Registration Decision

National Native Title Tribunal

Amended Application name	Maryvale Pastoral Lease
Name of applicant	Desmond Jack, Reggie Kenny, Jeanette Ungwanaka and Eric Braedon on behalf of the members of the family groups with responsibility for the Imarnte, Titjikala and Idracowra estates
Amended Application Received by Registrar	25 September 2017
Federal Court of Australia No.	NTD35/2015
NNTT No.	DC2015/005
Date of Decision	19 January 2018
Date of Reasons	25 January 2018

Decision: Claim accepted for registration

I considered the claim in the Maryvale Pastoral Lease amended application for registration as required by ss 190A, 190B and 190C the *Native Title Act 1993* (Cth).[1] I decided the claim satisfies all of the conditions required and so I must accept the claim for registration (s 190A(6)). The Register of Native Title Claims must be amended (s 190(2)(a)).

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Angie Underwood

Delegate of the Native Title Registrar

[1] All legislative references in this decision are to the *Native Title Act 1993* (Cth) unless otherwise stated.

Cases cited:

De Rose v State of South Australia (No 2) [2005] FCAFC 110 (*'De Rose*')
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 ('*Gudjala (2007)'*)
Gudjala People No 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 ('*Gudjala (2008)'*)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572('*Gudjala (2009)'*)
Martin v Native Title Registrar [2001] FCA 16 ('*Martin*')
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 ('*Yorta Yorta'*)
Mundraby v Queensland [2006] FCA 43 (*'Mundraby'*)
Northern Territory v Doepel (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*'NT v Doepel'*)
Stock v Native Title Registrar [2013] FCA 1290
Strickland v Native Title Registrar [1999] FCA 1530 ('*Strickland v Native Title Registrar*')
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 ('*WA v Native Title Registrar'*)
Western Australia v Strickland (2000) 99 FCR 33; [2000] FCA 652 ('*WA v Strickland')*

BACKGROUND AND DECISION – ALL CONDITIONS MET

[1] The Maryvale Pastoral Lease native title claim covers an area of land and waters on the lease of the same name in the Northern Territory (NT). On 9 September 2015 a delegate of the Registrar accepted the claim for registration and the claim was placed on the Register of Native Title Claims (ss 190A(6) and 190(1)).

[2] On 25 September 2017, the Federal Court gave a copy of the Maryvale Pastoral Lease amended application to the Registrar (s 64(4)). The Registrar delegated the task of considering the amended application to me, a member of staff assisting the Tribunal (s 99).

[3] I must apply the registration test to the claim in the amended application for two reasons. First, the application was not amended because of a part determination by the Federal Court (ss 190A(1A) and 87A). Second, the effect of the amendment is more than; (i) a reduction in claim area; (ii) a removal of a claimed right or interest; (iii) a change in representative body; (iv) a change in funding body; and/or (v) an alteration of address for service (s 190(6A)(d)).

[4] On 9 August 2017, the Northern Territory Government notified their intent to grant Exploration Licence Application EL31589 (s 29). I must use my best endeavours to consider the claim within four months of that date (s 190A(2)(f)).

[5] If the claim satisfies all the conditions in ss 190B and 190C, then I must accept the claim and the Register of Native Title Claims must be amended (ss 190A(6)) and 190(2)(a)). If it does not satisfy all the conditions, then I must not accept the claim and it must be removed from the Register (ss 190A(6B) and 190(2)(b)).

[6] I have decided the claim satisfies all the conditions in ss 190B and 190C. My reasons on each condition now follow.

s 190B(2) requirements met: identification of area subject to native title

What is needed to meet this condition?

[7] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application are sufficient to say with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The two questions for this condition are whether the information and map provide certainty about:

(a) the external boundary of the area where native title rights and interests are claimed; and

(b) any areas within the external boundary over which no claim is made (*NT v Doepel* [122]).

The information about the external boundary meets this condition

[8] Schedule B describes the claim area as comprising NT Portion 810 (Perpetual Lease 1063) and 7 hectares or 4,003 square metres of NT Portion 1229.

[9] Attached to the application is a colour map with inset, and a second colour map with the inset area further enlarged. The colour map shows the external boundary of the claim area outlined with a bold green line and green hatching throughout. It outlines and labels Northern Territory Portion (NTP) 810 (Perpetual Lease 1063), NTP 1229, and all neighbouring tenure that abuts the claim area. The inset and second colour map show which part of NTP 1229 is located within the green hatched claim area. It also shows other features of the external boundary (the external boundary surrounds but does not include a number of road reserves and portions near Titjikala Aboriginal community). Both maps contains tenure, legend, scale bar, and coordinate grid. On 3 October 2017 the Tribunal's geospatial unit reviewed the written description and maps and provided an assessment ('geospatial assessment'). The assessment states the written description and maps are consistent and identify the claim area with reasonable certainty.

[10] I considered the geospatial assessment, the written description and the maps. They are sufficient: I can identify the external boundary of the claim area with reasonable certainty.

The information about excluded areas meets this condition

[11] Schedule B lists the excluded areas: six named NT portions, the part of NTP 1229 previously covered by Miscellaneous Lease 51 , three road reserves and any areas where s 23B previous exclusive possession acts have been done (subject to Schedule L). There is nothing problematic about the last exclusion because general exclusion clauses are sufficient for s 190B(2) (*Strickland v Native Title Registrar* [50]-[55]).

