National Native Title Tribunal

Registration test decision

Application name	Lorella #2
Name of applicant	Jacob Riley, Rex Isaac, Gordon Nawundulpi, Julie Limmen Millar, Henry Nunggumajbarr and Henry Julaba Numamurdirdi on behalf of the Burdal Riley, Murrungun Wunubari and Mambali Walangara estate groups
NNTT file no.	DC2016/001
Federal Court of Australia file no.	NTD18/2016

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 do not accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

For the purposes of s 190D(3), my opinion is that the claim does not satisfy all of the conditions in s 190B.

Date of decision: 10 November 2016

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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 20 November 2015 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 not 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 Lorella #2 claimant application to the Registrar on 11 May 2016 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] Given that the claimant application was made on 9 May 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

[6] The application was filed on 9 May 2016. It was filed on the same day as another Northern Territory pastoral lease application, Billengarrah #2, for which I was also appointed the Registrar's delegate in applying the registration test to the application. The Northern Land Council is the legal representative for the applicants in both native title determination applications and the areas covered by the respective applications are proximate.

[7] The Billengarrah #2 application is very similar in form and substance to the current application. Specifically, the following Schedules of the Form 1 contain identical information:

- Schedule D
- Schedule E
- Schedule F
- Schedule G
- Schedule K
- Schedule L
- Schedule M

- Schedule N
- Schedule P
- Schedule Q
- Schedule R

[8] I note that the factual basis provided in support of the two applications, consisting of the information in Schedules F, G and M, is identical. The description of the native title rights and interests claimed in relation to each of the application areas, in Schedule E, is also identical. Further, while referring to different apical ancestors and their descendants, the description of the native title claim group in Schedule A of the Lorella #2 application is in exactly the same form and terms as the description of the claim group in Schedule A of the Billengarrah #2 application.

[9] On that basis, I have considered it appropriate to rely on my reasons set out in relation to the requirements of the registration test at ss 190B(3), 190B(4), 190B(5), 190B(6) and 190B(7) of the Billengarrah #2 registration decision of 9 November 2016, in applying those provisions to the current application. I have identified below at each condition, those paragraphs adopted from my reasons in the Billengarrah #2 decision.

Registration test

[10] 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.

[11] Pursuant to ss 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

[12] 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.

[13] 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.

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

- Form 1 and accompanying material;
- Geospatial assessment and overlap analysis dated 18 May 2016 (GeoTrack: 2016/0740);
- letter from the Northern Territory government Solicitor dated 6 June 2016;
- email from the applicant's legal representative of 21 October 2016.

[15] 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.

[16] 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

[17] 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 as follows.

[18] On 13 May 2016, I caused the Practice Leader for the application to write to the applicant, the Northern Territory government, and the Federal Court, advising of receipt of the application. The Northern Territory government was provided with a copy of the application and invited to make submissions regarding the application of the registration test provisions.

[19] By letter of 6 June 2016, the Northern Territory government Solicitor advised that the application overlapped a number of other applications, and on that basis, the application could not satisfy the requirement at s 190C(3). On 19 October 2016, the Practice Leader provided a copy of the submission to the applicant and invited a response. By email of 21 October 2016, the applicant's legal representative advised that it did not anticipate the claim being accepted for registration. In light of that response, and my view at that point in time that the application did not satisfy the requirements of the test, I did not provide the applicant's response to the Northern Territory government.

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.

[20] I am not satisfied that the application contains all details and other information, and is accompanied by any document required by ss 61 and 62 because the application is not accompanied by the affidavit required by s 62(1)(a), and it does not contain information about s 24MD(6B)(c) notices. This is explained in the reasons below.

[21] 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?

[22] 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.

[23] 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)

[24] A description of the persons comprising the native title claim group is contained in Schedule A. It is my understanding that only where, on the face of the application, it appears that not all of the persons comprising the group are included in the description, or that it is a sub-

group or part only of the actual native title claim group that is described, will the application fail to meet this requirement.

[25] Having considered the description at Schedule A, in my view there is nothing indicating that certain persons of the group have been excluded, or that the description is of a subgroup or part only of the actual native title claim group.

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

Name and address for service: s 61(3)

[27] The name and address for service for the applicant appear in Part B of the Form 1.

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

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

[29] My consideration at s 61(4), for the purposes of s 190C(2), is limited to whether the application contains the information required. That is, the application must either name the persons comprising the native title claim group (see s 61(4)(a)), or it must describe those persons (see s 61(4)(b)). I am not permitted to consider the correctness of the information provided – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

[30] As above, a description of the persons comprising the native title claim group appears at Schedule A.

