared with, or exchanged with, other persons, whether they be native title holders or persons outside of the native title claim group.

[202] Consequently, I consider that the material speaks to the right as one that exists pursuant to the traditional laws and customs of the group, and that it is, prima facie, established.

The right to be accompanied on the land and waters by non-native title holders

[203] The persons described as non-native title holders in relation to this right are set out in Schedule E as:

> (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.

[204] In my view, there is various information before me that speaks to the existence of such a right. For example, one claimant states that:

> My mother and I often go out with anthropologists and CLC people because we are *apmereke-artweye* and *kwertengerle* for the application area. When we were doing the research for this native title claim, my mother and I went out with Desmond Jack, [name removed], and lots of other people to show them the country. Sometimes I go out with CLC when we need to protect sites, like when we did the sacred site clearance over the application area for Tellus, an exploration company, in 2012 – affidavit of Jeanette Ungwanaka at [21].

[205] It is my understanding of the information contained in the application, that while the native title claim group assert the right to control who comes onto the application area, that there are various circumstances which involve non-*Imarnte* people coming onto the application area, and that these occurrences are provided for by the laws and customs of the group. In my view, certain statements indicate that at the time at which the grandparents of the claimants were occupying the application area (which, as per my reasons above at s 190B(5)(a) I understand to correspond with the time at which settlement occurred), other non-*Imarnte* Indigenous persons sought to access, and came onto, the application area, to fish and hunt, but were required to be accompanied by a native title holder with knowledge of that area (see for example the affidavit of Desmond Jack at [22]). All of the claimants speak to the rules that surround such persons coming onto their country.

[206] In this way, I consider that the information within the application speaks to the right as one that exists pursuant to the traditional laws and customs of the native title holders, and that it is, prima facie, established.

Conclusion

[207] 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.

[208] In being satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with some part of the application area, it is my understanding that the use of the word 'traditional' is referable to the definition of that term determined by the High Court in *Yorta Yorta*. Consequently, I consider that the material must

demonstrate how the connection with the land and waters is in accordance with the laws and customs of a group or society having their origin in a pre-contact society – *Gudjala 2007* at [89].

[209] The explanatory memorandum to the Native Title Amendment Bill 1997 states that the connection referred to must amount to more than a 'transitory' or 'intermittent non-native title access' – at [29.19]. The High Court in *Yorta Yorta* commented that the connection required at s 190B(7) 'strongly suggests the need for an actual presence on land' – at [184].

[210] In *Doepel*, Mansfield J described the task of the Registrar's delegate at s 190B(7) in the following way:

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [18].

[211] In this way, I understand that the application must provide material that goes directly to the particular matters prescribed by s 190B(7).

[212] In my view, Schedule M contains material of this nature. Noting that the focus is to be upon the relationship of one member of the claim group with the application area, I have set out below the information pertaining to the traditional physical connection of one particular member of the group with the area, namely Jeanette Ungwanaka.

[213] Being one of the applicant persons authorised by the native title claim group to make the application, and with her mother listed in the genealogies contained in Schedule A, I am satisfied that Ms Ungwanaka is a member of the native title claim group.

[214] Schedule M provides the following information about Ms Ungwanaka:

- she was born on Maryvale Station on the application area in 1969 and grew up there;
- as a child and young woman she would travel by foot, by camel and by car all over Maryvale Station;
- she and her family would camp in traditional shelters, hunt for kangaroo and goanna, gather bush foods and bush medicines, and collect water from soakages on the application area;
- Ms Ungwanaka also learnt about country from the senior *Imarnte* women as they travelled across and spent time on the application area;
- today Ms Ungwanaka lives at Titjikala, a Community Living Area in the centre of the claim area;
- she regularly accesses the area to go hunting and to collect bush foods;

- she takes her children swimming at certain water holes on the application area;
- with her mother, she collects *ininti* seeds from the application area and wood from fruit trees to make jewellery, coolamons and wooden animals;
- Ms Ungwanaka and her mother also access the application area to take care of sites;
- together they take younger women out on the application area to pass on knowledge about country.

[215] In addition to the information contained in Schedule M, Ms Ungwanaka is one of the applicant persons who has sworn an affidavit that in my view also speaks to the matters of s 190B(7). The following statement is an example of this material:

> I was born at the old village in 1969 and grew up on the application area. When we were children, I used to go out camping and hunting on the application area with all my family – my father, my mother, my grandparents and my brothers. We used to like to camp at Village Dam and hunt for kangaroo. During those trips, my mother taught me all about country, like where the soakages are, how to find bush tucker and how to collect bush medicine after the rains. There's an important soakage at Mt Charlotte and another one at Mt Burrell. We used to go for picnics there, and swim in the rock holes and take water to drink from the soakages – at [14].

[216] From the material of this nature contained in the application, it is clear, in my view, that Ms Ungwanaka has spent the most part of her life on the application area, such that I am satisfied she has a physical connection with the area. As to whether this physical connection can be said to be traditional, I have set out above at s 190B(5)(b) the reasons for which I consider the factual basis sufficient to support an assertion of traditional laws and customs. I have also set out my understanding of the various elements of that system of traditional laws and customs evidenced in the factual basis material. Among others, those elements include traditional patterns of teaching involving senior knowledgeable members of the group taking the younger generations out on country to pass on knowledge about country, and individual responsibilities to care for and look after country. In my view, both these elements are demonstrated in the material before me addressing the requirement at s 190B(7). Consequently, I am satisfied that Ms Ungwanaka, a member of the native title claim group, has a traditional physical connection with the application area.

[217] 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.

[218] 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)

[219] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment provides that there are no determinations of native title that cover any part of the application area.

Section 61A(2)

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

Section 61A(3)

[221] 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. Paragraph [4] of Schedule E of the application states that '[u]nless any extinguishment of native title rights and interests must be disregarded the native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others'.

Conclusion

[222] 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.

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

Section 190B(9)(a)

[224] Schedule Q includes a statement that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[225] Schedule P states 'not applicable' in relation to this requirement. I take this to mean that the application area does not cover any offshore waters or offshore place.

Section 190B(9)(c)

[226] I do not consider that there is anything in the application before me that suggests that the native title rights and interests have been otherwise extinguished.

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*]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Maryvale Pastoral Lease
NNTT file no.	DC2015/005
Federal Court of Australia file no.	NTD35/2015

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:

24 June 2015

Date application entered on Register:

9 September 2015

Applicant:

[As per the Schedule]

Applicant's address for service:

[As per the Schedule]

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

[As per the Schedule]