[12] I consider the written description of the excluded areas is sufficient.

s 190B(3) requirements met: identification of the native title claim group

What is needed to meet this condition?

[13] To meet s 190B(3), the Registrar must be satisfied:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[14] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group'. It is not relevant to consider whether

the claim is on behalf of the correct native title claim group – the focus is whether the description is adequate so the claim group members can be ascertained (*NT v Doepel* [51] and [37] respectively).

The description of the persons in the native title claim group meets this condition

[15] A description may be sufficient even if it requires factual inquiry to ascertain whether a person is a claim group member: a person's descent from certain ancestors provides a sufficient starting point for that inquiry – provided the ancestors are named and the descent rules are explained (*WA v Native Title Registrar* [64]-[67]). Schedule A at para 1 states the native title claim group comprises 'the members of the five family groups with responsibility for the Imarnte, Titjikala and Idracowra estates'.

[16] Para 9(a) states the claim group comprises all persons descended from one or more ancestors ('descent members'). It names the uppermost ancestors for each estate group and their descendants. The descent rules are 'birth or adoption'. This level of detail provides a sufficient starting point for a factual inquiry into whether a person is a descent member of the claim group.

[17] Para 9(b) states the claim group also comprises persons 'accepted as members … by the senior descent based members … on the basis of non-descent connections' ('non-descent members'). Paras 11 and 15 refer to the 'individual circumstances' of 'non'-descent connections' that the senior descent members have regard to 'when considering the recruitment of a particular individual'. These 'non-descent connections' are conception and/or birthplace affiliation, putative or close kinship ties, possession of cultural knowledge, long-term residence and ongoing ritual involvement. Because further factual inquiry is permitted to ascertain members of a claim group, those senior descent members who make decisions about the recruitment of non-descent members could be approached to identify such members. The senior descent members (and the non-descent connections listed) provide a sufficient starting point for a factual enquiry into whether a person is a non-descent member of the claim group.

[18] I am satisfied the claim group description enables the reliable identification of persons in the native title claim group.

s 190B(4) requirements met: identification of claimed native title

What is needed to meet this condition?

[19] To meet s 190B(4), the Registrar (or their delegate) must be satisfied the description of the claimed native title rights and interests allows these rights and interests to be readily identified (*NT v Doepel* [92]). I will consider the definition of 'native title rights and interests' in s 223 and decide whether the claimed rights and interests are understandable and have meaning (*NT v Doepel* [99]).

The description of the native title rights and interests meets this condition

[20] Schedule E claims a series of non-exclusive rights and interests (listed in full at Attachment A of this decision). I considered the definition of 'native title rights and interests' at s 223 and I am satisfied the description of the claimed native title rights and interests is meaningful and understandable (*NT v Doepel* [99]). I can readily identify the claimed native title rights and interests (*NT v Doepel* [92]).

s 190B(5) requirements met: factual basis for claimed native title

What is needed to meet this condition?

[21] To meet s 190B(5), the Registrar must be satisfied the factual basis sufficiently supports the assertion that the native title rights and interests claimed exist. In particular, the factual basis must support each the following assertions:

(a) the native title claim group have, and their predecessors had, an association with the area;

(b) there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and

(c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[22] To assess each of the above, the Registrar's task is to 'address the quality of the asserted factual basis' as 'if they are true' and 'not to test whether the asserted fact will or may be proved' (*NT v Doepel* [17]). Therefore I must accept the four affidavits submitted with this amended application as 'if they are true', even though three of them are almost identical to those submitted in 2015 (as part of the application that was accepted for registration on 9 September 2015). The notable differences are the date of affirmation and the insertion of a different authorisation meeting at paragraph 6.

s 190B(5)(a) – sufficient factual basis for association with the area

[23] To meet s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. It is not necessary that each claim member had an association with the area at all times: what is required is an association between 'the whole group and the area' and between the predecessors of the whole group and the area since European settlement (*Gudjala (2007)* [52]).[2] Further, the association must be over the entire claim area (*Martin* [23]-[26]).

[24] There is sufficient factual basis for the assertion that the claim group's predecessors had an association with the area at European settlement, that they continued the association since European settlement, and that the claim group still has an association with the area.

[25] Some factual basis for association is included in the application at Schedule F. The relevant statements are:

- The claim group are the owners of the claim area under their system of traditional laws and customs – at [1];
- The claimed native title rights and interests have been held and exercised in accordance with the traditional laws acknowledged and customs observed by the claim group and their ancestors 'since time immemorial' – at [2];
- The claim group inherited their rights and interests under those traditional laws and customs via descent from their ancestors or acquired rights when recruited by senior descent members – at [4];

[2] *Gudjala (2007)* was appealed to the Full Federal Court (*Gudjala (2008)*). The Full Federal Court found Dowsett J made certain errors in *Gudjala (2007)*, but they found he made no error in law on this point (at [90]-[96]).