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

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

[32] The Form 1 names six persons as the applicant. Accompanying the application are six affidavits, one sworn by each of those persons. The information contained in each of the affidavits is identical, except for paragraph [1] of the affidavits which sets out the basis of the deponent's membership of the claim group.

[33] I have considered the information contained in the remaining paragraphs of the affidavits. In my view, while that information addresses the matters prescribed by ss 62(1)(a)(i), (iii), (iv) and (v), it does not address the matter prescribed by s 62(1)(a)(ii). That is, in their affidavits, the deponents do not swear 'that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title'.

[34] Consequently, the application is not 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] This information is contained in Schedule B.

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

[37] The required map is at Attachment A of the application.

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

[38] Schedule D contains this information.

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

[39] This description appears at Schedule E.

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

[40] Schedule F contains this description.

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

[41] These activities are listed in Schedule G.

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

[42] Details of other applications are contained in Schedule H.

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

[43] There is no information contained anywhere in the application about this type of notice. I note that Schedule HA, being the Schedule within the Federal Court's current standard Form 1 template where this information is supplied, is absent from the Form 1 before me. Therefore, the application does not meet this requirement.

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

[44] Schedule I contains details of these notices.

Conclusion

[45] The application does not contain the details specified in ss 62(2)(a) to (h), and therefore does not contain 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] It is only where there is a previous application meeting all three criteria set out in ss 190C(3)(a), (b) and (c) that the requirement for me to consider the possibility of common members between the native title claim group for the previous application and the native title claim group for the current application is triggered – see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[47] The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services in relation to the map and description of the area accompanying the application (GeoTrack: 2016/0740, dated 18 May 2016) provides that there are three applications currently entered on the Register of Native Title Claims that overlap the current application. These are Lorella Downs (NTD6016/2000), Billengarrah (NTD6030/2000) and Lorella-Nathan River (NTD6031/2002).

[48] From my own research using the Tribunal's databases, I have gathered certain information about these overlapping applications. The Lorella Downs application was made on 5 December 2000. It was considered by a delegate of the Registrar and accepted for registration pursuant to s 190A(6), and entered onto the Register of Native Title Claims (the Register) on 4 January 2001. It was amended in November 2015, and was subsequently accepted by a delegate pursuant to s 190A(6A) on 15 February 2016, remaining on the Register.

[49] The Billengarrah application was filed on 20 December 2000, and accepted by a delegate for registration pursuant to s 190A(6) on 19 January 2001. It was amended in August 2013 and accepted pursuant to s 190A(6A) by a delegate of the Registrar on 23 September 2013. It was amended again in November 2015 and is awaiting registration testing by another delegate of the Registrar. Therefore, I understand that the application currently appears in an entry on the Register, and that it has remained on the Register since that entry was first made on 19 January 2001.

[50] The Lorella-Nathan River application was made on 24 October 2002. It was not accepted for registration by a delegate on 3 April 2003, and again, following its amendment, it was not accepted on 14 April 2008. It was again amended and accepted for registration pursuant to s 190A(6), being entered onto the Register for the first time on 8 May 2009. It has been amended another two times, in 2013 and 2015, and in both instances it was accepted by a delegate pursuant to s 190A(6A), thereby remaining on the Register.

[51] Consequently, it is my understanding that all three overlapping applications appeared in an entry on the Register at the time the current application was made. Therefore, I must now turn to consider whether I can be 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 of the previous applications.

[52] It is the Lorella Downs application which overlaps the current application to the greatest extent, namely 49.08 percent. I have produced a copy of the extract from the Register of Native Title Claims for the Lorella Downs application, including the description of the native title claim group for that application. Having undertaken a comparison of that description against the description of the claim group for the current application, I have found the following names appearing in both descriptions, either as an apical ancestor or as a predecessor of each of the native title claim groups:

