

Registration Decision

Application name	Rainbow Valley
Name of applicant	Eric Braedon and Peter Kenny on behalf of the members of the family groups with responsibility for the Imarnte estate who are connected to the area covered by this application
Federal Court of Australia No.	NTD24/2018
NNTT No.	DC2018/004
Date of Decision	2 October 2018

Claim accepted for registration

I have decided that the claim in the Rainbow Valley application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Katy Woods

*Delegate of the Native Title Registrar*²

¹ All legislative references are to the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

² Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

De Rose v State of South Australia (No 2) [2005] FCAFC 110 (*De Rose FC2*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People # 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*)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)

Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)

Wakaman People #2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Background

- [1] This application was filed on behalf of the Imarnte native title claim group. It covers the land and waters in the Rainbow Valley Conservation Reserve, which lies inside Orange Creek pastoral station to the south of Alice Springs in the Northern Territory.
- [2] On 28 June 2018 the applicant filed the application and accompanying affidavits (application) with the Federal Court of Australia (Court). On 2 July 2018 the Registrar of the Court gave a copy of the application to the Native Title Registrar (Registrar) pursuant to s 63. This triggered the Registrar's duty to consider the claim in the application under s 190A.

[3] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, it must not be accepted for registration.⁴ As a delegate of the Registrar, I have decided the application satisfies all of the registration test conditions and my reasons on each condition follow below.

Information considered

[4] I have considered the information in the application and note the applicant has not provided any further material.⁵ There is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers,⁶ and the Northern Territory (territory government) has not provided submissions in relation to the application of the registration test.⁷ I consider it appropriate to have regard to information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services, dated 5 July 2018 (geospatial report) and information available through the Tribunal’s geospatial database and Register of Native Title Claims.⁸ I have also considered information from Commonwealth government sources to assist in my assessment of the likely date of settlement in and around the application area for the purposes of s 190B(5)(a).

[5] Although I can consider material from outside of the application for some of the conditions of registration, and the guidance from Mansfield J that the Registrar’s task ‘is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application’.⁹

Procedural fairness

[6] On 6 July 2018 the senior officer for the matter wrote to the territory government advising that I would be relying on the information in the application for my decision and to make any submissions by 20 July 2018. On 12 July 2018 the territory government confirmed it would not be making any submissions. This concluded the procedural fairness process.

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ Section 190A(3)(a).

⁶ Section 190A(3)(b).

⁷ Section 190A(3)(c).

⁸ *Ibid.*

⁹ *Doepel* [16].

Merits of the claim (s 190B) – Conditions met

Identification of area subject to native title – s 190B(2) condition met

[7] I am satisfied the information provided about the external boundary and internally excluded areas is sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed, which means s 190B(2) is met.

What is required to meet this condition?

[8] To meet s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides 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.¹⁰

How does the information about the external boundary meet this condition?

[9] Schedule B describes the application area in terms of the ‘NT portion’ it covers, which is the Rainbow Valley Conservation Reserve.

[10] Attachment A is an A4 colour map prepared by the Central Land Council, titled ‘Rainbow Valley Native Title Determination Application, dated 27 June 2018 which includes:

1. The application area depicted in bold dark-green outline and dark-green hatching, labelled with name and NT Portion number;
2. Tenure, depicted as represented in the legend, identified by name and NT Portion number;
3. Settlements, road, railway, watercourses and local infrastructure;
4. Scalebar, northpoint, coordinate grid (GDA94, MGA Zone 53); and
5. Notes relating to the source, currency and datum of data used to prepare the map.

[11] The geospatial assessment is that the map and description are consistent and identify the application area with reasonable certainty. Having considered the description in Schedule B and the map in Attachment A, I agree with the geospatial assessment and am satisfied that the external boundary of the application area can be identified on the earth’s surface with reasonable certainty.

¹⁰ *Doepel* [122].

How does the information about excluded areas meet this condition?

