

# Registration test decision

Application name	Wave Hill Pastoral Lease
Name of applicant	Topsy Dodd (Vincent), Paddy Doolak, Freddy Algy, Pauline Ryan
NNTT file no.	DC2016/005
Federal Court of Australia file no.	NTD62/2016
Date application made	25 November 2016
Date of decision	2 March 2017

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

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

**Date of reasons:** 9 March 2017

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 21 December 2016 and made pursuant to s 99 of the Act.

# Reasons for decision

## *Introduction*

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Wave Hill Pastoral Lease native title determination application (WAD62/2016) to the Native Title Registrar (the Registrar) on 28 November 2016 pursuant to s 63 of the Act<sup>1</sup>. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

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

[3] Given that the claimant application was made on 25 November 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. I have reached the view that the claim in the application must be accepted for registration and this document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act.

## **Application overview and background**

[4] The Wave Hill Pastoral Lease native title determination application (Wave Hill) is located south-west of the town of Katherine and covers Perpetual Pastoral Lease 1002. The application states that the claim is located within Gurindji, Mudburra and Warlpiri territory which extends beyond the external boundaries of the area identified on the map and claimed in the application.

## **Information considered when making the decision**

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

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<sup>1</sup> 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.

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

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

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

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

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

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

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

[9] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 2 December 2016 (the geospatial report).

## *Merit conditions: s 190B*

### **Subsection 190B(2)**

#### **Identification of area subject to native title**

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

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

*Description of the area covered by the application*

[11] Schedule B describes the area covered by the application as “NT Portion 2653 comprising an area of 5,492 square kilometres held under Perpetual Pastoral Lease No 1002 by[name removed]. Those areas not covered by the application are specified as NT Portions 1340, 4104 and 4105, the Buntine Highway, Lajamanu Road and Wave Hill/Cattle Creek Road and by way of a general exclusion statement at paragraph 9.

[12] Schedule C refers to Attachment A which is a map prepared by the Central Land Council (CLC) (23/11/2016) titled “Wave Hill PPL Native Title Determination Application”, The map includes the application area depicted by bold green outline and hachure fill; a land tenure background with NT Portions labelled; three (3) insets to show excluded NT Portions in more

detail; major towns and roads; scalebar, northpoint, coordinate grid; and notes relating to the source, currency and datum of data used to prepare the map.

### *Consideration*

[13] The map and description together provide information in relation to the external boundaries of the area covered by the application which allows me to be reasonably certain of the location of those boundaries on the surface of the earth. The specific and general exclusion statements used to describe areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that may fall within the categories described and are therefore not subject to the claim.

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

[15] 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.

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

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

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

[18] The native title claim group is described at Schedule A as follows:

1. The native title claim group comprises the members of the Jamangku, Japuwuny, Parlakuna-Palkinykarni and Yilyiyimawu landholding groups ("the landholding group"). Those persons according to the traditional laws acknowledged and customs observed by them :

- (a) have spiritual, physical and/or historical associations with the area described in Schedule B ("the application area") and are traditionally connected to the area through:
    - (i) descent from ancestors (including adoption) connected with the application area as described in paragraph 7(a) below; or
    - (ii) non-descent based connections as described in paragraphs 7(b) and 9 below;
  - (b) hold the common or group rights and interests comprising the native title in the application area.
2. The application area is located in Gurindji, Mudbuna and Warlpiri territory. The common body of traditional laws acknowledged and customs observed by members of the native title claim group govern how rights and interests in land are acquired and who holds them in particular parts of this territory, including the application area. The four landholding groups which together comprise the native title claim group constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole.
3. The term "estate" is used to describe the land and waters associated with a landholding group. In this application the estates derive their name from the affiliated group or prominent site or area in the estate concerned. The four landholding groups are named after their respective estate areas and affiliated to the following parts of the application area:
  - (a) Jamangku- north and eastern
  - (b) Japuwuny - eastern
  - (c) Parlakuna-Palkinykarni- southern
  - (d) Yilyilyimawu -north and western

Some estates extend beyond the boundaries of the application area.
4. The landholding groups are associated with the Gurindji, Mudburra and Warlpiri languages. Under the traditional laws acknowledged and customs observed by members of the native title claim group rights in land are not acquired through membership of a language group. Accordingly, linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters.
5. Some members of the native title claim group have been recognised as traditional Aboriginal owners of other land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the ALRA") in the Daguragu Land Claim and as native title holders under the *Native Title Act 1993* (Cth) in the Kalkarindji Township Native Title Application.
6. The persons authorised to make the application are members of the following landholding groups:
 

Topsy Dodd (Vincent)	Yilyilyimawu
Paddy Doolak	Yilyilyimawu
Freddy Algy	Japuwuny
Pauline Ryan	Jamangku

**Membership of the native title claim group**
7. In accordance with the claimants' system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:
  - (a) descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding groups ("the ancestors"):

**JAMANGKU** (Jukutayi/Namija-Japalyi/Nalyirri)  
 Descendants of unnamed Japalyi male.  
**Lively Murrunturrkani**  
 No surviving descendants .

