National Native Title Tribunal

Registration test decision

Application name	Henbury Pastoral Lease
Name of applicant	Bruce Breadon, Baydon Williams, Christobel Swan, Felix Armstrong, Gordon Lucky, Kevin Ungwanaka
NNTT file no.	DC2016/004
Federal Court of Australia file no.	NTD47/2016
Date application made	6 September 2016
Date of Decision	9 December 2016

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 reasons: 21 December 2016

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Henbury Pastoral Lease native title determination application (NTD44/2016) to the Native Title Registrar (the Registrar) on 1 September 2016 pursuant to s 63 of the Act[1]. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[3] Given that the claimant application was made on 1 September 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. I have reached the view that the claim in the application must be accepted for registration and this document sets out my reasons, as the delegate of the Registrar, for my decision not to accept the claim for registration pursuant to s 190A of the Act.

Application overview and background

[4] The Henbury Pastoral Lease native title determination application (Henbury) is located south east of Alice Springs and is made over Perpetual Pastoral Leave 1094, areas of crown land, conservation reserve and stock route.

[5] A future act notice in relation to the grant of a mining exploration tenement application (EL31297) was issued pursuant to s 29 of the Act by the Northern Territory government. The notification date was 10 August 2016. The Henbury claimant application has been filed over the area affected by this notice within the required three-month timeframe. I have used my best endeavors to finish considering the claim by the end of four months after the notification day, that is 9 December 2016—see s 190A(2)(f).

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

Information considered when making the decision

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

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

[7] As required by s 190A(3)(a), I have had regard to information in the application and its accompanying documents.

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

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

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

[9] The Northern Territory Government has not provided any submissions in relation to the application of the registration test.

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

[10] I have also considered information contained in an overlap analysis and geospatial assessment prepared by the Tribunal's Geospatial Services dated 14 September 2016 (the geospatial report).

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

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

Description of the area covered by the application

[12] Schedule B describes the area covered by the application as NT Portions 657, 551, 1054, 3896 and 5169. Schedule B also describes areas within those boundaries that are not covered by the application:

1. NT Portions 1226, 3812, 3813, 3814, 4392;

2. Roads including parts of the Stuart Highway, Ernest Giles Road, Tempe Downs Road, Ilamurta Springs Access Road, Boggy Hole Access Road, a road from the Henbury Station Homestead to the Stuart Highway, a road from Ernest Giles Road to the Henbury Meteorite Conservation Park; and
3. by way of general exclusion statements.

[13] Schedule C refers to Attachment A which is a colour copy of an A4 map prepared by the Central Land Council (04/03/2016) titled 'Henbury PPL Native Title Determination Application' that includes the application area depicted by green cross hachure; five (5) insets showing areas of interest in greater detail; communities, homesteads and landmarks shown and labelled; a tenure background with NT Portion identifiers shown; Stuart Highway and other roads shown as red lines; the Central Australian Railway; scalebar, northpoint, coordinate grid; notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[14] The map and description together provide information in relation to the external boundaries of the area covered by the application which allows me to be reasonably certain of the location of those boundaries on the surface of the earth. The specific and general exclusion statements used to describe areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that may fall within the categories described and are therefore no subject to the claim.

[15] The geospatial report makes the assessment that the description and the map are consistent with each other such that the area covered by the application is readily identifiable. I agree with that assessment.

[16] 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.

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

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and is
- not on 'the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—at [37].

[18] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[19] There are two key paragraphs describing the native title claim group at Schedule A, which are not included in the text quoted below. However, I refer to them in summary, as they add some context to understand the regulation of membership of the native title claim group, which is described as follows:

> **Membership of the native title claim group**
>
> 7. In accordance with the claimants' system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:
>
> (a) descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding groups ("the ancestors"):
>
> **INTEYERE** (Pertame (Southern Arrernte); Ngale/Mpetyane)
> Descendants of Ingkinbora and his son Nakinkaka:
> **Policeman Jack Kwalba**
> Tim Armstrong (dcd) - Felix Armstrong [FFF], Brian Forrester [MFF], Gordon Lucky [MFF] and Robert Armstrong [FFF] and their siblings and descendants.
> Pauline Mauwi (dcd) - Glenys Porter, Barry Abbott [MMF] and their siblings and descendants.
> **TWENGE** (Pertame (Southern Arrernte); Pwerrerle/Kemarre)
> Descendants of Ililtjilkana and his son Pannikin Baningka, Pannikin's wife Polly Ngeliljika and their daughter Albertine (Florie) who was conceived at Twenge:
> Stanley and Christobel Swan and siblings - their children and descendants.
> **IPMENGKERE** (Pertame (Southern Arrernte); Ngale/Mpetyane)
> Descendants of Moses Ungwanaka and Jessie (aka Grace):
> **William Ungwanaka**
> John Ungwanaka (dcd) - Elfrieda Ungwanaka [FF] and siblings and their descendants.
> Mary Ungwanaka (dcd) - Carlene Ungwanaka [MF] and siblings and descendants.
> Paul Ungwanaka (dcd) - Christopher Ungwanaka [FF] and siblings and their descendants.
> Nancy Ebatarintja (nee Ungwanaka) (dcd) - Crystal Ebatarintja [MF] and siblings and their descendants.
> Nahasson Ungwanaka (dcd) - Eileen and Arfa Ungwanaka [FF] and siblings and their descendants]
> Kingsley Ungwanaka (dcd) - Kevin Ungwanaka [FF] and descendants.
> Pauline Ungwanaka (dcd) - Philemon Kumantjara [MF] and siblings and their descendants]
> Merle Ungwanaka (dcd) - Sharon and David Namitjira [MF] and siblings and their descendants.
> **Eileen Ungwanaka**
> Descendants do not assert interests in Ipmengkere.
> **Elvida Ungwanaka**

Mavis Rutjinama and Grace Robinja) [MF] and their siblings (all dcd) and descendants.