- The claim group are part of a regional society comprising other estate groups 'with whom they have a close association … and mutual estate recognition' – at [3];
- The regional society including the claim group have a communal belief that the physical and cultural landscape was established by spiritual ancestors who travelled on, above or below the land during the creative era or dreaming which they call *Altyerre* or *Tnengkarre* – at [5];
- The dreaming sites form 'countries' or 'estates' and the claim area comprises one country or estate – at [7].
- Claim group members are jointly responsible for looking after country subject to factors such as age, gender, residence and seniority. They perform complementary roles in relation to ceremonies and land management – at [14];
- Under their traditional laws and customs, succession processes may be set in motion or take place where a descent line is severely depleted to ensure 'knowledge about and the spiritual properties of the land are maintained' – at [16];
- The claim area is identified with the Pertame (or Southern Arrernte) language – at [19];
- Ethnographic sources confirm that at the time of contact and settlement of the region, and continuing to the present day, people affiliated with a dialect of the Arrernte language, including the claim group and their ancestors, maintained physical, spiritual and cultural associations with the claim area, including occupation and use of the area – at [19];
- Claim group members have a connection with the claim area based on knowledge received from ancestors, personal experience and continuing acknowledgement and observance of laws and customs – at [19];
- Continued observance of customary and spiritual practices by claim group members reaffirms their connection with the spiritual properties of the claim area – at [19];
- Many claim group members have had a continuing physical connection with the claim area throughout their lives – at [19];
- Claim group members have maintained their connection with the claim area notwithstanding the presence and activities of non-Aboriginal people – at [20];
- No other Aboriginal landholding groups have occupied or asserted rights in the claim area – at [21];

[26] Further factual basis for association is found in the four affidavits provided by the applicant persons, Desmond Jack, Reggie Kenny, Jeanette Ungwanaka and Eric Braedon.

Predecessors' association at European Settlement

[27] Schedule F includes a list of 20 ethnographic sources and states these sources 'confirm that at the time of contact and settlement of the region and continuing to the present day, people affiliated with the dialect of the Arrernte language, including members of the native title claim group and their ancestors, maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area.'

[28] The earliest source is a reprint of the 1858-1862 journals of one of the first explorers to the region and so it is reasonable to infer this is the 'time of contact' referred to in Schedule F. As for 'settlement of the region', it is reasonable to infer that European settlement occurred some decades afterwards, given the location and history of the region. The claim area is in a very remote part of Australia (approximately 65 kilometres south of Alice Springs). The town (originally named Stuart) was founded in 1872 following the completion of the telegraph line

'which made it viable for pastoralists to take up leases in the Centre'.[3] However, the increase in population did not occur until after the discovery of gold at Arltunga, about 100 km east of Alice Springs, in 1887.[4]

[29] Three of the deponents indicate their own birth dates are 1953, 1959 and 1969 (Reggie Kenny at [13]; Eric Braedon at [10]; and Jeanette Ungwanaka at [14]). The fourth deponent was likely born around or before 1959. He refers to living in Titjikala community when he was 18 years old (Desmond Jack at [15]) and another deponent (who was born in 1959) states Titjikala community was 'fairly new' when he moved there at 17 years (Affidavit of Eric Braedon at [11]). If I assume that each generation is around 25-35 years apart, then the deponents' grandparents were born in the late 1890s to early 1900s around the time of European settlement. In particular, one refers to his own father being an 'old man' by the time he was born in 1959 which suggests his grandfather was born earlier than the 1890s (Eric Braedon at [10]). Further, one deponent refers to a great grandparent within the claim area which could predate first contact (Reggie Kenny at [8]).

[30] Importantly, there is nothing that suggests the grandparents' association with the area was constrained by European settlers. All the deponents state that those grandparents who were born within the claim area walked 'all over' or 'all around' the claim area hunting, camping, gathering and caring for sites and places (Desmond Jack at [8]; Reggie Kenny at [8]; Jeanette Ungwanaka at [8]; and Eric Braedon at [9]).

[31] In addition to the statements that their grandparents walked 'all over' or 'all around' the claim area, some of the deponents refer to places their grandparents travelled through, cared for or were born in. One travelled 'all the way along the Hugh River', another's 'main dreaming was the gecko dreaming … including near Mt Burrell', another 'was born at Alice Well', another 'was born on Maryvale Station where the Hugh Creek comes through Maryvale' (Reggie Kenny at [8]; Jeanette Ungwanaka at [8] and [9]; and Eric Braedon at [9]). According to data extracted from the Gazetteer of Australia 2012 by the Tribunal's geospatial unit, all of these places are within the outermost boundary of the claim area (the land surrounding Alice Well is located within this boundary but is excluded from the claim area because it is Aboriginal Freehold land).

[32] Given the above, I am satisfied there is sufficient factual basis for the assertion that the claim group's predecessors had an association with the area at European settlement.

Predecessors' and claim group's association since European settlement

[33] Each of the deponents provides detailed information about the intergenerational association with the area. Each state they, and other claim members, continue to live within the

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[3] Source: Alice Springs Town Council Website 18 January 2018 http://www.alicesprings.nt.gov.au/living/alice-springs-history

[4] Ibid

immediate vicinity of the claim area. Each attest they hunt, gather, camp and look after sites and places and explain how they were taught to do so by their predecessors.