**Japulangari Jukurtiya**

Long Jack Pingkiyarri Japalyi: no known descendants.

Parrankart: no known descendants.

May Kampil Namija: no known descendants.

Ida Wupungali Namija: Valerie Paddy and Harvey Paddy [MF] and their children.

**Mawunyjingali Namija**

Jinpangali: no known descendants.

Horsetailer Mick Julupa: Lonely Wilson Jarmayani, Loma Don Nampula and David Amos Niwanga [FM].

**JAPUWUNY** (Japarta/Nimarra- Jurlama!Nawurla)

Descendants of Rudla Jurlama.

**Starlight Widjina Japarta**

Raymond Starlight Jurlama and siblings (adopted) [FF] and their descendants.

**Algy Tungkulkarri Japarta**

Dorothy Wumpurr (Nathan Hector and Jeremiah Hector [MFF]), Richar Freddy Algy, Michael Algy, Reggy Algy, Ian Algy and Raymond Algy [FF]; Daniel, Matthew and Sheldon [FF] and their descendants.

**Anzac Mungayarri Jangari**

No known descendants.

**Hector Wayitpiyarri Jangari**

Children with Molly Nyunuwangali Nangari: Barbara Wanmuyu Nanaku , Elizabeth Nanaku, Douglas Janama, Rodney Janama, Tony Janama, Victor Janama, Nugget Janama , Sally Parlat Nanaku, Melva Nanaku, Bobby Man-ara Janama, Jennifer Hector, Mildred Kumingka Nanaku, Kenny Janama and Raymond Janama [FF] and their descendants.  
Children with Ivy Kulngari Nangari: Dale Hector Janama, Sheila Hector Nanaku, Roy Hector Janama, Nina Hector Nanaku, Russel Hector Janama and Eunice Hector Nanaku [FF] and their descendants.

**PARLAKUNA-P ALKINYKARNI** (Jampin/Nampin- Jangala/Nangala)

Descendants of unnamed Jampijinpa male.

**Leo Tartu Morris Jangala**

Kathy Morris Nampin, Rita Monis Nampin, Noelene Morris Walilyana Nampin, Renita Monis Nampin, Aidan Morris Jampin, Nathan Monis Jampin and Christopher Dodd Jampin [FF] and their descendants.

**Charlie Jangala**

Archie Jampin [FF] and descendants.

**Maggie Kukaja Winingali Nangala**

No known descendants.

**Toby Jangala**

No known descendants.

**YILYILYIMAWU** (Janama/Nanaku -Jangari/Nangari)

Descendants of Jimmy Walkip Jangari.

**Blutcher Waruyarri Murnarrawa Janama**

Molly Dodd Nangari and Topsy Dodd Nangari [FF] and their descendants.

**Crocodile Paddy Marlatulung Janama**

Billy McCann Ngarinayarri Jangari, Amy Ngalnani Nangari (Theresa Yilbwain [MFF] and her children with non-descent based ngurramarla Paddy Doolak Jangari) and Happy Partlou Jangari [FF] and their descendants.

**Daylight Parunyja Janama**

Maria Yukngari (dcd) (also married to Cracker Tjaluyarri Jampin, see below): Jimmy Ryan and Ted Ryan [MFF] and their descendants.

Daisy Pulla (dcd): Barbara and Jack [MFF] and their descendants.  
Descendants of Ngunypa Jangala.

**Cracker Tjaluyarri Jampin**

Ronnie Wavehill Jangala, Teddy Crow Jangala (dcd), Steven Long Jangala, Bidy Wavehill Nangala, Peggy Nangala, Sheila Nangala and Carol Nangala [FF] and their descendants.

- (b) accepted as members of one (or more) of the landholding groups by the senior descent based members of the groups on the basis of their non-descent connections to the estate.
- 8. The ancestors identified in paragraph 7(a) are the uppermost generation of the known ancestors of members of the native title claim group.
- 9. Under the claimants' system of traditional laws and customs a person can be recruited and recognised as a member of a landholding group (by the senior descent based members of the group) on the basis of non-descent connections to the estate. The non-descent connections that senior members of a landholding group have regard to when considering the recruitment of a particular individual are:
  - (a) birth in an estate;
  - (b) long-term residence in an estate;
  - (c) possession of secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology; and
  - (d) seniority in traditional matters concerning the claim group and/or the estate including as ngurramarla on the basis of same patri-moiety affiliation as the estate's descent- based ngurramarla; and kurdungurlu on the basis of opposite patri-moiety affiliation.
- 10. Although the claimants' system of traditional laws and customs includes rules about succession there have been no instances of succession in relation to the application area. Additional information about these rules is contained in Schedule F.
- 11. Under the claimants' system of traditional laws and customs descent is the most important basis for the possession of rights and interests in land. Subject to individual circumstances members of the landholding group who are descended from one of the ancestors possess and transmit a wide range of traditional rights and interests.
- 12. Under the claimants' system of traditional laws and customs rights and interests in land are inherited through all four grandparental lines. However, members of the landholding group with descent connections through father's father and mother's father are generally able to activate the widest range of rights and interests in relation to the estate.
- 13. Under the claimants' system of traditional laws and customs the range of rights and interests in land possessed by members of a landholding group who are not descended from the ancestors depends on individual circumstances, including the nature and extent of their non-descent connections to the estate. Such rights and interests are usually limited to the individual and are not transmittable.
- 14. A number of members of the native title claim group are members of more than one estate group, for example, due to different grandparental links to multiple estates.