Johnson Breadon

Bruce Breadon and Bessie Liddle [FF] and siblings (all dcd) - their children and descendants.

Glenys Porter, Barry Abbott [MF] and siblings and descendants.

Descendants of Ltjabakuka:

Mattheus Kaltirbuka

Elsa, Rudolf, Jutta, Frederick, Susanna and Adolf – no known surviving descendants.

Timotheus (dcd) – Aloysius and Phillipine Gorey [FFF] and their siblings, classificatory siblings and descendants.

Dorothea (dcd) – Rachel McNamara [FMF] and siblings, classificatory siblings and descendants.

Amanda Kantawarra (dcd) – Edna Kantawarra [MF] and siblings and descendants.

Descendants of Kurubila, his son Nameia, and grandson Larry Aremela and Larry's wife Nellie Ulbolbuna:

Molly Tjalameinta

Jean Forrester and Alec Forrester [MM] (dcd) - Robert Armstrong [MMM] and siblings and descendants; Fiona, Grace, Nicola and Craig Forrester [FMM] and descendants.

Descendants of Aratiwuka, his son Ltutjiaka, grandson Kengkuneaka and great grandson Erota:

Daisy

Sarah (aka Tiny) Entata [MMF] and descendants.

Elsie

Felix Armstrong [MF] and siblings and descendants.

Fred Tjantji, Itjata and Browny

No known descendants.

MURTIKUTJARA (borderlands Pertame (Southern Arrernte)/Matuntara Luritja; Ngale/Mpetyane)

Descendants of Bobby Mulai – Sarah (aka Tiny) Entata [MF] and descendants.

Descendants of Jessie (aka Grace) and her son Johnson Breadon: Bruce Breadon and Bessie Liddle [FM] and siblings (all dcd) - their children and descendants.

NTHAREYE (Western Arrernte; Ngale/Mpetyane)

Descendants of Tatuka, his son, Tankintja and his children, three classificatory siblings – two brothers Erenkeraka and Salamo Eratara and their sister Kulta.

Erenkeraka

Albertina and Paulas Ebalanga (dcd) – no known surviving descendants.

Magdalena Katabukaia (dcd) – Graham Ebatarinja and siblings [FMM] and descendants.

Titus Mamerintja (dcd) – Titus and siblings [FF] and descendants.

Emilie Ljukuta (dcd) – Noreen and siblings [FMM] and descendants; Lenie and siblings [FFM] and descendants.

Salamo Eratara

Ernamba, Mulatjiba, Anna, Miriam and Jonas – no known surviving descendants.

Abel (dcd) – Anita and siblings [FF] and descendants (Conrad Ratara [FFF]).

Anna (dcd) – Isobel [FMF] and classificatory siblings their descendants.

Kulta
Lionel Kantawarra (dcd) – Nola Kantawarra [FMMM] and siblings and descendants.

(b) recognised as members of one (or more) of the landholding group by the senior descent based members of the landholding group on the basis of non-descent connections to the estate:
TWENGE (Pertame (Southern Arrernte); Pwerrerle/Kemarre)
Stanley and Christobel Swan and siblings - mother's and own conception place.
Alice Ngalken - conception place.
Sarah (aka Tiny) Entata - father's conception place.
IPMENGKERE (Pertame (Southern Arrernte); Ngale/Mpetyane)
Kevin Coulthard - father's (Jack Coulthard, senior kwertengerle for Ipmengkere) and own knowledge and responsibility for Dreamings for Ipmengkere (and married to Elfrieda Ungwanaka). His rights in the estate are transmissible to his children.
MURTIKUTJARA (borderlands Pertame (Southern Arrernte)/Matuntara Luritja; Ngale/Mpetyane)
Bruce Breaden and Bessie Liddle and siblings (all dcd) - burial of father, Johnson Breaden, in the estate and local knowledge of the estate.
ANILTIKA (Luritja; Ngale/Mpetyane)
Baydon Williams – conception place of great grandfather and mother.

8. The ancestors identified in paragraph 7(a) are the uppermost generation of the known ancestors of members of the native title claim group.

[20] Although a long and complex description, the identification of the native title claim group can essentially be narrowed down to two grounds governing membership of the native title claim group:

(a) descent (by birth relationship or adoption) from the named and unnamed ancestors (those named being the uppermost generation of the known ancestors)—at [7(a)]; and

(b) for those not descended from these ancestors, membership can be recognised by senior members of the group on the basis of non-descent connection—conception in and/or birthplace affiliation with an estate, long-term residence in an estate, possession of traditional knowledge, authority and responsibility for an estate, shared Dreaming tracks and or places of significance, burial of an ancestor in an estate—at [7(b)] and [9].

[21] I note that the six estates (landholding groups) connected to the country covered by the application, which together comprise the native title claim group, are: Inteyere, Twenge, Ipmengkere, Murtikutjura, Aniltika and Nthareye.

