National Native Title Tribunal

Registration test decision

Application name	Billengarrah #2
Name of applicant	Robert O'Keefe Senior, Douglas Pluto, Timson Lansen, Jerome Pluto, Desmond Lansen and Asman Rory
NNTT file no.	DC2016/002
Federal Court of Australia file no.	NTD21/2016

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: 9 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 Billengarrah #2 claimant application to the Registrar on 11 May 2016 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 10 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.

Registration test

[6] Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s 190C requirements first, in order to assess whether the application contains the information and documents required by s 190C before turning to questions regarding the merit of that material for the purposes of s 190B.

[7] Pursuant to 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

[8] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

[9] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

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

- Form 1 and accompanying materials;
- Geospatial assessment and overlap analysis, dated 23 May 2016 (GeoTrack: 2016/0745);
- Letter from the Northern Territory government Solicitor dated 6 June 2016;
- Email from the applicant's legal representative dated 21 October 2016.

[11] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

[12] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

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

[14] 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 by the Native Title Registrar (the Registrar). The Northern Territory government was provided with a copy of the application and invited to make submissions regarding the registration testing of the application.

[15] On 6 June 2016, the Northern Territory government Solicitor wrote to the Registrar, advising that the application overlapped certain other applications, and consequently, that it could not satisfy the requirement at s 190C(3) of the registration test.

[16] On 19 October 2016, I caused the Practice Leader for the application to write to the applicant, providing a copy of the submission and inviting the applicant to respond. On 21 October 2016, the applicant emailed the Practice Leader and advised that there was no expectation that the application would satisfy the requirements of the registration test. In light of my view at that time that the application would not be accepted for registration, I did not supply the Northern Territory government with a copy of the applicant's response.

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.

[17] 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 does not contain information about s 24MD(6B)(c) notices (see s 62(2)(ga)). This is explained in the reasons below.

[18] 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?

[19] 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.

[20] 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)

[21] A description of the native title claim group appears at Schedule A. It is my understanding that only where on the face of the application itself it appears that not all of the persons within the native title claim group have been included in that description, or where the group described is a

sub-group or part only of the actual native title claim group, will the application fail to meet this condition – *Doepel* at [36].

[22] Having considered the description at Schedule A, there is nothing to indicate that persons have been excluded from the group described, or that the description is of a sub-group or part only of the actual native title claim group.

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

Name and address for service: s 61(3)

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

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

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

[26] This condition requires only that I consider whether the necessary information is contained in the application. I am not permitted to consider the correctness of the information – see *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

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

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

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

[29] The Form 1 names six applicant persons. Accompanying the application are six affidavits, one sworn by each of the persons comprising the applicant. Following a statement about the way in which the applicant person identifies as a member of the claim group, the affidavits contain identical statements about an authorisation meeting of the native title claim group, the decision-making process used at that meeting and information about the application.

[30] I have considered the statements contained in the affidavits. While they do speak to the matters prescribed by ss 62(1)(a)(i), (iii), (iv) and (v), they do not address the matter prescribed by subsection (ii). That is, the applicant persons in their affidavits 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'. On that basis, my view is that the affidavits do not comply with the requirement at s 62(1)(a).

[31] The application is not accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

[32] 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)*

[33] Information about the boundaries of the application area is contained in Schedule B. Schedule B also contains information about those areas within the boundaries that are excluded from the application.

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

[34] A map showing the external boundaries of the application area is contained in Attachment A.

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

[35] Schedule D contains information about searches undertaken by the applicant.

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

[36] This description is at Schedule E.

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

[37] Schedule F contains a general description of the factual basis on which it is asserted that native title rights and interests exist.

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

[38] The activities currently undertaken by the members of the claim group in relation to the land and waters of the application area are listed in Schedule G.

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

[39] Schedule H contains details of other applications.

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

[40] There is no information addressing this requirement within the application. I note that the Form 1 used by the applicant does not contain Schedule HA, which in the Federal Court's current standard Form 1 template is the Schedule where this information is to appear. Consequently, the application does not contain the required information.

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

[41] Information about these notices appears at Schedule I.

Conclusion

[42] 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.

[43] The requirement for me to consider the possibility of common claimants between the native title claim groups for applications is only triggered where there is a previous application meeting all three criteria set out in subparagraphs (a) to (c) of s 190C(3) – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[44] The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services in relation to the map and description of the application area accompanying the application (GeoTrack: 2016/0745, dated 23 May 2016), provides that there are three applications overlapping part of the area. These are:

- Lorella Downs (NTD6016/2000);
- Billengarrah (NTD6030/2000); and
- Lorella-Nathan River (NTD6031/2002).