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

- (a) descent (by birth relationship or adoption) from the named and unnamed ancestors (those named being the uppermost generation of the known ancestors)—at [7(a)]; and
- (b) for those not descended from these ancestors, membership can be recognised by senior members of the group on the basis of non-descent connection—birth in an estate; long-term residence in an estate; possession of traditional spiritual knowledge, authority status and responsibility for an estate, specifically sites and their mythology; and seniority in traditional matters concerning the claim group and/or the estate—at [7(b)] and [9].

[20] I note that the four estates (landholding groups) connected to the country covered by the application, which together comprise the native title claim group, are: Jamangku, Japuwuny, Parlakuna-Palkinykarni, Yilyimawu.

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

- (i) whilst rules in relation to succession exist under the native title claim group's traditional law and custom, there are no instances of succession in relation to the area covered by the application—at [10];
- (ii) possession of rights and interests is at its widest range for those whose connection to country is based on descent (that is, descent connection through father's father and mother's father)—at [11]-[12];
- (iii) more limited rights and interests in land are possessed by those members with non-descent connection to country—at [13];
- (iv) members of the claim group may be members of more than one estate (for example, through different grandparental links to multiple estates)—at [14].

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

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

[24] The application satisfies/does not satisfy the condition of s 190B(3).

## **Subsection 190B(4)**

### **Native title rights and interests identifiable**

The Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[25] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

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

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

1. The native title rights and interest of the native title holders are the non-exclusive rights possessed under and exercisable in accordance with their traditional laws and customs, being:
  - (a) the right to access and travel over any part of the land and waters;
  - (b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
  - (c) the right to hunt, gather and fish on the lands and waters;
  - (d) the right to take and use the natural resources of the land and waters;
  - (e) The right to access, take and use natural water on or in the land, except water captured by holders of Pastoral Lease;
  - (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;
  - (g) the right to share or exchange natural resources obtained on or from land and waters, including traditional items made from the natural resources;
  - (h) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;
  - (i) The right to conduct and participate in the following activities on the land and waters:
    - (i) cultural activities;

- (ii) ceremonies;
  - (iii) meetings;
  - (iv) cultural practices relating to birth and death including burial sites; and
  - (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;
  - (j) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such persons to the determination area;
  - (k) the right to be accompanied on the land and waters by persons who, though not native title holders, are:
    - (i) people required by traditional law and customs for the performance of ceremonies or cultural activities on the land and waters;
    - (ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;
    - (iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.
  - (l) the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.
2. The rights and interests listed in paragraph 1 above existed and continue to exist in relation to the application area as a whole.
3. The native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area as a whole.
4. The applicant acknowledges that the native title rights and interests are subject to and exercisable in accordance with valid laws of the Northern Territory of Australia and the Commonwealth of Australia.
5. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interest within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including:
- (a) the particular association that members of the native tile claim group have with one or more of the landholding groups and their respective estate areas; and
  - (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.
6. The activities referred to in schedules G and M were and are undertaken in the exercise of the native title rights and interest set out in paragraph 1.

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

[28] 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

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

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

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

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

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

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

[32] The principal material in the application that goes to the factual basis of the claim is found at Schedules A, F, G and M and in the four affidavits of the persons comprising the applicant that accompany the application—Topsy Dodd (Vincent), Paddy Doolak, Freddy Algy, Pauline Ryan.

[33] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

### **Reasons for s 190B(5)(a)**

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

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

#### *Area of the application*

[35] Schedule A states that the application area comprises parts of Gurindji, Mudburra and Warlpiri territory. The native title claim group is comprised of the members of four landholding groups, named after their respective estate areas and affiliated to the specific parts of the application area:

1. Jamangku- north and eastern
2. Japuwuny - eastern
3. Parlakuna-Palkinykarni - southern
4. Yilyilyimawu -north and western

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

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

[37] Schedule F makes the general assertion that connection to the application area is through the traditional laws and customs acknowledged and observed by the native title claim group since the time of British sovereignty and first contact with non-Aboriginal people. Members of the claim group have inherited rights and interests in the area through their descent from ancestors or have acquired them on the basis of non-descent connections to an estate—at [4]. The application area and the landholding groups, Jamangku, Japuwuny, Parlakuna-Palkinykarni and Yilyilyimawu, are associated and identified with the Gurindji, Mudburra and Warlpiri languages<sup>3</sup>—at [19(a)]. Schedule F includes a list of ethnographic and historical sources. These are

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<sup>3</sup> Although 'rights in land are not acquired through membership of a language group' and 'linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters'—Schedule A at [4].

said to confirm that at the time of first contact and settlement in the region to the present day, people associated with the Gurindji, Mudburra and Warlpiri languages have ‘maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area itself—at [19(c)].