[22] Paragraphs 1 through 6 provide contextual information about the regional society, the areas of land and waters affiliated with each estate group, and other such matters. The statements at paragraphs 9 to 13 relate to the basis on which members of the native title claim group possess rights and interests in land, including regulation of rights and interests in relation to the particular estates. These, in my view, do not go to identifying the native title claim group but go

to clarifying or qualifying how rights and interests are held by the claim group. They are, in summary:

(i) whilst rules in relation to succession exist under the native title claim group's traditional law and custom, there are no instances of succession in relation to the area covered by the application—at [9];
(ii) possession of rights and interests is at its widest range for those whose connection to country is based on descent (that is, descent connection through father's father and mother's father)—at [10]-[11];
(iii) more limited rights and interests in land are possessed by those members with non-descent connection to country—at [12];
(iv) members of the claim group may be members of more than one estate (for example, through different grandparental links to multiple estates)—at [13].

[23] I note that the description provides that descent from an ancestor is 'by birth relationship or adoption'—at [7(a)]. The application does not provide any qualification that indicates whether adoption is according to traditional laws and customs, Australian law or otherwise. In my view, I can accept a description that provides for membership of the group by adoption without specific criteria to define the process. In this case, membership of landholding groups appears to be strictly governed and this is clearly articulated in the information about the claim group's traditional laws and customs, and, in my view, it would follow that recruitment by adoption will be regulated to the same degree. I do not believe that it is for me to question the means by which adoption criteria is applied by the group. It is sufficient for me to understand that a person is a member of the claim group if he/she falls within the two principles outlined above, which may include adoptive descent.

[24] It may be that some factual inquiry is required to ascertain how members of the claim group are descended from the named apical ancestors or how a person is affiliated with a particular estate group or groups. However, this would not mean that the group had not been sufficiently described. In my view, the description of the group is capable of being readily understood and is sufficiently clear so that it can be ascertained whether any particular person is in that group.

[25] The application satisfies/does not satisfy 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.

[26] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and

interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration.

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

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

> 1. The native title rights and interest of the native title holders are the non-exclusive rights possessed under and exercisable in accordance with their traditional laws and customs, being:
> (a) The right to access and travel over any part of the land and waters;
> (b) The right to live on the land, and for that purpose, to camp, erect shelters and other structures;
> (c) The right to hunt, gather and fish on the lands and waters;
> (d) The right to take and use the natural resources of the land and waters;
> (e) The right to access, take and use natural water on or in the land, except water captured by holders of Perpetual Pastoral Lease 1094;
> (f) The right to light fires for domestic purposes, but not for the clearance of vegetation;
> (g) The right to share or exchange natural resources obtained on or from land and waters, including traditional items made from the natural resources;
> (h) 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;
> (i) The right to conduct and participate in the following activities on the land and waters:
> (i) cultural activities;
> (ii) ceremonies;
> (iii) meetings;
> (iv) cultural practices relating to birth and death including burial sites; and
> (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;
> (j) The right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such person to the determination area;
> (k) The right to be accompanied on the land and waters by persons who, though not native title holders, are:
> (i) people required by traditional law and customs 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.
> (l) The right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

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

[28] When read together with the description at Schedule B of the area covered by the application, I am of the view that the native title rights and interests claimed can be 'properly understood'. There is also 'no inherent or explicit contradiction' in the description which prevents me from reaching the level of satisfaction required by s 190B(4)—*Doepel* at [123]. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[29] 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

[30] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*[2], Mansfield J stated that:

[2] This was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85].

> 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].

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

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

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92]; and
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].

[33] 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)

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

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

Area of the application

[35] Schedule A states that the application area comprises parts of Pertame (Southern) Arrernte, Western Arrernte and Matuntara Luritja territory. The native title claim group comprises of the

members of the Inteyere, Twenge, lpmengkere, Mmtikutjara, Aniltika and Nthareye landholding groups ("the landholding groups"). These six landholding groups are named after their respective estate areas and affiliated to the following parts of the application area:

4. Inteyere—eastern
5. Twenge—east-central
6. Ipmengkere—north, west-central
7. Murtikutjura—south-western
8. Aniltika—north-western
9. Nthareye—north-western corner

[36] These estates are said to extend beyond the boundaries of the application area—at [1]-[3].

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

[37] Schedule F states connection to the application area is through the traditional laws and customs acknowledged and observed by the native title claim group since the time of British sovereignty and first contact with non-Aboriginal people. Members of the claim group have inherited rights and interests in the area through their descent from ancestors or have acquired them on the basis of non-descent connections to an estate—at [4]. These are the six countries or estates affiliated with the Inteyere, Twenge, Ipmengkere, Mmti- kutjara, Aniltika and Nthareye landholding groups—at [7].

[38] All the persons who comprise the applicant speak in their affidavits of their parents, grandparents and great grandparents who were born and grew up on, or proximate to, Henbury Station. Bruce Breaden's grandmother went to live on Henbury Station, where his father was born and grew up—at [8]. Christobel Swan's mother was born near Twenge on Henbury Station, her father spent all his life there—at [8]. Felix Armstrong's great grandfather 'grew up and walked around Henbury Station, his grandfather was born at Twenge, his grandmother was also from Henbury—at [8]. Gordon Lucky's mother and Felix Armstrong's father were siblings, and his parents also spent their lives working and living on Henbury—at [9].

[39] Each of the persons comprising the applicant attests to rights and interests held in relation to the country of their landholding group. Baydon Williams has rights and interests in Ipmengkere country through his mother's mother; Christobel Swan has rights and interests in Twenge country through her 'mother's borning place and [her] conception place'—at [7].

[40] Bruce Breadon would 'walk all over that country with his father 'learning about his country, camping, hunting, building shelters – 'he lived on that country all his life—[9]-[11]; 'learnt all about country from those old men'—at [14]. Felix Armstrong's predecessors lived in humpies, 'camping on that country' and 'hunting for bush food', making shields and boomerangs; his grandfather worked on Henbury Station , his father was a boundary rider—at [9]-[10].