[45] Through my own research using the Tribunal's databases, I have gathered information about the overlapping applications relevant to my consideration at s 190C(3). Lorella Downs was first 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 and consequently, tested again in February 2016. Pursuant to s 190A(6A) it was accepted for registration, remaining on the Register.

[46] Billengarrah was first accepted for registration pursuant to s 190A(6) on 19 January 2001. It was amended and tested again in September 2013, being accepted pursuant to s 190A(6A) and remaining on the Register. It has since been amended, in November 2015, and is currently identified for registration testing, however at this point in time has not been considered by a delegate pursuant to s 190A. Consequently, it has remained on the Register since it was last tested in September 2013.

[47] Lorella-Nathan Downs was first accepted for registration on 8 May 2009. It was amended, tested and accepted for registration pursuant to s 190A(6A) in September 2013, remaining on the Register. It was again amended, tested, and accepted for registration pursuant to s 190A(6A) in December 2015. Accordingly, it has remained on the Register since that time.

[48] The current application was made on 9 May 2016. From the above information, I understand that there was an entry on the Register of Native Title Claims for all three of the overlapping applications at that date. Consequently, there are three previous applications meeting the criteria at subparagraphs (a), (b) and (c) of s 190C(3).

[49] Following on from this, I now turn to consider whether I can be satisfied that no person in the native title claim group for the current application is also a member of the native title claim group for the three previous applications.

[50] It is the previous Billengarrah application which overlaps the current application to the greatest extent, namely 92.57 percent of the current application. On that basis, I have first considered the native title claim group description for that previous application.

[51] Both the previous Billengarrah application and the current Billengarrah #2 application identify the native title claim group using descriptions that refer to a number of apical ancestors and then for each ancestor, set out certain persons descended from that ancestor. The members of the claim group for both applications are the descendants of the named/listed persons. Having compared the two descriptions, the following names appear in both:

- Manyangarabi;
- Tjibanme;
- Bobby Lansen;
- Kitty Gunjuli;
- Bruce Limmen;
- Bruce Kulkulmirri;
- Mudungguna Old Lansen;
- Rita Lansen Junbalima;
- Kathleen Limmen;
- Eileen Lansen;
- Pompey Jack;
- Tyson Lansen;
- Mabel Lansen;
- Pharaoh Lhawulhawu;
- Rosalyn Roberts Mawurarila; and
- Edna Pluto Maliyawuna.

[52] In light of the above, namely that the same persons are ancestors (or descendants of ancestors) for both the current application and the previous application, I am not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the previous application.

[53] 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.

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

[55] Schedule R of the Form 1 contains a document titled 'Certification'. Consequently, I must be satisfied that the requirements in s 190C(4)(a) are met. In undertaking the task at this condition, I note that I am restricted to a consideration of two issues: firstly, whether there is an appropriate representative body that can certify the application, and secondly, whether the certification is valid pursuant to s 203BE(4) – see *Doepel* at [78].

[56] The geospatial assessment provides that the representative body in relation to the entirety of the application area is the Northern Land Council (the NLC). The NLC has provided the certification. Paragraph one of the certification confirms that the NLC certifies the application 'as the representative Aboriginal and Torres Strait Islander body responsible for the land and waters covered by this application'. With reference to the Tribunal's National Representative Aboriginal and Torres Strait Islander Bodies map, I am satisfied that the NLC is a recognised representative body pursuant to s 203AD, charged with all of the functions of a representative body.

[57] Section 203BE(4)(a) provides that a certification must include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met. Having considered the information contained in the document, I am satisfied that paragraph [2] of the certification contains this statement.

[58] Section 203BE(4)(b) provides that the certification must also briefly set out the representative body's for being of the opinion stated in response to s 203BE(4)(a). Following the required statement, the certification contains four paragraphs, which speak about the long-standing relationship of legal representation by the NLC for the applicant, and the substantial research undertaken over that period, including research about the composition of the claim

group and the identification of the relevant traditional decision-making process pursuant to the group's laws and customs. The information also provides that the NLC has conducted various meetings with the claimants about this application and that the applicant was authorised to make the application by all the other persons in the native title claim group. In my view, this information is sufficient in 'briefly' setting out the NLC's reasons for being of the opinion stated.

[59] Section 203BE(4)(c) provides that, 'where applicable', the certification must 'briefly set out what the representative body has done' to address overlapping applications, namely to reduce the number of applications overlapping the area of the current application – see s 203BE(3). As above, the application is overlapped by three previous applications. Consequently, this requirement is 'applicable' in the circumstances. Paragraph [8] of the certification 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 s 29 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 subject of this application.

[60] In my view, this is sufficient in addressing the requirement at s 203BE(4)(c). Therefore, I consider the certification complies with s 203BE(4) and that it is a valid certification.