- Niyundiyege
- George Riley/George Riley Marlindja
- Mac Riley/Mac Riley
- Willy Riley//Willy Riley Nambayala
- Tom Riley/Tom Riley Nawurrungu
- Larry Riley/Larry Riley Buruwulanji
- Paddy Riley/Paddy Riley Wurrandan
- Ginger Riley/Ginger Riley Munduwalawala
- Robert Riley/Robert Riley Manjayu
- Roy Hammer/Roy Hammer Gundunguwu
- William Riley/William Riley Jarrbulangayi
- Janggawuma
- Clara
- John Forrest/John Forrest Jurrmin
- Wangiwangi
- Joshua Ambirrirring
- Isaac Joshua/Isaac Joshua Loburr
- Stanley Mabungu/Stanley Mabungu Wunubarri
- Nora Walingandu/Nora Walingandu Wuymalu
- Harry Limmen/Harry Limmen (Lilyerri)
- Sammy Limmen
- Marie Limmen
- Noel Limmen
- Mavis Limmen
- Julie Limmen
- Nelson Limmen
- Baju/Jack Baju
- Jemima Baju
- Musso Harvey/Musso Harvey Bunggarinu
- Elsie Maljinbangu

- Isaac Yuwalinji
- Rosalyn Roberts/Rosalyn Roberts Mawurarila
- Edna Pluto/Edna Pluto Maliyawuna
- Ganjirrwala
- Joe Yabumana/Jabumana
- Peter Ngarrawu
- Topsy Mindirriju
- Fanny Yilayi
- Henry Jurluba
- Mawurlu
- Bessie Wunyuga/Nunyuga
- Wurranduwa
- Roger Rogers/Roger Rogers Ganbubuk
- Queenie Simon/Queenie Simon Anjarlarla
- Kitty Gunjurli
- Bruce Limmen
- Girly Limmen

[53] On that basis, I cannot be satisfied that no person in the native title claim group for the current application was a member of the native title claim group for this previous application, Lorella Downs. As I have reached this conclusion after consideration of only one of the overlapping applications, I have not turned to consider whether the remaining two overlapping applications also have common claim group members.

[54] The application does not satisfy 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.

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

[56] Schedule R is entitled, 'Certification'. Consequently, it is the requirement at s 190C(4)(a) that I am to consider.

[57] Where an application is certified, it is my understanding that my consideration is restricted to two matters. Firstly, whether the application has been certified by an appropriate representative body, and secondly, whether the certification is valid – see *Doepel* at [78]. That is, does it comply with the requirement at s 203BE(4)?

[58] Paragraph [1] of the certification states: 'The Northern Land Council, as the representative Aboriginal and Torres Strait Islander body responsible for the land and waters covered by this application, hereby certifies this Claimant Determination Application pursuant to s. 203BE of the *Native Title Act* 1993'.

[59] The geospatial assessment confirms that there is only one representative body in relation to the application area, namely the Northern Land Council (the NLC). I have had reference to the Tribunal's National Representative Aboriginal/Torres Strait Islander Body Areas map, which provides that the NLC is a recognised representative body pursuant to s 203AD, charged with all of the functions of a representative body including certification – see s 203B(1). On that basis, I am satisfied that the NLC is an appropriate representative body able to certify the application.

[60] Section 203BE(4) sets out the requirements for a valid certification. Pursuant to s 203BE(4)(a) a certification must contain certain statements. Having considered the document before me in Schedule R, I am satisfied that it contains the required statements.

[61] Section 203BE(4)(b) requires that the certificate contain brief information addressing the matters stated pursuant to subsection (a). I am satisfied that the certificate contains this brief information.

[62] Section 203BE(4)(c) requires that, 'where applicable', the certificate must address what the representative body has done to meet the requirements of subsection (3). Subsection (3) deals with overlapping applications, requiring the representative body to 'make all reasonable efforts' to achieve agreement between overlapping claimants and reduce the number of overlapping applications.

[63] Noting that the geospatial assessment provides that three applications overlap the current application, the requirement of subsection (3) is applicable in this instance. In answering s 203BE(4)(c), paragraph [8] of the certificate states:

> The Northern Land Council has negotiated a program for the determination of native title over a pastoral lease in the Northern Land Council's region which involves lodging native title claims over individual pastoral leases. Those leases, or parts thereof, are subject to registered native title claims which were lodged in response to notices under s29 of the Native Title Act 1993. The Northern Land

> Council will either amend or discontinue the relevant earlier claims or parts thereof in due course to facilitate a consent determination over the area the subject of this application.

[64] In my view, this information is sufficient in 'briefly setting out' what the representative body has done to meet the requirements of s 203BE(3), and it follows, therefore, that I am satisfied that s 203BE(4)(c) is met.

[65] Consequently, I consider the certificate meets the requirements of a valid certificate pursuant to s 203BE(4).