[41] Kevin Ungwanaka's grandfather's mother was born on Henbury station and 'grew up there and walking around all that country with her mother', they stayed to look after the country and its sacred sites—at [8]-[11]. His father and grandparents moved back and forth between Hermannsburg[3] and Henbury throughout their lives—at [10]. He describes the lives of his forebears, working on the stations, walking all over the country:

> They got most of their food from the bush there. They went hunting all around there like kangaroos and fish from the waterhole. They used to get bush turkey, bush plum, echidna, goanna and all that food. When they ran into bush food they would grab it and eat it. They used to get water from that spring that runs all the time. Plenty of water around there. They used to camp in windbreaks and humpies from trees, bark, anything that makes a good shade and used fires to cook their dinner. They were still making boomerangs and spears then from the trees on that country. My niece when she was about 10 years old she was playing on the hill near the waterhole at Ipmengkere and they found an old coolamon used by my family. They used to live there and use all that wood from around there. Early times the old people used to take water for there in the coolamon down to Bowra bore area to make rain, they used to be rainmakers. That old rainmaker passed away there at Ipmengkere, mission time then—at [11].

[42] Felix Armstrong has rights and interests in Inteyere country through his father and his predecessors and Murtikutjara through his mother's father—at [7]. His father was born at Twenge and worked on Henbury Station as a stockman and boundary rider which allowed him and his family to 'walk all over that country, camping and hunting—at [10].

[43] Gordon Lucky also has rights and interests in Inteyere country through his mother and his mother's father. His great grandfather, his grandfather and his mother were all born at the same place on Henbury Station. They all lived and worked on the station – 'growing up walking around that country', hunting bush food, living in humpies. His mother's father was born on at Twenge on Henbury Station:

> He grew up in the camp at the sandhill near the homestead. A lot of people were camping there then. They were living in humpies then made of mulga and gum leaves. They were travelling around all over then camping and getting bush food on that country. They mainly went hunting for bush food then like kangaroos, emu, witchetty grub, honey ants, all that and cooked their food on fires. They got water from the soakage in the creek and from claypan and waterhole—at [8].

[44] Some of the predecessors of members of the native title claim group where born and grew up in areas outside the application area (Hermansberg, Alice Springs, surrounding stations) but spent much of their lives travelling up and down and walking around country on Henbury Station. For example, Baydon Williams speaks of his mother and himself being born at Hermannsburg but moving between Henbury Station and Hermannsburg. His grandparents, and their parents before them, belonged to 'Ipmengkere country on Henbury Station' – walking all around the area camping and hunting, working on the stock route, using water from the river, fishing in the waterhole, using the mulga trees to make boomerangs, shields and spears. His

[3] 125km southwest of Alice Springs.

grandfather and his father would visit Anitilka country for hunting, getting bush food and for looking after their sacred sites—at [9]-[12].

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

[45] Schedule F includes the statement that members of the native title claim group have maintained their connection with the application area 'notwithstanding the presence and activities of non-Aboriginal people in the region—at [20]. Schedules G and M list the activities currently undertaken by the claim group and the traditional physical connection of certain claimants, respectively.

[46] As referred to earlier, the native title claim group comprises of six landholding groups connected to six countries covered by the application—Schedule A at [1] and [3]. Each of the claimants attests in their affidavit to their membership of one of these groups and by virtue of this, their connection to and knowledge of their particular country. They each have knowledge of their country passed onto them by the predecessors. The native title claim group continues to hunt and camp in the area covered by the application area, living close to the area or on Henbury Station itself. They take their children and grandchildren out to teach them how to catch and kill bush tucker—teaching them about the landscapes, where to find water and the wood to make boomerangs and other tools, and the songs, stories and sites for their country.

[47] Kevin Ungwanaka, although born in Alice Springs, was taken back to his Ipmengkere country as a child for camping, hunting, learning about his country with his father and his father's brothers and grandfather and those old aunties'—at [13]. He went through 'Young Men's Business' and was taught about his country 'proper way' – taken to all the places on his country and 'taught the songs and stories right there on [his] country'—at [10]. Today Kevin Ungwanaka lives at Hermannsburg but still goes to his country at Ipmengkere on Henbury station. His family still goes camping, hunting and getting bush food (fish, goanna, perentie) and bush medicine and water from the rockhole—at [14].

[48] Bruce Breadon has worked on stations, including Henbury, all his life and now goes out onto country to care for sacred sites, speaking for and making decisions about his country—[12] and [18]. Christobel Swan grew up on Henbury Station, lived and worked there with her brothers and sisters—travelling, camping and hunting, and learning from her father and her mother's sisters—at [14]. She takes the younger generation out hunting and looking for bush tucker, telling them stories and teaching about country, conducting ceremonies and singing and sharing the songs and dances of her country—at [18]-[20].

[49] Baydon Williams was born and grew up at Hermannsburg. He lives on an outstation proximate to the application area and regularly accesses his Ipmengkere country – camping along the creek, getting water from the waterhole, hunting, cooking on fires, making tools and teaching his children where to go to get bush food and to understand the places of their country—at [14].