[61] 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 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.

[62] A written description of the boundaries of the application area appears at Schedule B. That description provides that the application area is the land and waters within the bounds of the Billengarrah Pastoral Lease (Perpetual Pastoral Lease 1069).

[63] Schedule B also contains information about areas that are excluded from the application, including two Northern Territory Portions. Schedule B further states that any area in relation to which a previous exclusive possession act under section 23B of the *Native Title Act* has been done is excluded from the application. The use of a general exclusion clause to identify the excluded areas is not, in my view, problematic in the application meeting the requirement at s 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 at [50] to [55].

[64] A map showing the boundary of the application area is contained in Attachment A. It is a colour map titled 'Billengarrah' and dated 26 March 2014, which includes:

- the external boundary of the application area depicted by bold black outline;
- colour coded land tenure and parcel IDs;
- scale bar, north point, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[65] The geospatial assessment and overlap analysis confirms that the map and description are consistent and identify the application area with reasonable certainty. Having considered the information before me about the area, I agree with the assessment, and am satisfied that the map and description 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.

[66] 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.

[67] Schedule A of the application contains a description of the persons in the native title claim group, providing that the group 'is comprised of the Primary Native Title Holders and Other Native Title Holders'. Primary Native Title Holders are defined as members of four estate groups 'who, in accordance with traditional laws and customs, are traditionally connected with the area'. The description sets out three criteria by which those persons are 'traditionally connected with the area', namely by reason of patrilineal descent, having a mother or grandmother who was a member of the group through patrilineal descent, or by reason of being adopted or incorporated into the former descent relationships.

[68] Following this, at paragraphs [3] to [6], the description names the apical ancestors for each of the four estate groups. From paragraphs [7] through to [22], the description identifies the descendants of each of the apical ancestors for the estate groups, through two subsequent generations.

[69] Paragraph [23] 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.

[70] 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.

[71] 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].

[72] 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].

[73] 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].

[74] 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.

[75] 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.

[76] 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.

[77] 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.

[78] 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*.

[79] 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].

[80] 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.

[81] 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.

[82] 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.

[83] 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].

[84] 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.

[85] Schedule E contains four paragraphs. Paragraph [1] 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…

[86] 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.

[87] 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'.

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

[89] 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.

[90] 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.

[91] 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). Subsequently, further information provided by the applicant cannot rectify the ambiguity.

[92] 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.

[93] The application does not satisfy 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.

[94] 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].

[95] 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].

[96] 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].

[97] 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*.

[98] 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].

[99] 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;
- 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.

[100] 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.

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

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

[101] On this aspect of the factual basis, not criticised by the Full Court in *Gudjala FC*, 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 FC* at [90] to [96].

[102] 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.

[103] 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.

[104] 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).

[105] 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].

[106] 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.

[107] 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

[108] 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 FC* at [90] to [96].

[109] 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].

[110] 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.

[111] 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].

[112] 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.

[113] 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

[114] 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].

[115] *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].

[116] 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 FC* at [96].

[117] 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

[118] 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.

[119] 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.

[120] 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.

[121] 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.

[122] The application does not satisfy the requirement at 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.

[123] 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.

[124] 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.

[125] 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.

[126] 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*.

[127] 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].

[128] 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.

[129] 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.

[130] 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)

[131] 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 and overlap analysis provides that there are no determinations of native title in relation to any part of the application area.

Section 61A(2)

[132] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B provides that the application excludes any area in relation to which a previous exclusive possession act has been done.

Section 61A(3)

[133] 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. In my reasons above at s 190B(4), I state my view that the description of the native title rights and interests claimed is not sufficiently clear to allow those native title rights and interests to be readily identified. On that basis, without clarity as to the nature of the rights and interests claimed, it is my view that I cannot make an assessment as to whether this condition is met, and therefore, that the application must fail the requirement.

Conclusion

[134] In my view the application does offend 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.

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

Section 190B(9)(a)

[136] Schedule Q states: 'The claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown…'

Section 190B(9)(b)

[137] Schedule P of the application states '[n]ot applicable' in relation to this requirement. From this, I understand that the native title claim group does not make any claim to any offshore place.

Section 190B(9)(c)

[138] Despite the lack of clarity around the native title rights and interests claimed (see my reasons above at ss 190B(4) and 190B(6)), in my view, there is nothing within the application and accompanying documents that indicates that any native title rights and interests subject of the application have otherwise been extinguished.

Conclusion

[139] 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).

[*End of reasons*]

Attachment A

Summary of registration test result

Application name	**Billengarrah #2**
NNTT file no.	**DC2016/002**
Federal Court of Australia file no.	**NTD21/2016**
Date of registration test decision	**9 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*]