[34] For example, one deponent states his grandmother and father were born 'on the application area' (Reggie Kenny at [8]-[9]). His father was born at Mt Burrell Bore and grew up there: 'he used to walk all over Maryvale Station (the application area), hunting and camping. He would walk from water hole to water hole, up and down the Hugh River. He learnt where those waterholes were from his mother and all them family' (at [9]). The deponent himself was born in the Flying doctor airplane over Maryvale Station. He grew up on Horseshoe Bend Station, located immediately south of the claim area 'until I was ready to go to school and then I went to live in Alice Springs' some 65 kilometres north of the claim area (at [13]). He 'used to travel with my father to Maryvale Station' on the school holidays and 'stop and sit down there with all the old people' (at [14]). When he was 16, he began station work at neighbouring stations and 'would take the cattle up and down across the application area'. He recalls sitting in the stock camps at night where his oldest brother ('a proper Law man') 'would sit down and tell us all the stories about our country' (at [16]-[17]). He has lived at Walkabout Bore (approximately one kilometre north of the claim area) since the 1980s 'for getting close to 30 years' (at [18]). He states:

> Because I live on *Imarnte* country adjacent to the application area, I still go travelling and hunting and camping all over Maryvale Station. I go on horses with my nephews … We might go hunting, get perentie or a goanna or a kangaroo and build a fire and cook our dinner there. We also go out and get bush tucker … [and] bush tobacco … When we need water we stop at the waterholes on the application area. Those are the waterholes that my father taught me about when I was a young fella. (at [20])

[35] Another deponent states his mother and grandfather were 'born on the application area, on *Imarnte* country'. His mother 'grew up on the application area, hunting and camping and walking around on that country with her father' (Desmond Jack at [8]-[9]). When he 'was maybe 7 or 8 year old' he 'would go out to Maryvale Station (the application area)' with his mother and brother. They all moved to Maryvale when he was 'about 10 years old' because his 'father got a job there as the Station Manager' (at [12]). After that time, he recalls 'going out on the application area all the time – sometimes with my grandfather, sometimes with my mother and the old ladies … my other brother … and my cousins'. They 'would hunt and camp … get bush tucker too' (at [12]-[13]). He states:

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

[36] The other deponents make similar statements attesting to their association and their predecessors association with the claim area (Jeanette Ungwanaka at [8]-[19] and Eric Braedon at [8]-[20]). All deponents refer to specific places located within the outermost boundary of the claim area (according to data extracted from the Gazetteer of Australia 2012

by the Tribunal's geospatial unit). Two refer to caring for a sacred place near Gumtree Bore (Desmond Jack at [18]; Eric Braedon at [25]). Others refer to past and current use of ochre 'just up from Mt Charlotte' for ceremony (Reggie Kenny at [22]) and 'from Hugh Creek and other places inside Maryvale' for initiation in particular (Eric Braedon at [13]). Another refers to learning about and using 'important' soakages near Mt Charlotte and Mt Burrell and the 'main women's dreaming … running from Deep Well Station [approximately 800 kilometres south of the claim], all the way through Mt Burrell'' (Jeanette Ungwanaka at [14] and [16]). Another refers to learning the Bush Boys Dreaming near 'Gumtree Well Bore', 'the Irretye (Eaglehawk) dreaming around the Titjikala township area and the Tyelpe (Native Cat) Dreaming in the north-west of the Maryvale Station', and the Leye 1 (Emu 1) Dreaming track along Rodinga, Jackawarra Creek and Bill Dam (Eric Braedon at [10], [16] and [18]). He states '[a]s we would drive along and came up to an important place those old men would start singing the songline for that place. They made sure I learnt that song as well… This is the same way that I teach the younger men about the country on Maryvale nowadays' (at [18]). He also notes there are stone arrangements 'near Titjikala township for the Dingo Dreaming, at Nine Mile Bore near Mt Burrell for the Witchetty Grub Dreaming and another near Kraegens Grave for the Possum Dreaming' (at [25]). He refers to knowledge and responsibility for these arrangements being transferred from his grandfather to his father 'and then to me' (at [25]).

[37] The above examples indicate a strong continuity of association with area. I am therefore satisfied there is sufficient factual basis for the assertion that claim group have and their predecessors had an association with the area since European settlement.

s 190B(5)(b) – sufficient factual basis for traditional laws and customs

[38] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to the definition of 'native title rights and interests' within s 223(1)(a). As such, it is appropriate to consider s 190B(5)(b) in light of the case law regarding s 223(1)(a) (*Gudjala (2007)* [26]). The leading decision for this case law is *Yorta Yorta*.

[39] In *Yorta Yorta*, the High Court held a traditional law or custom 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice'. Its origins are in the normative rules of the society that existed before the Crown's assertion of sovereignty, and this normative system must have 'continuous existence and vitality since sovereignty' ([46]-[47]). Therefore, for the purposes of s 190B(5)(b), the factual basis must demonstrate the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society' (*Gudjala (2007)* [63]). The two elements of this factual basis are:

(i) an identification of an indigenous society at the time of sovereignty or, at the least, European occupation; and

(ii) a 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty'

(*Gudjala (2007)* at [64]-[66] and [26] respectively)

[40] I note again that the Registrar's task is to assess the quality of the assertions made in the claim. The registration test conditions 'are not, nor could they be, concerned with the proof that native title exists' (*Stock v Native Title Registrar* [64]).