[50] Each of the claimants speaks of collecting bush tucker with their parents and grandparents, being with the old people who are now buried on the application area and being taught the songs and stories for their country. Christobel Swan has taught her children where to get bush food, she takes the young girls out to her country – to visit the sacred sites on Henbury Station, camping, hunting across the area to teach them 'culture, singing and how to dance'—at [18]-[19]. She looks after the women's sites on her country and she speaks for and makes decisions for her country—at [22]. Gordon Lucky lives in Alice Springs as well as at his family's outstation Pantyinteme (located in the middle of Henbury Station). His family still goes hunting and getting bush food, his sisters live there permanently. They cook everything in the bush and take whatever is left over back to the outstation. He and his brother get mulga wood to make boomerangs—at [14].

Consideration

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

[52] The native title claim group is said to comprise of six landholding groups clearly affiliated with six countries or estates situated in and extending beyond the area covered by the application. Members of the claim group attest to their long and continuing association with these countries, including their interconnected spiritual affiliations with the area of the application. The affidavits are replete with examples of the claim group's current association with the six countries that make up the area of the application, with each person attesting to how and where their parents, grandparents and great grandparents were born, where they lived, worked and travelled. They document that their predecessors travelled all over their country—working on the stations, conducting Law business, camping, hunting and teaching and learning the stories and Dreamings—in exercise of those rights and responsibilities connected to their countries and held under their traditional laws and customs.

[53] In my view, there is a clear link between the current claim group's and its predecessors' association with the application area to be found in the application and the affidavits. The information demonstrates the claim group's connection to the land and waters of the application area through descent affiliation to one or more of the countries of the application area. In this way it is clear that this current association has its origins in the preceding generations' association with the area.

[54] For these reasons I am satisfied that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

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

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

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

[57] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala 2007* at [62] and [63]. In my view, there is sufficient factual account in the application and accompanying affidavit material to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

The relevant society

[58] Schedule F includes the following statement:

> The six landholding groups whose members comprise the native title claim group are part of an Anernte-Luritja regional society which includes all Pertame Arrernte and Matuntara Luritja estate groups and their Arrernte and Luritja neighbours with whom they have a close association, for example, through intermarriage, ceremonial connections and mutual estate recognition. Members of this society acknowledge and observe a common body of traditional laws and customs—at [3].

[59] It is under this system of traditional laws and customs that the members of the native title claim group assert to be the owners of the land and waters covered by the application. The rights and interests claimed in the application are held under, and exercised in accordance with, the traditional laws acknowledged and customs observed by the native title claim group. The statements at Schedule F assert that these rights and interests have been held by the group and their ancestors since and before the assertion of British sovereignty and European settlement.

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

[60] Schedule F states that communally held beliefs of this society exist in relation to the system of traditional laws and customs of the native title claim group. The foundation of these is in the *Altyerre/Tjukurpa*:

> …the 'physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions for their continuity, were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *altyerre* or sometimes *tnengkarre* in Arrernte, *tjukurpa* in Luritja, and glossed as "The Dreaming" or "Dreamtime"—at [5].

[61] These Dreaming attributes provide a foundation for the exercise of rights and interests in relation to land and waters and associated spiritual and cultural beliefs. Sites associated with Dreamings form countries or estates affiliated with the Inteyere, Twenge, Ipmengkere, Murtikutjara, Aniltika and Nthareye landholding groups—at [7].

[62] Each of the claimants attests in their affidavits to the details and the date of their birth and the names of up to four generations that preceded them, the names of which are found at Schedule A. While not stated in the application, I understand that sustained European settlement of the region in which the application falls is not likely to have occurred until well into the latter part of the 19th century[5]. In my view, it is reasonable to infer that the Arrernte-Luritja regional society, of which the predecessors of the native title claim group were a part, acknowledged and observed traditional laws and customs in the area of the application at the time British sovereignty was asserted in Australia in 1788, and most certainly at the time of sustained European contact in the late 1800s. The application asserts, and this is illustrated in the affidavit material that accompanies it, that this is the society that has continued largely uninterrupted since that time. That is, a society existed at sovereignty in respect of the area covered by the application, comprised of land holding groups affiliated with particular tracts of country, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived (*Gudjala 2009* at [66]).

Traditional laws and customs of the native title claim group

[63] The application at Schedules A and F contains information about the system under which the claim group's traditional laws and customs exist. As referred to above, the foundation of this system is in the *Altyerre* (the 'Dreaming') which is held to be unchanged from the time of its creation, and has been transmitted to each succeeding generation by the ancestors. Schedule F provides details in relation to the kinship and land tenure systems and the transmission, acknowledgement and observance of the native title claim group's traditional laws and customs.

[64] Rights and interests in an estate are inherited through descent from the ancestors or 'conferred on persons who are accepted as members of a landholding group by senior descent based members of the group on the basis of their non-descent connections to the estate'. Each of the affidavits include information as to the basis on which they hold rights and interests in

[5] Explorer John McDouall Stuart succeeded in traversing Central Australia in 1862, and many of the pastoral stations in the area were only founded from the 1880s.

relation to their estate. Each define their connection: as 'place owners' through their father's father – *pmerekwerteye*, or 'managers' through their mother's father – *kwertengerle*:

> *Pmerekwerteye* and *kwertengerle* are jointly responsible for looking after country, an arrangement that requires the diffusion of knowledge amongst the members of a land-holding group, subject to factors such as age, gender, residence and seniority. As they perform different but complementary roles in relation to ceremonies and land management they are indispensable to each other.