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

Merit conditions: s 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[67] A written description of the application area appears in paragraph [1] of Schedule B, and states: 'The land and waters subject to this application are within the bounds of the Lorella Pastoral Lease (Perpetual Pastoral Lease 757). This includes Northern Territory Portion 1333.'

[68] Paragraph [2] of Schedule B states that any area in relation to which a previous exclusive possession act under section 23B of the NTA has been done, is excluded from the application. In my view, the use of general exclusion clauses to describe the areas excluded from the application is not problematic in the description satisfying s 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 at [50] to [55].

[69] A map showing the boundary of the application area appears at Attachment A. It is a copy of a colour map titled 'Lorella Pastoral Lease Native Title Claim' and includes:

- the application area depicted as a solid purple outline labelled 'NT Por 1333';
- a topographic background;
- a locality diagram;
- scalebar, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[70] The geospatial assessment concludes that the map and description are consistent and identify the application area with reasonable certainty. In light of this, and having considered the information before me, I am 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.

[71] 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.

[72] A description of the persons comprising the native title claim group appears at Schedule A of the application. The description provides that the native title claim group 'is comprised of the Primary Native Title Holders and Other Native Title Holders who, in accordance with traditional laws and customs have a communal native title in the application area, from which rights and interests flow'.

[73] Primary Native Title Holders are defined as the members of three estate groups, who are 'traditionally connected with the area' by one of three criteria. The criteria are connection by reason of patrilineal descent, having a mother or grandmother who was a member of the group through patrilineal descent, or having been adopted or incorporated into the descent relationships referred to in the first two criteria.

[74] Following this, at paragraphs [3] to [5], the description sets out the apical ancestors for each of the estate groups comprising the Primary Native Title Holders. Paragraphs [6] to [15] set out the descendants of each of the named apical ancestors through two successive generations.

[75] Paragraph [16] of the description provides that:

> The Other Native Title Holders are, in accordance with traditional laws and customs, other people who have rights and interests in respect of the area claimed, subject to the rights and interests of the Primary Native Title Holders, such people being:
>
> (a) members of estate groups from neighbouring estates; and
> (b) spouses of the estate group members.

[76] As explained above in the Application Overview, the description of the native title claim group for the current application is in the same form and terms as the native title claim group description for the Billengarrah #2 application, in relation to which I made a registration decision on 9 November 2016. Consequently, I have considered it appropriate to rely on my reasons at s 190B(3) of that decision here. The following 12 paragraphs are taken from my reasons in that decision (at [70] to [81]) and repeated here for the reader's convenience:

[77] In my view, this description of the persons in the native title claim group is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[78] In *Doepel*, Mansfield J stated that the focus of s 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of [*sic*] any particular person in the identified native title claim group can be ascertained'—at [37].

[79] A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s 190B(3)—see *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*Western Australia v Registrar*). In that case Carr J considered a claim group described as:

1. The biological descendants of the unions between certain named people;
2. Persons adopted by the named people and by the biological descendants of the named people; and
3. The biological descendants of the adopted people referred to in paragraph 2 above—at [64].

[80] Carr J referred to this description as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, because:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. 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. It is more likely to result from the effects of the passage of time and the movement of people from one place to another—at [67].

[81] Although the description before me is more complex than that considered by Carr J, it is nonetheless my view that it provides significant and objective factual criteria which would allow an inquiry of the kind discussed by Carr J, such that it can be ascertained whether any particular person is in the claim group. I note that the requirement in s 190B(3)(b) is only one of sufficient certainty—it is not that each and every person must be identified.

[82] In this case, we are told the estate group names by which the group is known and the names of the apical ancestors for the Primary Native Title Holders. We are also told the rules of descent by which a person may be related to those apical persons. We are also told the names of some of the descendants and their children.

[83] For the Other Native Title Holders encompassed by the claim group description, we are told that they are from neighbouring estate groups to those named in Schedule A and that such persons also include the spouses of the estate group members.

[84] It seems to me that the rules of descent described in Schedule A and the operation of traditional laws and customs surrounding the rights of members of neighbouring estates and spouses of estate group members are outlined sufficiently clearly. It seems to me that none of these rules are alien to the system of traditional laws and customs that operates in this part of the world. I am of the view that they clearly provide a basis for a factual inquiry should there be a dispute. I note also that the group's known apical ancestors have been named, as have some of their descendants. The means by which the named persons have acquired membership could well inform any factual inquiry about other persons asserting membership.