[38] All the persons who comprise the applicant speak in their affidavits of their parents and grandparents who were born and grew up on the Wave Hill pastoral station that was developed on the lands of their traditional country and now comprises the area covered by the application. Each possesses rights and interests in the application area through their parents and grandparents and each is *ngurramarla*<sup>4</sup> through them for their landholding group.

[39] Topsy Dodd’s father was born at ‘the Wanyarri tree at [Location removed] [on old Wave Hill Station] and grew up on Wave Hill station’ and her grandfather was born at Kilkil on Wave Hill Station—at [8]. Her father grew up ‘walking to Kilkil [on the application area] with his family’ – camping, hunting, building shelters, taught by his mother and father and showed the sacred sites and how to look after them – ‘he learnt the proper way to look after country’. When Topsy Dodd (b. 1934) was a child she lived and worked with her mother and grandmother on Wave Hill station—at [8].

[40] Paddy Doolak’s parents had connections to Angkatul and Catfish [on the application area] – they both lived at [Location removed] and were taught by the ‘old people’ all the stories for that country. Paddy Doolak (b. 1941) learnt about his country when he travelled across it as a boy with his mother and father and the old people – from Jinparrack to No. 6 Bore then to Kilkil, to Angkatul, along Gordy Creek to Sambo Yard to Catfish and to Lajamanu (on the southern border of the application area)—at [8] and [12].

[41] Freddy Algy’s (b. 1948) father grew up at [Location removed], ‘walking around his country’ – between No. 29 Bore, Camfield River, Malkunarra, Junjamineji, No. 2 Dam, No. 3 Bore, all the way to Jamangku and No. 12 Bore in the north of the application area’, learning ‘everything for his country from his father’—at [9]. Both his father and his father before him worked on Wave Hill Station, went through Young men’s Business and lived all their lives at [Location removed], close to the sites they looked after—at [10].

[42] Pauline Ryan’s mother and grandfather were born on, and spent all their lives on, their country at [Location removed]. She was ‘grown up’ by Patsy Edwards from the Yilyiyimawu landholding group who taught her his knowledge about the country—at [8]-[9]. Her mother and her grandmother taught her about women’s ceremony, hunting and getting bush food, walking all over the application area and camping together on the Victoria River (to the north)—at [15].

[43] Each of the deponents speak of walking all over their country and learning about it from their parents, grandparents and the old people. They travelled all through the country of the application area, hunting and camping, collecting bush tucker with their predecessors who knew

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<sup>4</sup> ‘Owners’ or ‘bosses of the Dreaming or ritual associated with their country—Schedule F at [12].

all of the stories and songs for their country. Their predecessors were born on and lived and worked on Wave Hill Station all their lives – travelling throughout the application area, hunting, camping, going through Young Men’s Business, participating in ceremonies, caring for important sites and teaching their laws and customs to the younger generations.

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

[44] Schedule F states that the native title claim group’s connection to the application area is based on people’s knowledge and continuing acknowledgement and observance of traditional laws and customs received from their ancestors and through personal experience. Spiritual and ancestral connections to the application area are maintained today as members of the native title claim group continue to observe ‘customary secular and spiritual practices’ in relation to the land and waters of their country. These practices often relate to Dreaming tracks and associated sites of significance:[Names removed]—at [19(d)-(g)].

[45] Further, members of the native title claim group have maintained their connection with the application area ‘notwithstanding the presence and activities of non-Aboriginal people in the region’—at [20]. Schedules G and M list the activities currently undertaken by the claim group and the traditional physical connection of the four applicant persons.

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

[47] Topsy Dodd was born at [Location removed] on old Wave Hill Station and lived and grew up with her mother’s mother, working on the station and on weekends her ‘family walked across the application area to the Victoria River or Lipanangku, walking south to the McDonald Yard country, camping, fishing, hunting. Her country is at Kilkil which she got from her father and her father’s father – she has learnt the Law and she helps to look after it’—at [12]-[14].

[48] Paddy Doolak was also born at [Location removed] and travelled across the country when he was a boy learning the Dreamings and where they went, camping, hunting with his mother and father. He went through ‘Young Men’s Business’ and was taught about his country ‘proper way’ – learning about the important places on his country and ‘taught the songs and stories for that place right there on that country’—at [9]. Today Paddy Doolak goes out and looks after country – to care for its sacred sites, to show people around and to teach the young boys about

their culture. He has the right to make decisions for Yilyimawu country because he is *ngurramarla* for that country—at [13]-[15].

[49] Freddy Algy (b. 1948) has spent most of his life at [Location removed] and worked at Wave Hill Station as a stockman. He too went through Young Men's Business and was taught to look after all the important places on [Location removed]. He still goes hunting and getting bush food on his country – teaching his family the way his father and his father's father taught him—at [16]. He looks after [Location removed], teaching young men about the Dreamings and stories as he was taught, recording and protecting important sites and making decisions about how his country is cared for—at [17]-[19].