Indigenous society at sovereignty or European occupation

[41] Each of the deponents state they have rights and interests in the claim area via descent from named *Imarnte* parents and grandparents who were born in *Imarnte* country and, in most cases, on the claim area (Desmond Jack at [7]-[9]; Reggie Kenny at [7]-[9]; Jeanette Ungwanaka at[8]; and Eric Braedon at [7]-[8]). As noted above, it is reasonable to infer that:

a) First contact occurred during European exploration of the claim area in 1858-1862;
b) European settlement of the claim area did not occur until some decades after this time; and
c) The *Imarnte* grandparents were born in the late 1890s to early 1900s (being around the time of European settlement).

[42] Schedule A describes the society at sovereignty. It states the claim group comprises five family groups with responsibility for three 'estates' within Pertame (Southern Arrernte) territory. An 'estate' is an area associated with a particular landholding group under the claim group's traditional laws and customs. The family groups are affiliated with the Pertame (Southern Arrernte) language. While this information describes the claim group and its current tenure system, Schedule F asserts the traditional laws and customs (which give rise to the system) are unchanged from pre-settlement times (at [2]).

[43] Schedule A also gives some genealogical information about the claim group. I can locate the names of the deponents and the names of each of their *Imarnte* grandparents and parents. The genealogical information also lists apical ancestors who are one to two generations above the grandparents. There are no dates included in the genealogical information, however, as above, I concluded the *Imarnte* grandparents were persons who were present in the application area around the time of European settlement. This is sufficient to explain who comprised the society at sovereignty (*Gudjala (2009)* [37], [40] and [52]) and the link between that society and the apical ancestors (*Gudjala (2007)* [64]-[66]).

[44] As noted above, I concluded the *Imarnte* grandparents association with the area was unconstrained by Europeans. On this basis, it is reasonable to infer that any laws and customs observed and practiced by the *Imarnte* grandparents were also unconstrained and were therefore unchanged since pre-sovereignty. Further, Schedule F states:

- The native title rights and interests claimed 'are held under and exercised in accordance with the traditional laws acknowledged and customs observed by members of the native title claim group and their ancestors, since time immemorial, including: (a) at the time when British sovereignty was asserted; and (b) at the time of contact with non-Aboriginal people' – at [2];

- The system of traditional laws and customs has its foundations in the creative era of the *Altyerre* (or *Tnengkarre*), is unchanged from that time, and has been passed down to each succeeding generation unchanged by the ancestors – at [5] and [17];

[45] The factual material to support the existence of laws and customs acknowledged and observed by the society at settlement are:

- The *Imarnte* grandparents observed age and/or gender restrictions for access to particular sacred sites and ceremonies (Desmond Jack at [11]-[12] and [14]; Reggie Kenny at [15]; Jeanette Ungwanaka at [8] and [16]);
- They cared for country, dreaming and sites and were obligated to do so (Jeanette Ungwanaka at[8]; Reggie Kenny at [15]; Eric Braedon at [8], [16] and [25]);
- They observed patterns of teaching where knowledgeable 'old people' would take the younger generations out on country to impart knowledge about country, including methods for hunting, camping, cooking and gathering bush foods and medicines(Desmond Jack at [12]-[13]; Eric Braedon at [10]);
- They used the resources of the application area for ceremonial purposes, sustenance, medicine, shelter, and the making of cultural tools and items (Desmond Jack at [8], [12] and [13]; Reggie Kenny at [8]; Jeanette Ungwanaka at [10] and [15]; Eric Braedon at [20]);
- They had knowledge of dreaming tracks, sites, songs, dances and stories on the application area and they participated in ceremonies (Desmond Jack at [11], [14] and [17]; Reggie Kenny at [11] and [19]; Jeanette Ungwanaka at [15]-[17]; Eric Braedon at [10], [13] and [14]);
- They were obligated to impart that knowledge and practice to younger generations (Desmond Jack at [14] and [17]; Jeanette Ungwanaka at [17]; Eric Braedon at [14]);
- Rights and interests in land were inherited through one's parents (Desmond Jack at [7]-[8]; Reggie Kenny at [7]-[8]; Eric Braedon at [7]-[8]; Jeanette Ungwanaka at [7]).

[46] The above meets the requirement of 'at least an outline of facts' about 'the pre-sovereignty society and its laws and customs relating to land and waters' (*Gudjala* (2009) [29]).

Relationship between laws and customs then and now

[47] The requirement here is that there must also be 'at least an outline of facts' about how the current claim group's laws and customs are derived from the laws and customs of the pre-sovereignty society (*Gudjala* (2009) [29]). With reference to the laws and customs described above, there is sufficient factual material to support the assertion that these remain largely unchanged and continue to be observed and practiced by the claim group. That material is as follows:

- Members of the claim group observe the same age and/or gender restrictions for access to particular sacred sites and ceremonies as their predecessors (Desmond Jack at [11]-[12], [14] and [17]; Reggie Kenny at [11], [15] and [22]; Jeanette Ungwanaka at [16]);
- They continue to care for country, dreaming and sites and are obligated to do so (Desmond Jack at [18]; Reggie Kenny at [20]; Eric Braedon at[8], [16], [17] and [25]);