[85] In *Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*) at [11] to [27], Carr J agreed with the Registrar that a claim group description which merely identified the group as the 'Miriuwung Gajerrong People . . . including people who are descended from the traditional owners of the land and waters claimed at sovereignty' did not meet the requirements for a sufficiently certain description. Carr J said at [27] that s 190B(3)(b) is 'largely one of degree with a substantial factual element.' Clearly the Miriuwung Gajerrong description was a much broader and uncertain way of describing a claim group than that which is before me. It seems to me that the description before me contains significant factual elements and is to be distinguished from the open-ended and vague description in *Ward v Registrar*.

[86] I am also mindful of these comments by Carr J in *Western Australia v Registrar*:

> The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55… in relation to definition of areas, apply equally to the issue of sufficient description of the native title group—at [67].

[87] The reference by Carr J in relation to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55] was that:

> The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

[88] For the reasons I have outlined I am satisfied that the description of the native title claim group is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[89] 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.

[90] As stated above in the application overview, the description of the native title rights and interests claimed in relation to the application area, in Schedule E, is identical to the description contained in the Billengarrah #2 application which I did not accept for registration on 9 November 2016. In light of this, and noting that the focus at s 190B(4) is entirely upon the description contained in Schedule E, I have considered it appropriate to rely on my reasons at s

190B(4) of the Billengarrah #2 decision. The following paragraphs are extracted from that decision (at [83] to [92]) and repeated here for the reader's convenience:

[91] The description of the native title rights and interests claimed in relation to the application area is set out in Schedule E. The description required by s 190B(4) is one that is understandable and has meaning – see *Doepel* at [99]. I note that it is open to me to read the contents of Schedule E together, including any stated qualifications, so that properly understood there is no inherent or explicit contradiction within the description – *Doepel* at [123].

[92] In my consideration, I have also referred to the definition of 'native title rights and interests' set out in the Act at s 223(1). I have not, however, considered each individual right or interest included in the description against the requirements of that definition. This task I consider more appropriate for the condition at s 190B(6), regarding whether each right and interest can be, prima facie, established.

[93] Schedule E contains four paragraphs. Paragraph one is a list of non-exclusive rights and interests of the 'estate group members', possessed under their traditional laws and customs. Paragraph [2] states:

> The native title rights and interests of the native title holders referred to in clause 7 hereof that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, non-exclusive rights to use and enjoy…

[94] Following the list of seven non-exclusive rights claimed under paragraph [2], the paragraph concludes with the statement:

> These native title rights and interests do not confer on the native title holders referred to in clause 7 hereof possession, occupation, use and enjoyment of the Determination Area, to the exclusion of all others.

[95] I note that the same statement follows the list of non-exclusive rights and interests at paragraph [1], except that the statement refers to the 'estate group members' rather than 'the native title holders referred to in clause 7 hereof'.

[96] Following paragraphs [1] and [2], paragraphs [3] and [4] of Schedule E contain qualifications on the exercise of the rights and interests claimed.

[97] There is no clause 7 within the description in Schedule E. Consequently, I do not know who the persons referred to in paragraph [2], namely 'the native title holders referred to in clause 7 hereof' are. While it is clear that these persons are not the same as the 'estate group members', I do not have any information before me about these other persons who claim rights and interests.

[98] In my view, paragraph [1] of Schedule E is clear and understandable and the rights and interests claimed have meaning as native title rights and interests. I cannot say the same about paragraph [2], and it is unclear to me what the purpose of that paragraph is, or how I am supposed to understand it.

[99] At s 190B(4), noting the wording of the condition, I consider my focus is to be upon the description as a whole – see for example *Doepel* at [123]. Consequently, I cannot merely ignore the contents of paragraph [2] and accept the contents of the remaining paragraphs that are clear and easily understood. I note that I am not to go beyond the application in applying the condition of s 190B(4) – see *Doepel* at [16]. Subsequently, further information provided by the applicant cannot rectify the ambiguity.

[100] I have, therefore, formed the view that the description before me is not sufficient to allow the native title rights and interests claimed to be readily identified.

[101] 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.

[102] I have set out in the Application Overview the similarities between the current application and the Billengarrah #2 application for which I made a decision regarding registration on 9 November 2016. Noting that the factual basis material provided in support of each application is identical, I have considered it appropriate to rely on my reasons set out in the Billengarrah #2 decision at those conditions requiring consideration of the factual basis material. Consequently, the following paragraphs are taken from that decision (at [94] to [117]) and repeated here below:

[103] The nature of the Registrar's task at s 190B(5) was explored by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence. . .'—at [17].