[12] Schedule B states '[s]ubject to Schedule L, any other area within the boundaries of the area covered by the application in relation to which a previous exclusive possession act under section 23B of the NTA has been done is excluded from the application.' Schedule L, which asks applicants about tenure and land use issues, states 'not applicable'.

[13] I note French J's comment in regard to the requirements of s 190B(2), that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.¹¹ Following this reasoning, I am satisfied that the description of the excluded areas sufficiently describes the excluded areas so that they can be ascertained at the appropriate time.

Identification of the native title claim group – s 190B(3) condition met

[14] I am satisfied the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. This means s 190B(3)(b) is met.

What is required to meet this condition?

[15] To meet s 190B(3), 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] I note that I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group'.¹²

How does the description of the persons in the native title claim group meet this condition?

[17] The description in Schedule A extends to six pages. It begins:

1. [t]he native title claim group comprises the members of the family groups with responsibility for the Imarnte estate ("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:

¹¹ *Strickland* [55].

¹² *Wakaman* [34].

(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 [sic] 7(b) below;

(b) hold the common or group rights and interests comprising the native title in the application area.

[18] Paragraphs 2–4 of Schedule A provides further description of the claim group, explaining that although located in Pertame (Southern) Arrernte territory, rights in land are not acquired through membership of a language group.

[19] Paragraph 5 states that members of the claim group are recognised as traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in relation to other land, and provides a summary of the relevant land claims.

[20] Paragraph 6 states that the persons authorised to make the application are all members of the Imarnte landholding group.

[21] Paragraph 7 extends over 3 pages of Schedule A. It begins:

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) descended (by birth or adoption) from one or more of the following named and unnamed ancestors ("the ancestors"): ...

[22] There follows four lists of the members of each landholding group. Within each list, the apical ancestors are listed in bold, followed by the names of their descendants, followed by a catch-all of 'and their descendants' or 'no known surviving descendants'.

[23] Paragraph 7(b) reads:

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: ...

b. accepted as members of the landholding group by the senior descent based members of the landholding group on the basis of non-descent connections to the estate.

[24] There are no non-descent based members named.

[25] Paragraph 8 states that the ancestors in paragraph 7(a) 'are the uppermost generation of the known ancestors of members of the native title claim group'.

[26] Paragraph 9 describes the means by which a person can become a member of a landholding group, other than descent. It states that 'a person can be recruited and recognised as a member of a landholding group (by the senior descent based members of the group)...'.¹³ The connections to which senior members have regard are: conception / birthplace affiliation with

¹³ Emphasis added.

the estate; putative or close kinship ties; and ‘possession of cultural knowledge, including of neighbouring shared Dreamings, consolidated long-term residence in and ongoing ritual involvement with an estate’.

[27] Paragraph 10 explains the claimant group’s rules about succession involving the amalgamation of two different but connected estates. It notes that additional information about the rules of succession is contained in Schedule F.

[28] Paragraphs 11–13 provide further information about how rights and interests in land arise from the different types of connection (descent and non-descent). Paragraph 11 explains that descent is the most important basis for the possession of rights and interests in land. Paragraph 12 explains that rights and interests in land are inherited through all four grandparental lines. Paragraph 13 explains that non-descent based rights and interests ‘are usually limited to the individual and are not transmittable’.

[29] Based on the description in Schedule A, I consider that in order for an individual to qualify as a member of the group they must either:

1. be a member of at least one of the four land-holding groups by virtue of their descent (including by adoption) of the listed apical ancestors described in paragraph 7(a); or
2. be a non-descent based member as described in paragraphs 7(b), 9 and 13.