[50] Pauline Ryan has rights and interests in Jamangku country because she was born on that country, grew up there and learnt the Law – she is a senior knowledge holder for the Jamangku landholding group—at [7]. She was taught the women's ceremonies by her mother and grandmother and now teaches the younger women today. As a girl she walked across the application area with her parents, went hunting and fishing, collecting water and learning about bush medicine—at [16]-[17]. She takes the younger generations out hunting and looking for bush tucker, telling them stories and teaching about country, conducting ceremonies and singing and sharing the songs and dances of her country—at [18]-[20].

[51] Each of the claimants speaks of collecting bush tucker with their parents and grandparents, being with the 'old people' who are now buried on the application area and being taught the songs and stories for their country. Each speak of taking children and grandchildren out to their country – to visit the sacred sites, camping, hunting across the area to teach them the Dreamings and ceremony. All look after the sites on their country and speak for, and make decisions about, their country.

### *Consideration*

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

[53] The native title claim group is said to be comprised of four landholding groups affiliated with four countries or estates situated in and extending beyond the area covered by the application. Members of the claim group attest to their long and continuing association with these countries, including their interconnected spiritual affiliations with the area of the application. The affidavits are replete with examples of the claim group's current association with the four countries that make up the area of the application, with each person attesting to how and where

their parents, grandparents and great grandparents were born, where they lived, worked and travelled. They document that their predecessors travelled all over their country—working on Wave Hill Station once it was established, conducting Law business, camping, hunting and teaching and learning the stories and Dreamings—in exercise of those rights and responsibilities connected to their countries and held under their traditional laws and customs.

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

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

### **Reasons for s 190B(5)(b)**

[56] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests it claims—*Gudjala 2007* at [62] and [63].

[57] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate<sup>5</sup>:

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

[58] In my view, there is sufficient factual account in the application and accompanying affidavit material to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

#### *The relevant society*

[59] Schedule F includes the following statement:

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<sup>5</sup> This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

Members of the four landholding groups who together comprise the native title claim group are part of a regional society of Gurindji, Mudbuna and Warlpiri peoples with whom they have an association, for example, through intermarriage, ceremonial connections and mutual recognition of estate and subsection affiliation. Members of this society acknowledge and observe a common body of traditional laws and customs—at [3].

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

[61] Each of the four claimants referred to previously attests to the details and the date of their birth and the names of at least two of the generations that preceded them. The names of these ancestors can be found at Schedule A. Based on a 25 year span between the generations, the ancestors at the apex of each of the landholding groups that go to describing the native title claim group are likely to have been born around the 1880s and 1890s. While not stated in the application, I understand that sustained European settlement of the region in which the application falls is not likely to have occurred until well into the latter part of the 19<sup>th</sup> century<sup>6</sup>. On this basis, it is, in my view, reasonable to infer that the society, of which the predecessors of the native title claim group were a part, acknowledged and observed traditional laws and customs in the area of the application at the time British sovereignty was asserted in Australia in 1788, and most certainly at the time of sustained European contact in the late 1800s. The application asserts, and this is illustrated in the affidavit material that accompanies it, that this is the society that has continued largely uninterrupted since that time. That is, a society existed at sovereignty in respect of the area covered by the application, comprised of landholding groups affiliated with particular tracts of country, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived—*Gudjala 2009* at [66].

#### *Traditional laws and customs of the native title claim group*

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

...the 'physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions for their continuity, were established by spiritual ancestors who travelled on, above or below the land in a creative era long ago, termed *puwarraj* in Gurindji and Mudburra, *jukurrpa* in Walpiri and glossed as "The Dreaming" or "Dreamtime"—at [5].

[63] These Dreaming attributes provide a foundation for the exercise of rights and interests in relation to land and waters and associated spiritual and cultural beliefs. Sites associated with

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<sup>6</sup> Explorer John McDouall Stuart succeeded in traversing Central Australia in 1862, and many of the pastoral stations in the area were only founded from the 1880s.

Dreamings form countries or estates affiliated with the Jamangku, Japuwuny, Parlakuna-Palkinykami and Yilyimawu landholding groups—at [7].

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

[65] Rights and interests in an estate are inherited through descent from the ancestors or conferred on persons who are accepted by senior descent based members of the group as members of a landholding group on the basis of their non-descent connections to the estate—at [11]. Each of the affidavits includes information as to the basis on which they hold rights and interests in relation to their estate. Each defines their connection in accordance with their affiliation with a landholding group and its country: as *ngurramarla* or *kurtungurlu*. Through their father's father *ngurramarla* are 'the "owners" or "bosses" of the Dreaming and ritual associated with the country'. Through mother's father, father's mother and mother's mother, *kurtungurlu* are "managers" or "workers"—at [12] and [13]:

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

[66] This system in operation is explained by Topsy Dodd in her affidavit:

I acknowledge and observe the traditional laws and customs of the Gurindji people. That law comes from the Puwarraj ('Dreaming'). According to our traditional law, I have rights and interests in Yilyimawu country through my father, Blutchter Waruyarri Janama, and his father, Jimmy Walkip Jangari. They were both *ngurramarla* for their country and I am *ngurramarla* through them—at [7].