[104] The Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) agreed with this assessment—at [83], and also held that a 'general description' (as required by s 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s

190B(5)—at [90] to [92]. The Full Court did say however that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'—*Gudjala 2008* at [92].

[105] In my view, the above authorities establish clear principles by which the Registrar must be guided when assessing the sufficiency of a claimant's factual basis. They are:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala 2008* at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala 2008* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at ss 190B(5)(a) to (c)—*Doepel* at [17].

[106] The decisions of Dowsett J in *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 2008,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*[1], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His Honour, in my view, took a consonant approach in *Gudjala 2009*.

[107] It is in my view fundamental to the test at s 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala 2007* at [39].

[108] The general description of the factual basis is found at Schedules F, G and M. In my view, these schedules consist of largely general assertions in relation to the claimants' traditional country, of which this application area is a part. The statements do not appear to contain any material/information of any specificity to the native title claim group, but assert the following:

- the claimants are, traditionally, the owners of the land and waters in the claim area;
- the claimed rights and interests and the traditional laws acknowledged and customs observed have been possessed and exercised since before sovereignty and contact with non-Aboriginal people;

[1] See *Gudjala 2008 at* [90] to [96].

- the traditional connection of the claimants with the claim area, and the native title rights and interests, were inherited from their ancestors, in accordance with the traditional laws and customs;
- the group continues to acknowledge and observe traditional laws and customs, and possess and exercise its native title rights and interests in relation to its traditional country;
- historical, archaeological and site information in relation to the wider area of land and waters suggests that since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the claimants;
- material evidence of physical connection by the ancestors of the claimants exists in their traditional country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation;
- particulars of the traditional laws and customs relating to the rules and operation of the group's kinship system; and
- land use laws and obligations exist in relation to land and waters.

[109] Schedule G provides a general list of activities said to relate to traditional usage of country by the native title claim group. Schedule M provides some general information to the effect that the claimants have maintained a traditional physical connection with the application area by entering and travelling across it, hunting, fishing, collecting resources, and visiting and protecting significant sites.

Section 190B(5)(a)—that the native title claim group have, and the predecessors of those persons had, an association with the area

[110] On this aspect of the factual basis, not criticised by the Full Court in *Gudjala 2008*, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala 2007* at [52] and *Gudjala 2008* at [90] to [96].

[111] The material states that the claimants are, traditionally, the owners of the land and waters subject to this application. Further, the area is a part of a larger area of land and waters which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown of the United Kingdom. It is asserted that the claimants retain a traditional connection to the claim area and generally to their traditional country. This was inherited from their ancestors in accordance with traditional laws and customs.

[112] At best, the above statements and assertions provide a very limited factual basis in support of the assertion that the group's predecessors had an association with the area. For instance, it provides no details or facts in relation to those predecessors, other than the assertion that the traditional connection of the claimants with the area was inherited from their ancestors in accordance with traditional laws and customs. The statement that the claimants are, traditionally,

the owners of the land and waters in the application area is also of a very general and limited factual nature.

[113] Schedule G of the application outlines a number of activities that are currently being carried out by the claim group, including camping, hunting, and caring for the land and waters. While that material provides some of the factual basis pertaining to the assertion that the native title claim group have an association with the area, it is, in my view, insufficient for the purpose of s 190B(5)(a).

[114] In *Martin v Native Title Registrar* [2001] FCA 16, French J (as his Honour was then) held, in regard to the requirement at s 190B(5)(a), that the delegate was not obliged to accept 'very broad statements' that did not demonstrate an association with the entire application area and which lacked any 'geographical particularity'—at [26].

[115] It is my view that the material within the application provides no information of any specificity pertaining to the claim group's continuing association with the application area since sovereignty.

[116] I am not satisfied that the factual basis is sufficient to support the assertion in s 190B(5)(a).

Section 190B(5)(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 interests

[117] In *Gudjala 2007*, Dowsett J recognised the importance of understanding the meaning attributed to 'native title' pursuant to s 223 of the Act, in order to examine the factual basis provided in support of the assertion at s 190B(5)(b) (and similarly at s 190B(5)(c))—*Gudjala 2007* at [26], where Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). Again, this aspect of the decision of Dowsett J was not criticised by the Full Court—see *Gudjala 2008* at [90] to [96].