[65] This system in operation is explained by Bruce Breaden in his affidavit:

> I acknowledge and observe the traditional laws and customs of the Matuntara Luritja people and the Pertame (Southern) Arrernte people. Those laws come from the Altyerr ('Dreaming'). According to our traditional law, I have rights and interests in Ipmengkere country through my father and my father's father. They were pmerekwerteye and I am also pmerekwerteye through them. My father's mother's country was Henbury. I also have interests in Murtikutjara country because my father was buried in that country, just south of the application area and I was taught that knowledge. My father had that knowledge and when he passed away I took over. I have that knowledge—at [7].

[66] A kinship system exists that incorporates both actual and classificatory kin relations between people, and also metaphoric relationships between people, their ancestral country and the *Altyerre*. Features of the kinship system include recognition of common spiritual and human ancestors, behavioural rules and sanctions relating to interpersonal relationships, group and individual affiliation with 'Dreaming Beings' associated with particular countries. Complementing the kinship system is another level of social classification based on sections, moieties, affiliations with a subsection and patricouples to which Dreamings are associated.

[67] The group and individuals have spiritual obligations towards the land and waters:

- observation of restrictions imposed by gender, age ritual knowledge and experience, and those imposed by the presence of Dreamings and/or sites of significance on the land and waters.
- members of family groups are responsible for 'looking after country' and transmitting knowledge among their own family group; and
- rights and interests in country are inherited by or conferred upon members of the family group.

[68] The accompanying affidavits support and illustrate the factual statements and assertions found in Schedules A and F of the application. They articulate that members of the claim group possess rights and interests under their traditional laws and customs by virtue of those laws and customs being handed down to them by their ancestors.

[69] Each of the claimants attests to their knowledge of the Dreamings, songs and stories for their estate and for which they have responsibility under their Law. Each is a senior person for the country to which they are affiliated, for which they speak and hold knowledge and have been taught by their forebears and now pass on to the younger generations. Ceremony to teach the Law continues to be held today and is led by senior people—showing young men and women

ceremony, hunting and collecting, teaching about country and showing and protecting special places and sites.

[70] All of the claimants attest to their acknowledgement and observance of the traditional laws and customs of the Pertame (Southern) Arrernte people and that law comes from the *Altyerr*. Each, according to their traditional law, has rights and interests in the application area to one or two of the six estates / countries. These senior people speak for and make decisions about the countries that comprise the area covered by the application.

[71] Baydon Williams went through the 'Law for Ipmengkere and Aniltika':

> I am kwertengerl for Ipmengkere, so I have to know that. I went through Young Men's Business at Hermannsburg and I learnt all about my country, two books. Those old men, they took me around to all the important places on my country. They took me to all those places and taught me the songs and stories right there on my country. They took me to sacred sites on the application area and taught me the proper way.

[72] Schedule A of the application describes that system under the native title claim group's traditional laws and customs as allowing for membership of the group through birth affiliation and/or such things as long term residence. The system in operation is evidenced by Christobel Swan who attests to having rights and interests in Twenge country because of her birth affiliation and long-term residence on Twenge country. This affiliation gives her knowledge of Dreamings and sites and she has the right to talk for this country because it is her conception place—at [7] and [22].

Consideration

[73] The application and accompanying affidavits provide, in my view, sufficient evidence that there was a society at sovereignty in respect of the claim area, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived (*Gudjala 2009* at—[66]). The statements made in the affidavits demonstrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*—showing an inter-generational transmission of traditional law and custom from the predecessors of the claim group. Together with the information in Schedule F, there are examples that illustrate aspects of the group's traditional law and custom, in respect of the area of the application, pertaining to family and ancestors, rules of affiliation to landholding groups and country, special places and stories, hunting and gathering and the passing on of traditional and cultural knowledge.

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

Reasons for s 190B(5)(c)

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

[76] Schedule F contains many statements that assert the continuity of the native title claim group's traditional laws and customs. The affidavits illustrate and, in my view, demonstrate that these laws and customs have been 'passed from generation to generation by traditional modes of oral transmission, teaching and common practice', and continue to be acknowledged and observed today among the current generations of the claim group—at [13].

[77] This acknowledgement and observance has been possible because the members of the claim group and their predecessors have continued to live and travel through their country, including the area covered by the application. Gordon Lucky and Felix Armstrong have been through 'Young Men's Business'. They were taken around to all the important places on their country. Gordon Lucky was brought back to Henbury from Hermannsberg by the old men: 'They took me to all those places and taught me the songs and stories right there on my country. They took me to sacred sites on the application area and taught me the proper way'—at [15]. Felix Armstrong was taught by his grandfather about his Dreaming so that he learnt it 'proper way'—[15]. Both these men attest to young men still being taught:

> Only the right people, the men who have been through the Law for that country can hear those stories. Its still the same today. When it warms up we go back out with my nephews and show them all that and teach them the Dreamings and the dances. We have to pass it on to the young mob now. We are still teaching young men in private on the country—Gordon Lucky at [16].

[78] Kevin Ungwanaka knows 'all that Law for Ipmengkere'. He says in his affidavit that when he visits sacred sites, his *kwertengerl* (manager) must come with him: 'He is an old man now so he is passing all that knowledge onto me so I can know and so I can pass it on to the younger men'—[15]. All of the claimants attest in their affidavits to walking all through their country with their parents and grandparents, being taught the stories and songs for their country, how to hunt and gather the natural resources and care for important sites and areas. Christobel Swan learnt about her country and her stories from her mother's sisters and other older ladies, teaching her how to dance and sing the songs, who to talk to and who not to, where to go and where not to go, how to hunt and get bush food. She and others are now teaching these same things to their grandchildren – showing them country and teaching the young girls so they know the dances and the stories—[18]. In this way, members of the claim group have continued to practise their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country areas.

[79] In my view there is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Conclusion

[80] 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.