- They still observe the patterns of teaching where knowledgeable 'old people' take the younger generations out on country to impart knowledge about country, including methods for hunting, camping, cooking and gathering bush foods and medicines (Desmond Jack at [16]; Reggie Kenny at[20]-[21]; Jeanette Ungwanaka at [19]);
- They continue to use the resources of the application area for ceremonial purposes, sustenance, shelter, and the making of cultural tools and items (Desmond Jack at [16]; Reggie Kenny at [20]-[22]; Jeanette Ungwanaka at [18] and [19]; Eric Braedon at [20]);
- They have knowledge of dreaming tracks, sites, songs, dances and stories on the application area and they participate in ceremonies and received this knowledge from their predecessors (Desmond Jack at [14] and [17]; Reggie Kenny at [17] and [19]; Jeanette Ungwanaka at [15]-[17]; Eric Braedon at [10], [12]-[18]);
- They are obligated to impart that knowledge and practice to younger generations just as their predecessors were obligated (Desmond Jack at [17]; Reggie Kenny at [21] and [22]; Jeanette Ungwanaka at [17]; Eric Braedon at [15] and [16]);
- Rights and interests in land are still inherited through one's parents (Desmond Jack at [7]-[8]; Reggie Kenny at [7]-[8]; Eric Braedon at [7]-[8]; Jeanette Ungwanaka at [7]).

[48] By way of example, one deponent recalls being taught by his 'grandfather and the other old men' about 'the country' including the sacred sites and dreaming tracks on the application area. He was forbidden to go to certain places until after he was 'put through the law by the old men who knew my grandfather'. He recalls 'sometime after I had been through law, my "uncle" … chose me to go with him to a Land Council meeting. He said "you gotta do this because your grandfather is leader". And so I did it.' He refers to the obligation that 'I have to pass on the knowledge'. He states 'I taught my sons about the country and about the sacred sites, same way as my grandfather'. They were also forbidden entry to certain places until they 'went through the Law at Titjikala' with the next 'grandfather' generation. He states 'I have the right to go walking and camping over *Imarnte* country, including the application area, anytime because it is my county. Other Aboriginal people, who are not from *Imarnte* country must come and ask permission' (Desmond Jack at [12]-[22]).

[49] Given the above, there is sufficient factual basis for the requirement at s 190B(5)(b) 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'.

s 190B(5)(c) – sufficient factual basis for continuance of native title

[50] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.' In *Yorta Yorta,* the High Court considered that a claim group holds native title rights and interests by acknowledging and observing the laws and customs of the pre-sovereignty society in a 'substantially uninterrupted' way ([47] and [87]). In other words, if I conclude there are sufficient facts for the assertion that the claim group acknowledges and observes the pre-sovereignty society's laws and customs in a 'substantially uninterrupted' way, then it must follow that there are sufficient facts for the assertion that native title continues to be held.

[51] At s 190B(5)(b), I concluded there are sufficient facts to support the assertion that there was an indigenous society at European occupation that practiced and observed traditional laws and customs, that these have been practiced and observed across the generations since that time, and the claim group continues to do so today. This addresses the requirement that pre-sovereignty laws and customs have been acknowledged and observed in a 'substantially uninterrupted' way per *Yorta Yorta* above. Therefore it must follow there are sufficient facts for the assertion that the claim group continues to hold native title in accordance with those traditional laws and customs at s 190B(5)(c). The requirements at s 190B(5)(c) are met.

s 190B(6) requirements met: prima facie case

[52] To meet s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.' 'Prima facie' means 'at first sight; on the face of it; as appears at first sight without investigation' (*NT v Doepel* [134]). There is a requirement to measure the factual material against each of the individual rights and interests claimed (*NT v Doepel* [126]-[132]).

[53] The claimed native title rights and interests that are prima facie established are as follows.

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

[54] This right is prima facie established. Each of the deponents attests to accessing and travelling over the claim area for most of their lives and describe how their predecessors accessed and travelled over the application area. (Desmond Jack at [8]-[9], [11]-[13] and [16]; Reggie Kenny at [8]-[9], [12], [14], [19] and [20]; Jeanette Ungwanaka at [8], [10]-[14], [18]-[19]; and Eric Braedon at [9]-[11], [18] and, [20])

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

[55] This right is prima facie established. Each of the deponents attest to camping on the claim area for most of their lives and describe how their predecessors also camped on the application area. Some refer to erecting shelters and other structures. (Desmond Jack at [8], [9], [12], [13] and [16]; Reggie Kenny at [8], [12], [14], [19] and [20]; Jeanette Ungwanaka at [8], [10]-[12], [14], [18]-[19]; and Eric Braedon at [10], [11], [15] and [18).

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

[56] This right is prima facie established. Each of the deponents attests to hunting and gathering on the claim area for most of their lives and describe how their predecessors did the same. (Desmond Jack at [8]-[9], [11]-[13] and [16]; Reggie Kenny at [8], [12], [14] and [20]; Jeanette Ungwanaka at [8], [10]-[12], [14], [18] and [19]; and Eric Braedon at [10], [11], [18] and [20]). The deponents do not specifically describe fishing. However, I am satisfied the right to take and use the natural resources is established (see below). It is reasonable to infer that fish in natural watercourses meet the definition of a 'natural resource' (see below).

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

[57] This right is prima facie established. Each of the deponents attests to taking and using natural resources on the claim area for sustenance and other purposes and describe how their predecessors did the same. (Desmond Jack at [13]; Reggie Kenny at [22]; Jeanette Ungwanaka at [15] and [19]; and Eric Braedon at [13], [20] and [24]).