[118] Dowsett J's examination of *Yorta Yorta* led him to form the view that a necessary element of this aspect of the factual basis is the identification of the relevant Indigenous society at the time of sovereignty or, at the very least, the time of first contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary to provide a factual basis sufficient to support an assertion that the 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty' can be demonstrated—*Gudjala 2007* at [26], [66] and [81].

[119] The claimant's factual basis in support of this assertion, in my view, is limited to listing a number of laws and customs, which are asserted to be traditional in nature. This material does not include a factual basis that identifies the relevant pre-sovereignty Indigenous society, nor does it provide a factual basis pertaining to laws and customs of the claim group at sovereignty or how such laws and customs have been acknowledged and observed by the native title claim group. The assertion is that the laws and customs identified are traditional in nature, however, no factual basis is provided in support of this assertion.

[120] In that regard, Dowsett J in *Gudjala 2009* considered that the applicant must, at least, provide an outline of the facts pertaining to the traditional laws and customs of the native title claim group. Further, to assert that 'the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society from which the claim group also claims to be descended', in the absence of any factual details relevant to that assertion, is insufficient as it simply restates the claim—at [29].

[121] The factual basis, in my view, must also demonstrate how the traditional laws and customs of the group give rise to the claimed native title rights and interests—*Gudjala 2007* at [39]. Of course, this need only be in a general sense, as it is the task at s 190B(6) that requires the weighing of the factual material in support of each right or interest—*Doepel* at [126] and [127]. That said, I must be satisfied that there is a 'proper factual basis' on which it is asserted that the native title rights and interests exist—*Doepel* at [128]. The material within the application does not demonstrate how the asserted traditional laws and customs in Schedule F give rise to the claim for native title rights and interests.

[122] I am not satisfied that the factual basis is sufficient to support the assertion in s 190B(5)(b).

Section 190B(5)(c)—that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

[123] I take the view that the assertion in subparagraph s 190B(5)(c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta* and in Full Court cases thereafter, that the native title claim group has continued to hold its native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—*Yorta Yorta* at [47] and [87].

[124] *Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group; and

- that there has been a continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement—at [82].

[125] The Full Court appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area—*Gudjala 2008* at [96].

[126] Given my conclusion above and observations on the inadequate nature of the claimant's factual basis, it must follow, in my view, that the factual basis is not sufficient to support the assertion in s 190B(5)(c).

Conclusion

[127] The application does not satisfy the condition of s 190B(5) because the factual basis provided is not 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.

[128] As explained in the Application Overview, the description of the native title rights and interests claimed in the current application is identical to that provided in the Billengarrah #2 application, in relation to which I made a decision on 9 November 2016. The factual basis provided in support of those rights and interests claimed is also identical between the two applications. Consequently, at this condition, I have relied on my reasons at paragraphs [119] to [121] of the Billengarrah #2 decision. These are repeated below, for the convenience of the reader:

[129] I note my conclusion above at s 190B(4), that the description of the native title rights and interests claimed, contained in the application, is not sufficient to allow those native title rights and interests to be readily identified. Without clarity as to the rights and interests claimed, in my view it follows that I cannot consider any of those rights and interests to be, prima facie, established.

[130] Further, in undertaking the task at s 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s 223(1) of the Act. For instance, I must consider whether, prima facie, the rights and interests claimed exist under the traditional laws and customs of the native title claim group.

[131] Given my conclusion formed above at s 190B(5)(b) that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title, it follows, in my view, that the application cannot satisfy this requirement. I note that

this is consonant with the approach taken by Dowsett J in *Gudjala 2007* and *Gudjala 2009* —at [87] and [82] respectively.

[132] The application does not satisfy 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.

[133] As explained in the Application Overview, for those conditions requiring consideration of the factual basis material, noting that the factual basis for this application is identical in terms to that provided in support of the Billengarrah #2 application, I have relied on my reasons in the Billengarrah #2 decision of 9 November 2016. Consequently, the following six paragraphs are extracted from that decision (at [123] to [128]) and comprise my reasons in relation to the current application at this condition of the registration test:

[134] It is stated in Schedule M that the claimants have maintained a traditional physical connection with the application area, including by residing on their country. It is asserted in Schedule M that there are many examples of the group's physical connection to their country, including entering and travelling across the claim area, hunting, fishing, collecting resources on the claim area, and visiting and protecting sites of significance.