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

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

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

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

Consideration

[83] Schedule E prefaces its description of the claimed native title rights and interests with the following statement: 'The native title rights and interests of the native title holders are the non-exclusive rights possessed under and exercisable in accordance with their traditional laws and customs'. I have grouped together similar rights for the purposes of my consideration and rely also on the factual and affidavit material referred to in my reasons under s 190B(5).

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

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

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

[84] These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[85] The predecessors of the native title claim group have lived in humpies and temporary shelters since Henbury Station was established. Members of the claim group have, through the generations, continued to live on and access the area covered by the application, camping and walking around everywhere, travelling through the area with their parents and grandparents and now with their own children and grandchildren—Bruce Breadon at [9]. The landholding groups have been living and working on Henbury Station for generations, accessing their traditional lands for hunting, ceremony and protecting sacred sites—Christobel Swan at [8]-[14], Kevin Ungwanaka at [9]-[14].

[86] Even when living away from Henbury Station, the claimants attest to continuing to access and travel over their country on Henbury Station—walking in the bush around their country with their families, with their fathers and their father's before them—Bayden Williams at [9] to [13]. Members of the claim group recall the use of fires for cooking and ceremony by their predecessors and continue to light fires while camping, working and travelling through their country; building wind breaks, cooking their food on fires and using water from the soaks—Felix Armstrong at [9]-[11], Gordon Lucky at [8]-[14].

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

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

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

(e) the right to access, take and use natural water on or in the land, except water captured by the holders of Perpetual Pastoral Lease 1094;

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

[88] These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[89] All of the claimants attest to the exercise of these rights, by current members of the claim group and by the generations preceding them. Gordon Luckey would go hunting with his family as a child for emu, kangaroo, wild turkey; he was taught the best spots to find bush food like bush banana—[11] and [14]. He still goes hunting on the claim area, getting wood to make boomerangs and showing his children the best places to find water—[14]. Felix Armstrong also goes hunting and collecting bush tucker on the claim area, sharing what he hunts and collects with his family—at [11]-[13]. Christobel Swan would go all over her country with her family

when she was a child, hunting and collecting bush tucker – witchetty grubs, wild bananas, wild oranges, wild berries, yams, getting water from the soakages—[9]. Today she takes her children, grandchildren and great grandchildren on the claim area, hunting, camping and 'teaching them culture'—[18].

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

(h) 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;

[91] This right is evidenced in the material before me, suggesting the right exists under the traditional laws and customs of the native title claim group.

[92] All of the affidavits include information illustrating that members of the claim group continue to maintain and protect sites and areas of significance under their traditional laws and customs. Bruce Breadon, regularly looks after the sites for which he is responsible and is involved in working with mining companies to tell them 'where they can go and where they can't … they can't damage our sites'—at [16]. Kevin Ungwanaka maintains and protects sites and important places on the application area as *pmerekwertye* for his Ipmengkere country—[16].

[93] I consider that this right can be established, prima facie.

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

(i) cultural activities;
(ii) ceremonies;
(iii) meetings;
(iv) cultural practices relating to birth and death including burial rites; and
(v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;

[94] This right is evidenced in the material before me, suggesting the right exists under the traditional laws and customs of the native title claim group.

[95] All of the claimants attest to the exercise of this right – both during their childhoods with their parents and grandparents and currently in the form of 'Young Man's Business', ceremonial business, meetings on country to care for and manage areas within the claim area and cultural practices in relation to important sites. All attest to passing their knowledge about all of these matters onto the younger generations of the native title claim group.

[96] I consider that this right can be established, prima facie.

(j) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such persons to the dete1mination area;

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

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

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

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

[97] These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[98] As referred to earlier in these reasons, the claim area is affiliated with six land holding groups connected to six countries located in Pertame (Southern) Arrernte, Western Arrernte and Matuntara Luritja territory. The claimants' system of traditional laws and customs regulate who speaks for which country throughout this landholding territory. By implication, and in my view, the affidavits demonstrate this, the traditional laws and customs acknowledged and observed by the native title claim group currently operate to regulate between the six landholding groups the right to speak for particular areas of country (estates) and to make decisions about the use and enjoyment of the land and waters.

[99] Schedule F states that *pmerekwerteye* and *kwertengerle* are jointly responsible for looking after country. Each of the affidavits document the continued to exercise of rights and obligations in relation to the accompaniment on the land and waters of persons who do not 'know' the country. Bruce Breadon states that he is has the right to talk for his country Ipmengkere and Murtikutjara, that he has the right to make decisions about where Aboriginal people who are not native title holders can go on his country—at [18]. Bayden Williams states that he is one of the persons who can take people out onto country who are researching his country to show them and tell them the stories—[19]. Felix Armstrong states that he also makes such decisions and that there will be trouble for people if they go near sites they shouldn't—at [17].

[100] Gordon Lucky states that when mining clearances are done the right people have to be asked first ... people who are not members of the landholding groups, and who do not have knowledge about the country should not take people onto country and tell them about it—at [17]. Christobel Swan states that she has the right to take people onto country when they are doing research as she has the right to talk for her country because it is her conception place—at [21]-[23].

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

(l) the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

[102] I am not satisfied that this claimed right can be established prima facie. Whilst it is a right that has been recognised in determinations of native title in the Northern Territory, I have found no guidance in this application as to its meaning. In my view, as it is expressed, the claimed right is open to wide interpretation and is potentially not a right claimed in relation to land and waters.

[103] I consider that this right cannot be established, prima facie.

Conclusion

[104] 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.