[67] A kinship system exists that incorporates both actual and classificatory kin relations between people, and also metaphoric relationships between people, their ancestral country and the *puwarraj/jukurpa*. Features of the kinship system include recognition of common spiritual and human ancestors, behavioural rules and sanctions relating to interpersonal relationships, group and individual affiliation with 'Dreaming Beings' associated with particular landholding groups. Complementing the kinship system is another level of social classification based on sections, subsections and moieties. Claimants have a personal name that denotes their affiliation with the section/subsections of Gurindji, Mudburra and Warlpiri, with each subsection forming pairs called patricouples to which Dreamings are associated—[8]-[10].

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

- observation of restrictions imposed by gender, age ritual knowledge and experience, and those imposed by the presence of Dreamings and/or sites of significance on the land and waters;
- members of family groups are responsible for ‘looking after country’ and transmitting knowledge among their own family group; and
- rights and interests in country are inherited by or conferred upon members of the family group—at [14].

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

[70] Each of the claimants attests to their knowledge of the Dreamings, songs and stories for which they have responsibility under their Law. Each is a senior person for the country to which they are affiliated, for which they speak and hold knowledge and has been taught by their forebears and now pass it onto the younger generations. Ceremony to teach the Law continues to be held today and is led by senior people—showing young men and women ceremony, hunting and collecting bush foods, teaching about country and showing and protecting important places and sites.

[71] All of the claimants attest to their acknowledgement and observance of the traditional laws and customs of the Gurindji, Mudburra or Warlpiri people and that law comes from their Dreaming. Each, according to their traditional law, claims rights and interests in the application area to one of the four estates, Jamangku, Japuwuny, Parlakuna-Palkinykami or Yilyilyimawu. These senior people speak for and make decisions about the countries that comprise the area covered by the application.

[72] There is information relating to areas and ‘business’ that are restricted, for which only certain senior Law persons have responsibility to protect and to conduct ceremony. Topsy Dodd ‘got that country from my father and my father’s father ... we got a snake Dreaming there too...I have learnt the Law and I help look after it—at [14]. She speaks of women’s ceremony held ‘with all the Gurindji, Mudburra and Warlpiri women’, at the sacred place for women where no men were allowed, taking her daughters and teaching her grand-daughter ‘about these things’—at [16]. She has the right to make decisions for her country – it’s her job, her country, her Dreaming and she has the knowledge—at [18]. She speaks of the Dreaming that travels through her country, knows the songs and dances for her country, looks after the women’s sites and passes on her knowledge to the younger women. Freddy Algy was taught his Rain Dreaming by his father, how to look after their sacred sites and to how conduct ceremony for [Location removed]:

I went through Young Men's business at [Location removed]. My father and my father's father taught me everything for my country during that business. They taught me how to make the rain, how to go hunting and get water. After the ceremony they took me to [Location removed] and taught me to look after all the important places and sacred sites so I knew. They

took me to those places and taught me the stories for my country and those Dreamings on the application area and our way on that country—at [15].

### *Consideration*

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

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

### **Reasons for s 190B(5)(c)**

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

[76] Schedule F contains many statements that assert the continuity of the native title claim group's traditional laws and customs. The affidavits illustrate and, in my view, demonstrate that these laws and customs have been 'passed from generation to generation by traditional modes of oral transmission, teaching and common practice', and continue to be acknowledged and observed today among the current generations of the claim group—at [19].

[77] This acknowledgement and observance has been possible because the members of the claim group and their predecessors have continued to live and travel through their country, including the area covered by the application. All of the claimants attest in their affidavits to walking all through their country with their parents and grandparents, being taught the stories and songs for their country, how to hunt and gather the natural resources and care for important sites and areas. Paddy Doolak has learnt the Law from both his father and the 'old people', who taught him the Dreaming, about the sites, songs and ceremonies for Yilyilyimawu country—[9] and [11]. Freddy Algy says he was taught the proper way in the bush on the country with the old men ... 'we still teach young men about those sacred sites, songs, designs and the stories for that country

and take them through Young Men's business in the same way' — at [17]. In this way, members of the claim group have continued to practise their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their estate areas.

[78] There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

## **Conclusion**

[79] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

## **Subsection 190B(6)**

### **Prima facie case**

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[80] For the application to meet this merit condition, I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

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

## **Consideration**

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

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

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

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

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

[83] The predecessors of the native title claim group have lived in humpies and temporary shelters before and since Wave Hill Station was established on their traditional country. Members

of the claim group have, through the generations, continued to live on and access the area covered by the application, camping and walking around everywhere, travelling through the area with their parents and grandparents and now with their own children and grandchildren—Topsy Dodd at [9]. The landholding groups have been living and working on Wave Hill Station for generations, accessing their traditional lands for hunting, ceremony and protecting sacred sites—Pauline Ryan at [8]-[14], [Name removed] at [9]-[14].

[84] The claimants attest to continuing to access and travel over their country—walking in the bush around their country with their families, with their fathers and their fathers before them—Paddy Doolak at [9] to [13]. Members of the claim group recall the use of fires for cooking and ceremony by their predecessors and continue to light fires while camping, working and travelling through their country; building wind breaks, cooking their food on fires and using water from the soaks—[Name removed] at [9]-[12], Topsy Dodd at [8]-[12].