The right to access, take and use natural water on or in the land, except water captured by the holder of Perpetual Pastoral Lease No. 1063

[58] This right is prima facie established. Each of the deponents attests to accessing, taking and using natural water on the claim area and describe how their predecessors did the same. (Desmond Jack at [12]; Reggie Kenny at [9], [14] and [20]; Jeanette Ungwanaka at [14]; and Eric Braedon at [18]).

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

[59] This right is prima facie established. Each of the deponents attest to lighting fires on the claim area for cooking and some describe how their predecessors did the same. (Desmond Jack at [16]; Reggie Kenny at [20]; Jeanette Ungwanaka at [10]; and Eric Braedon at [20]).

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

[60] This right is prima facie established. Each of the deponents describe accessing, maintaining and/or protecting sites and places on the claim area and how their predecessors did the same. (Desmond Jack at[8], [12], [14], [17] and [18]; Reggie Kenny at [11], [12], [20], [22] and [24]; Jeanette Ungwanaka at [8], [16] and [21]; and Eric Braedon at [10], [13], [15]-[18] and [25]).

The right to conduct and participate in particular activities on the land and waters

[61] The five particular activities claimed are: (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.

[62] The right to participate in these activities is prima facie established. Each of the deponents describe the conduct and participation of at least three activities by current members and predecessors. (Desmond Jack at [11], [13]-[15], [17]-[19], [21] and [22]; Reggie Kenny at [11], [14], [16], [17], [19], [21], [22]; Jeanette Ungwanaka at [14]-[17] and [19]; and Eric Braedon at [10], [12]-[18], [20], [24] and [26]).

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

[63] This right is limited to making decisions about the use and enjoyment '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 land and waters'. The Court has recognised similar non-exclusive rights that only operate on those persons who consider themselves governed by native title holders' traditional laws and customs (e.g. *De Rose* 3(1) and *Mundraby* 3(c)(ii)).

[64] The right is prima facie established. Each of the deponents attests to the right and explains this right (amongst others) is inherited from their predecessors. (Desmond Jack at [7], [19]-[22]; Reggie Kenny at [7], [22]-[25]; Jeanette Ungwanaka at [7], [20]-[22]; and Eric Braedon at [7] and [26])

The right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources

[65] The right is prima facie established. Three deponents attest to sharing or exchanging natural resources as a part of traditional laws and customs also practised by their predecessors. (Desmond Jack at [13]; Jeanette Ungwanaka at [19]; and Eric Braedon at [13] and [24]).

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

[66] Three types of non-native title holders are described in the claim: (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; and (iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.

[67] The right is prima facie established. Each deponent describes how this right operates and explains this right (amongst others) is inherited from their predecessors. (Desmond Jack at [7], [13], [18] and [21]; Reggie Kenny at [7], [23] and [24]; Jeanette Ungwanaka at [7], [20] and [21]; and Eric Braedon at [7] and [21]-[23]).

s 190B(7) requirements met: traditional physical connection

What is needed to meet this condition?

[68] To meet s 190B(7), the Registrar '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'. To be satisfied about this fact, some evidentiary material must be provided and again, the focus for the Registrar 'is not the same focus as that of a Court when it comes to hear and determine the application' *(NT v Doepel* [18]).

There is evidence of traditional physical connection

[69] Jeanette Ungwanaka is one of the applicant persons. She appears in Schedule A as a descendent of the uppermost ancestors listed in Group 4, so I am satisfied that Ms Ungwanaka is a member of the native title claim group. In her affidavit she states she was born at the old village on Maryvale Station, grew up there and went camping, hunting and collecting on the application area including at Mt Charlotte and Mt Burrell (at [14]). I am satisfied this physical connection is traditional because Ms Ungwanaka states that '[d]uring those trips, my mother taught me all about country, like where the soakages are, how to find bush tucker and how to collect bush medicine' (at [14]). She also refers to 'the ladies' making ceremonial paint 'from the lime rocks on the application area', and learning 'the sacred women's sites', 'all the little places' and 'all the songs and all the stories' from her mother and grandmother (at [15]-[17]). Further, Ms Ungwanaka currently lives at Titjikala community (which is in the centre of, but excluded from the claim area) and she states 'I still always go

hunting and camping on the application area, in the sandhill country… [and] collect all sorts of bush tucker' (at [18]). As explained above at s 190B(5)(b), these are all activities the material supports as being undertaken according to the traditional laws and customs of the group. I am satisfied this current physical connection is traditional because she states she passes the knowledge on to 'the younger generations' who 'come out too' (at [17] and [19]).

[70] There is evidentiary material of at least one claim group member's traditional physical connection with the claim area. The requirement at s 190B(7) is met.

s 190B(8) requirements met: s 61A compliance

[71] To meet s 190B(8), the 'application and accompanying documents must not disclose and the Registrar must not otherwise be aware that, because of s 61A … the application should not have been made.' The amended application complies with all of s 61A as follows:

Requirement	Result	Reasons
s 61A(1) – application must not be made over an approved native title determination area	Met	The geospatial assessment shows no overlap with any native title determination area.
s 61A(2) – application must not be made over previous exclusive possession act areas	Met	Schedule B states the claim area excludes previous exclusive possession act areas.
s 61A(3) – application must not claim exclusive rights and interests in previous non-exclusive possession act areas	Met	There is no claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others.