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

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

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

[107] Sufficient material is provided in the affidavits of the claimants to show that the native title claim group has a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in my consideration for both ss 190B(5) and 190B(6), above.

[108] Bruce Breaden's father was born on Henbury Station. He grew up on the station – his family living in humpies, hunting and getting bush food, accessing water and other resources. When his father was working on other stations, the family would always return to live and camp on the application area and get their food and water from the land. Today Mr Breaden regularly resides on the Akanta Land trust (excised from the application area). When not living on the application area, he regularly accesses the application area to uphold his religious responsibilities and to ensure no damage has been done to the sacred sites in his country—Schedule M at [1] and affidavit.

[109] Christobel Swan's mother was born on the application area and spent most of her life living there. Her mother 's father was also born on Henbury Station and lived there most of his life. The family lived mainly near the Twenge waterhole in traditional bush shelters – getting their water from the waterholes or soakages and food by hunting and gathering bush foods. Christobel recalls growing up in the same way and same place as her mother although she was grown up by her mother's sisters on Henbury. Christobel now regularly takes her family to camp at her family's living area which runs through the application area, teaching her children the songs and stories for her country— Schedule M at [2] and affidavit.

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

[111] 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 s61A (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.

[112] 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)

[113] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report of 14 September 2016 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

Section 61A(2)

[114] 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 at (20) states that the application excludes any area where a previous exclusive possession act under s 23B has been done.

Section 61A(3)

[115] 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. The application does not claim the exclusive right.

Conclusion

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

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Section 190B(9)(a)

[118] Schedule Q contains the statement that 'the native title claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown'.

Section 190B(9)(b)

[119] Schedule P provides the statement, 'not applicable' (no offshore place is included in the area covered by the application).

Section 190B(9)(c)

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

Conclusion

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

Procedural and other conditions: s 190C

Subsection 190C(2)
Information etc. required by ss 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[122] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[123] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. This condition is procedural only and simply requires the Registrar to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. I am not required to undertake any merit or qualitative assessment of the material for the purposes—*Doepel* at [16] and also at [35] to [39]. In other words, I must be satisfied that the application contains the prescribed details and other information required of it.

[124] 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)**

[125] This section provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

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

[126] In my view, there is nothing on the face of the application that suggests that it is not brought on behalf of all members of the native title claim group.

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

Name and address for service: s **61(3)**

[128] Part B of the application states on page 50 the name and address for service of the persons who are the applicant.

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

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

[130] Schedule A provides a description of the six landholding groups which comprise the native title claim group and a description of the group's traditional laws and customs that pertain to regulating membership of the native title claim group.

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

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

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

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

Details required by s **62(1)(b)**

[134] 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)*

[135] Schedule B lists those areas both covered and not covered by the application by reference to NT Portion numbers, roads and a general exclusion statement.

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

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

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

[137] Schedule D provides a list of existing tenure and mining interests, the search results of which are attached to the application at Attachment B. The applicant states that the 'searches do not disclose the existence of any historical titles or expired grants or interests over the area covered by the application'.

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

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

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

[139] Schedule F provides a general description of the factual basis for the claim made in the application, and refers to Schedules F and M of the application and affidavits sworn or affirmed by the persons comprising the applicant that accompany the application.

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

[140] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application and refers to Schedule M for further examples of activities

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

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

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

[142] Schedule HA provides the statement 'not applicable' which I take to mean that the applicant is not aware of any such notices.

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

[143] Schedule I provides the details of the notice issued under s 29 to which the application has been made in response.

Conclusion

[144] 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.

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

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

[147] As the Henbury Pastoral Lease application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

[148] 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.

[149] For the condition of s 190C(4) to be satisfied, I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. Schedule R comprises a certification made by the Central Land Council (CLC). As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a). This imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body' which necessarily entails:

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

Identification of the representative body

[150] The Tribunal's geospatial report confirms that the CLC is the only representative body for the whole of the area covered by the application. The certificate states that it is the representative Aboriginal and Torres Strait Islander body responsible for the land and waters covered by this application. It is therefore the only body that could certify the application under s 203BE.

[151] The certificate is dated 31 August 2016 and is signed by the Native Title Manager for the CLC, in accordance with Resolution No. FC98:61 of the Full Council of the CLC.

Does the certificate meet the requirements of 203BE

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

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

- that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group—at [5].

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

- a meeting organised and facilitated by the CLC on 9 December 2015 was attended by claimants, including all senior members of the native title claim group, as well as CLC legal and anthropological staff;
- the persons comprising the applicant were authorised in accordance with a traditional decision-making process that must be complied with by those in attendance at the meeting who had the authority to make such decisions;
- the CLC consulted the meeting about the contents of the application and received instructions from the claimants and persons authorised to make and deal with the application;
- the CLC's anthropological and historical research indicates that the native title claim group described in the application:
    - is the only one to assert, and is entitled to assert, native title rights and interests in the area covered by the application and that this is acknowledged by the wider Aboriginal community; and
    - its description accords with the traditional laws acknowledged and customs observed by the native title claim group and identifies the persons who hold the common or group rights comprising the native title claimed in the application.

[154] In my view, the statements made in the certificate, as summarised above, are sufficient for it to be said that the certificate briefly sets out the reasons for the CLC being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[155] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. In my view, as there are no other applications that cover the area of the Henbury application, (confirmed by the geospatial report) there is no requirement for the certificate to address this provision. In any event, paragraph 5 of the certificate states that the CLC 'is not aware of any application or proposed application that partly or wholly covers the application area'.

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

[End of reasons]