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

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

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

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

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

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

[87] All of the claimants attest to the exercise of these rights, by current members of the claim group and by the generations preceding them. Freddy Algy would go hunting with his family as a child for emu, kangaroo, wild turkey; he was taught the best spots to find bush food—[13] and [16]. He still goes hunting on the claim area, getting wood to make boomerangs and teaching his younger brothers and children the best places to find water—[16]. Paddy Doolak also goes hunting and collecting bush tucker on the claim area, sharing what he hunts and collects with his family—at [10]-[12]. Pauline Ryan would go all over her country with her family when she was a child, hunting and collecting bush tucker – goanna, kangaroo, bush turkey, water from the waterholes and the river, bush medicine—[16]-[17]. Today she takes her children, grandchildren and great grandchildren on the claim area, hunting, camping and ‘teaching them culture’—[18].

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

*(h) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;*

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

[90] All of the affidavits include information illustrating that members of the claim group continue to maintain and protect sites and areas of significance under their traditional laws and customs. Paddy Doolak, regularly looks after the sites for which he is responsible and is involved in working with mining companies to tell them ‘where they can go and where they can’t ... they can’t damage our sites’—at [16]. Topsy Dodd maintains and protects sites and important places on the application area as she is ngurramarla for her country—[17].

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

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

*(i) cultural activities;*

*(ii) ceremonies;*

*(iii) meetings;*

*(iv) cultural practices relating to birth and death including burial rites; and*

*(v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;*

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

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

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

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

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

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

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

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

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

[96] As referred to earlier in these reasons, the claim area is affiliated with four land holding groups connected to four estates located in Gurindji, Mudburra and Warlpiri territory. The

claimants' system of traditional laws and customs regulate who speaks for which country throughout this landholding territory. The affidavits demonstrate that the traditional laws and customs acknowledged and observed by the native title claim group currently operate to regulate, between the four landholding groups, the right to speak for particular areas of country (estates) and to make decisions about the use and enjoyment of the land and waters.

[97] Schedule F states that *ngurramarla* and *kurtungurla* are jointly responsible for looking after country—at [13]. Each of the affidavits documents the continued exercise of rights and obligations in relation to the accompaniment on the land and waters of persons who do not 'know' the country. Paddy Doolak states that he is has the right to talk for his Yilyilymawu country, that he has the right to make decisions about where Aboriginal people who are not native title holders can go on his country. He can make such decisions because he is *ngurramarla* for that country and that there will be trouble for people if they go near sites they shouldn't—at [15]-[16]. Pauline Ryan states that she is one of the persons who can take researchers out onto country to show them and tell them the stories—[21].

[98] Freddy Algy states that he protects the sacred sites when mining companies look around his country—at [18]. Topsy Dodd states that she has the right to take people onto country because she is *ngurramarla* and she knows the country – she tells then the stories about her Dreaming—at [17]-[18].

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

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

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

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

## **Conclusion**

[102] The application satisfies the condition of s 190B(6).

## **Subsection 190B(7)**

### **Traditional physical connection**

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or

- (ii) a statutory authority of the Crown in any capacity, or
- (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

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

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

[106] Topsy Dodd was born on Wave Hill Station. She grew up on the station – her family living and working on the station, sometimes travelling for long periods up and down the length of the application area, hunting and getting bush food, accessing water and other resources. She and her family supported themselves from the land, her father taught her the Law and how to look after the country and sacred sites of the application area. Her mother taught her the women's ceremonies and she is considered to be a senior woman for her land. Today Topsy Dodd lives in Kalkarindji (on the western boundary of the application area) and regularly visits her land to collect bush tucker and bush medicine, to uphold her cultural responsibilities and to ensure no damage has been done to the sacred sites in her country — at [1].

[107] Freddy Algy was born and grew up at Jinbarrak. As a young boy he travelled across the application area with his family – fishing, collecting water from the river and creeks, learning to live off the land. His father taught him to use the resources of the country – to make spears for hunting, to build humpies and windbreaks, use sticks to make fire. His father also taught him about his Dreaming, showed him the sacred sites and songs and ceremonies for his country. He was initiated at [Location removed] and now takes young men through Law business in the same way. He is a senior man for his country and as ngurramarla his permission is sought in relation to mining and exploration and access to country — [2].

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

[109] The application satisfies the condition of s 190B(7).

### **Subsection 190B(8)**

#### **No failure to comply with s 61A**

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[110] 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)*

[111] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report of 2 December 2016 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

*Section 61A(2)*

[112] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B at paragraph 9 states that the application excludes any area where a previous exclusive possession act under s 23B has been done.

*Section 61A(3)*

[113] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, , unless the circumstances described in s 61A(4) apply. The application does not claim the exclusive right.