s 190B(9) requirements met: no extinguishment etc. of claimed native title

[72] To meet s 190B(9), 'the application and accompanying documents must not disclose and the Registrar must not otherwise be aware' of any claims of the type described below. The amended application meets s 190B(9) as follows:

Requirement	Result	Reasons
s 190B(9)(a) – no claim of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Met	Schedule Q states there is no claim of ownership of minerals, petroleum or gas wholly owned by the Crown.
s 190B(9)(b) – no claim of exclusive possession over an offshore place	Met	Schedule P shows the claim area is inland.
s 190B(9)(c) – no claimed native title rights and interests have otherwise been extinguished	Met	There is no information to indicate other extinguishment.

s 190C(2) requirements met: information etc. required by sections 61 and 62

[73] To meet s 190C(2), the Registrar must be satisfied the application contains all of the material required by ss 61 and 62. The Registrar is not required to undertake any merit or qualitative assessment of the material at s 190C(2) (*NT v Doepel* [16], [35]-[39]).

s 61 – all material is provided

[74] I examined the amended application. It contains the material required as listed below:

Section requirement	Location in amended application
s 61(1) Native title claim group	Schedule A
s 61(3) Name and address for service	Part B
s 61(4) Native title claim group named/described	Schedule A

s 62(1)(a) – accompanying affidavit meets the requirements

[75] Section 62(1)(a) states:

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

[76] Four affidavits accompany the amended application sworn by each of the persons who comprise the applicant. The affidavits appear to be compliant (*Evidence Act 1995* (Cth) ss 186; *Federal Court Rules 2011* Div 29.1). Each affidavit contains the statements required by s 62(1)(a).

s 62(1)(b) – the amended application contains all details specified in s 62(2)

[77] An application must contain all of the details specified in s 62(2). The relevant details and the locations in the amended application are listed below:

Section requirement	Location in amended application
s 62(2)(a) Information about the boundaries of the area	Schedule B
s 62(2)(b) Map of external boundaries of the area	Attachment A
s 62(2)(c) Searches	Schedule D

Section requirement	Location in amended application
s 62(2)(d) Description of native title rights and interests	Schedule E
s 62(2)(e) Description of factual basis	Schedule F
s 62(2)(f) Activities	Schedule G
s 62(2)(g) Other applications	Schedule H
s 62(2)(ga) Notices under s 24MD(6B)(c)	Schedule HA
s 62(2)(h) Notices under s 29	Schedule I

s 190C(3) requirements met: previous overlapping claim groups

What is needed to meet this condition?

[78] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application ('the current application') was a member of a native title claim group for any previous application'. To be a 'previous application':

a. the previous application must overlap the current application in whole or part;
b. there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
c. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

There are no previous applications

[79] The geospatial assessment shows the 'current application' is on the Register of Native Title Claims. It does not show any applications that meet the term 'previous application'. There is no requirement to consider s 190C(3) any further (*WA v Strickland* [9]).

s 190C(4) requirements met: Identity of claimed native title holders

What is required to meet this condition?

[80] To meet s 190C(4), the Registrar must be satisfied the application is certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application (s 190C(4)(a)). The certification must contain the information required by ss 203BE(4)(a)-(c). There is no requirement to look behind the certification or to consider whether the applicant is in fact authorised (*NT v Doepel* [80]-[81]).

[81] Alternatively, if the application is not certified, the Registrar must be satisfied 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 (s 190C(4)(b)).

The amended application is certified

[82] The geospatial assessment shows one representative Aboriginal/Torres Strait Islander body recognised under s 203AD and/or s 203FE - the Central Land Council (CLC). The CLC certification is at Attachment R of the amended application. It is signed by the CLC Director and dated 30 May 2017. I am satisfied the amended application is certified.

The CLC is an appropriate body who can certify the application

[83] The certification does not state the basis of the CLC's authority to certify the application. I have referred to the Tribunal's 'Representative Aboriginal and Torres Strait Islander Body Areas' map which confirms the CLC is a recognised representative body under s 203AD. It follows that the CLC has authority to perform all the functions of a representative body, including certifying a native title determination application.

The certification meets the requirements in ss 203BE(4)(a) to (c)

[84] The certification complies with s 203BE(4)(a). It states the CLC 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 matters arising in relation to it'; and 'all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group'. It briefly sets out the CLC's reasons for having that opinion. So the certification complies with s 203BE(4)(b).

[85] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3)'. Section 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between competing claimants and to minimise the number of overlapping applications. The certification states the CLC is not aware of any other applications. This is confirmed by the geospatial assessment and my own searches. The certification complies with s 203BE(4)(c).

End of reasons

Attachment A: Information to be amended on the Register of Native Title Claims (s 186(1))

Applicant:

[As per the Schedule]

Applicant's address for service:

[As per the Schedule]

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

1. The native title rights and interests of the native title holders are the non-exclusive native title rights and interests possessed under and exercisable in accordance with the traditional laws acknowledged and traditional customs observed, including the right to conduct activities necessary to give effect to them, 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 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 holder of a pastoral lease;
   (f) the right to light fires for domestic purposes, but not for the clearance of vegetation;
   (g) 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;
   (h) 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;
      (v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;
   (i) 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 land and waters;
   (j) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;
   (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.
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 rights and interests claimed do not confer possession, occupation, use and enjoyment of the land and waters 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 interests 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 title 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 interests set out in paragraph 1.

End of document