[135] In my view, the information in Schedule M (and elsewhere within the application) lacks the specificity required under this section. For instance, there is no information describing who, within the native title claim group, is said to have or to have previously had a traditional physical connection with the area or any part of it. Mansfield J commented in *Doepel* that 'the focus is upon the relationship of at least one member . . . with some part of the claim area' and requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration'—at [18]. I take this to mean that there must be some specific information which goes to the relevant traditional physical connection of a particular member of the group with the area, as opposed to the very general statements in Schedule M on this topic.

[136] The information within this application does not allow any assessment of whether any particular member of the native title claim group has, or previously had, a requisite traditional physical connection, given there is simply no material included that goes specifically to this issue.

[137] I am also of the view that the phrase 'traditional physical connection' means a physical connection in accordance with the particular traditional laws and customs relevant to the native title claim group, with 'traditional' having the meaning discussed in *Yorta Yorta*.

[138] Dowsett J indicated in *Gudjala 2007* that an application which fails to satisfy the requirements for a sufficient factual basis under s 190B(5) will likewise fail this condition due to the requirement for material showing a 'traditional' physical connection. This aspect of the decision was not overturned on appeal by the Full Court. I refer also to these comments by Dowsett J in *Gudjala 2009* that:

> As to s 190B(7), much may depend upon the meaning of the term "traditional physical connection". I have not been referred to any authority on the point. It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs. For the reasons which I have given, the requirements of that subsection are not satisfied—at [84].

[139] It follows, in my view, that the application must also fail this condition as a result of my decision above at s 190B(5) that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

[140] The application does not satisfy 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.

[141] 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)

[142] 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 in relation to the application area.

Section 61A(2)

[143] 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. Paragraph [2] of Schedule B states that the application area excludes 'any area in relation to which a previous exclusive possession act under section 23B of the NTA has been done'.

Section 61A(3)

[144] 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. I note my conclusion at s 190B(4) that the description of the native title rights and interests claimed is not sufficient to allow those rights and interests to be readily identified. On that basis, I am not able to make an assessment at this condition, and the application must fail the requirement.

Conclusion

[145] In my view the application offends the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application does not satisfy 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.

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

Section 190B(9)(a)

[147] Schedule Q specifies that the claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[148] Schedule P, in relation to this requirement, states '[n]ot applicable'. I understand, therefore, that there is no claim to exclusive possession of any offshore place.

Section 190B(9)(c)

[149] Despite my conclusion regarding the insufficiency of the description of the native title rights and interests claimed, there is nothing before me, in my view, that indicates that any rights or interests claimed have been otherwise extinguished.

Conclusion

[150] 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

Summary of registration test result

Application name	**Lorella #2**
NNTT file no.	**DC2016/001**
Federal Court of Australia file no.	**NTD18/2016**
Date of registration test decision	**10 November 2016**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s 190C(2)			**Aggregate result:** **Not met**
	re s 61(1)		**Met**
	re s 61(3)		**Met**
	re s 61(4)		**Met**
	re s 62(1)(a)		**Not met**
	re s 62(1)(b)		**Aggregate result:** **Not met**
		s 62(2)(a)	**Met**
		s 62(2)(b)	**Met**
		s 62(2)(c)	**Met**
		s 62(2)(d)	**Met**
		s 62(2)(e)	**Met**
		s 62(2)(f)	**Met**
		s 62(2)(g)	**Met**
		s 62(2)(ga)	**Not met**

Test condition	Subcondition/requirement		Result
		s 62(2)(h)	Met
s 190C(3)			Not met
s 190C(4)			Overall result: Met
	s 190C(4)(a)		Met
	s 190C(4)(b)		NA

Section 190B conditions

Test condition	Subcondition/requirement	Result
s 190B(2)		Met
s 190B(3)		Overall result: Met
	s 190B(3)(a)	NA
	s 190B(3)(b)	Met
s 190B(4)		Not met
s 190B(5)		Aggregate result: Not met
	re s 190B(5)(a)	Not met
	re s 190B(5)(b)	Not met
	re s 190B(5)(c)	Not met
s 190B(6)		Not met
s 190B(7)(a) or (b)		Not met
s 190B(8)		Aggregate result: Not met
	re s 61A(1)	Met
	re s 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss 61A(3) and (4)	**Not met**
s 190B(9)		**Aggregate result:** **Met**
	re s 190B(9)(a)	**Met**
	re s 190B(9)(b)	**Met**
	re s 190B(9)(c)	**Met**

[*End of document*]