## **Conclusion**

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

## **Subsection 190B(9)**

### **No extinguishment etc. of claimed native title**

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

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

*Section 190B(9)(a)*

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

*Section 190B(9)(b)*

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

*Section 190B(9)(c)*

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

## **Conclusion**

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

## *Procedural and other conditions: s 190C*

### **Subsection 190C(2)**

#### **Information etc. required by ss 61 and 62**

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

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

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

[122] 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)**

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

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

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

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

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

[126] Part B of the application states on page 42 the name and address for service of the persons who are the applicant.

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

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

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

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

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

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

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

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

[132] 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)*

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

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

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

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

[135] Schedule D provides a list of existing tenure and mining interests. The applicant states that the 'searches do not disclose the existence of any historical titles or expired grants or interests over the area covered by the application'

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

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

### **Subsection 190C(3)**

#### **No common claimants in previous overlapping applications**

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[143] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described in ss 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the

application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

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

[145] As the Wave Hill application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

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

## **Subsection 190C(4)**

### **Authorisation/certification**

Under s 190C(4) the Registrar/delegate must be satisfied that either:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

#### *Identification of the representative body*

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

[149] The certificate is dated 23 November 2016 and is signed by the Director of the CLC, in accordance with Resolution No. FC98:61 of the Full Council of the CLC.

#### *Does the certificate meet the requirements of 203BE*

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

- that all the persons in the native title claim group have authorised the applicant to make the application and to deal with all matters arising in relation to it ; and
- that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group—at [5].

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

- a meeting organised and facilitated by the CLC on 7 July 2016 was attended by claimants, including all senior members of the native title claim group, as well as CLC legal and anthropological staff;
- the persons comprising the applicant were authorised in accordance with a traditional decision-making process that must be complied with by those in attendance at the meeting who had the authority to make such decisions;
- the CLC consulted the meeting about the contents of the application and received instructions from the claimants and persons authorised to make and deal with the application;
- the CLC’s anthropological and historical research indicates that the native title claim group described in the application:
  - is the only one to assert, and is entitled to assert, native title rights and interests in the area covered by the application and that this is acknowledged by the wider Aboriginal community; and
  - its description accords with the traditional laws acknowledged and customs observed by the native title claim group and identifies the persons who hold the common or group rights comprising the native title claimed in the application.

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

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

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

[End of reasons]

# Attachment A

## Information to be included on the Register of Native Title Claims

<b>Application name</b>	Wave Hill Pastoral Lease
<b>NNTT file no.</b>	DC2016/005
<b>Federal Court of Australia file no.</b>	NTD62/2016

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

### *Section 186(1): Mandatory information*

**Application filed/lodged with:**

Federal Court of Australia

**Date application filed/lodged:**

25 November 2016

**Date application entered on Register:**

2 March 2017

**Applicant:**

Topsy Dodd (Vincent), Paddy Doolak, Freddy Algy, Pauline Ryan

**Applicant's address for service:**

Sarah Wilkie  
Central Land Council  
PO Box 3321  
ALICE SPRINGS NT 0871  
Phone: 08 8951 6369  
Fax: (08) 8958 2954

**Area covered by application:**

As per Schedule of Native Title Applications (the Schedule)

### **Persons claiming to hold native title:**

A copy of Schedule A of the application sets out information in relation to the native title claim group and is attached to this extract. (*Attach copy of Schedule A of the Form 1 to the Register*)

### **Registered native title rights and interests:**

1. The native title rights and interests of the native title holders are the non-exclusive rights possessed under and exercisable in accordance with their traditional laws and customs, being:
  - (a) The right to access and travel over any part of the land and waters;
  - (b) The right to live on the land, and for that purpose, to camp, erect shelters and other structures;
  - (c) The right to hunt, gather and fish on the lands and waters;
  - (d) The right to take and use the natural resources of the land and waters;
  - (e) The right to access, take and use natural water on or in the land, except water captured by the holders of Pastoral Lease;
  - (f) The right to light fires for domestic purposes, but not for the clearance of vegetation;
  - (g) The right to share or exchange natural resources obtained on or from land and waters, including traditional items made from the natural resources;
  - (h) The right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;
  - (i) The right to conduct and participate in the following activities on the land and waters:
    - (i) cultural activities;
    - (ii) ceremonies;
    - (iii) meetings;
    - (iv) cultural practices relating to birth and death including burial rites; and
    - (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;
  - (j) The right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such person to the determination area;
  - (k) The right to be accompanied on the land and waters by persons who, though not native title holders, are:
    - (i) people required by traditional law and customs for the performance of ceremonies or cultural activities on the land and waters;
    - (ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;
    - (iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.
2. The rights and interests listed in paragraph 1 above existed and continue to exist in relation to the application area as a whole.
3. The native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.

4. The applicant acknowledges that the native title rights and interests are subject to and exercisable in accordance with valid laws of the Northern Territory of Australia and the Commonwealth of Australia.

5. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interest within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including: (a) the particular association that members of the native tile claim group have with one or more of the landholding groups and their respective estate areas; and (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.

**Attachments:**

1. Schedule A - Native title claim group - 5 pages - A4, 25/11/2016
2. Attachment A - Map of area, 1 page - A4, 25/11/2016

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Lisa Jowett

2 March 2017