[30] The description of the descent-based members includes an objective starting point, being descent from persons either named or described. Determining all the members of the group from the apical ancestors will require some genealogical research, however I note Carr J’s view that the need to undertake a factual enquiry to determine the members of the group does not mean that the group has not been described sufficiently.¹⁴

[31] While no non-descent based members are named, I consider there is a sufficient description Schedule A to identify any such members, due to the explanation of the recruitment system and criteria for non-descent based membership in paragraph 9, and the further information in paragraph 13 regarding the individual and non-transmittable nature of such membership. I consider the application of the criteria in these paragraphs would allow for identification of any non-descent based members, noting that s 190B(3) requires only a clear description, rather than a ‘cogent explanation’ of the basis on which individuals qualify as members of the claim group.¹⁵ I also note the guidance from Dowsett J that it is ‘necessary that such identification be possible at any future point in time’ and ‘membership must be based on

¹⁴ *WA v NTR* [67].

¹⁵ *Gudjala 2007* [33].

group acceptance'.¹⁶ I consider it will be possible to identify the non-descent based members at a future point in time in accordance with the description provided.

Identification of claimed native title – s 190B(4) condition met

[32] I am satisfied the description in Schedule E is sufficient to readily identify the claimed native title rights and interests and so s 190B(4) is met.

What is required to meet this condition?

[33] To meet s 190B(4), the Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the claimed native title rights and interests to be identified.

How does the description of the native title rights and interests meet this condition?

[34] Schedule E states:

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: ...

[35] There follows a list of 11 non-exclusive rights such as the right to hunt, gather and fish on the land and waters.

[36] Paragraph 3 of Schedule E states '[t]he native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others'. I therefore consider the native title claim group are not claiming a right of exclusive possession over any part of the application area.

[37] I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I will address that as part of my consideration of s 190B(6), where I must decide whether each of the claimed rights are prima facie established.

Factual basis for claimed native title – s 190B(5) condition met

[38] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c).

¹⁶ *Aplin* [256], [260].

What is required to meet this condition?

[39] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;
- (b) that 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.

[40] I understand my task is to assess whether the asserted facts in the application can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹⁷

What is required to meet s 190B(5)(a)?

[41] To meet s 190B(5)(a) the information in the application must demonstrate:

1. the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since European settlement;¹⁸
2. there is 'an association between the whole group and the area', although not 'all members must have such association at all times';¹⁹ and
3. there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.²⁰

How does the application support an association between the predecessors of the claim group and the area at European settlement and since that time?

[42] Schedule F asserts:

20. ...members of the native title claim group, as their ancestors before them, have a connection with the application area: ...
 - (b) 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 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.

¹⁷ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

¹⁸ *Gudjala 2007* [52].

¹⁹ *Ibid.*

²⁰ *Martin* [26]; *Corunna* [39], [45].

- [43] The assertion in paragraph 20(b) is supported by references to Spencer and Gillen’s book *The Native Tribes of Central Australia*, first published in 1899. Based on the date of this work and my understanding of settlement in the central desert region, I consider it is reasonable to infer that European settlement in the application area occurred in the period 1890–1910.
- [44] With regards to the intervening generations, Schedule F refers to the extensive ethnographic research of TGH Strehlow in 1933, 1947, 1953, 1960 and 1971.
- [45] The affidavit of [name deleted] deposes that he has rights and interests in the application area through his grandfather.²¹ [Name deleted] was born in 1959 and he deposes that his father was an ‘older man’ by that time.²² I infer from this statement that his father would likely have been born in the 1920s or 1930s and that his grandfather was born around 1890–1900, around the time of settlement in the application area. The affidavit deposes the deponent’s grandfather was born and spent most of this life on neighbouring Maryvale Station, which I can see is located to the south of the application area. The affidavit deposes Maryvale Station is ‘Imarnte country’, as is the application area.²³ This accords with the information provided in paragraph 3 of Schedule A, that the Imarnte estate and landholding group includes the entire application area. The affidavit deposes the deponent’s grandfather used to spend time on the application area ‘for hunting and getting bush food’, that ‘[t]he main corroboree place at that time was Rainbow Valley. So [the deponent’s grandfather] who was boss, used to go there for ceremony’.²⁴ The affidavit deposes the ‘old people’ would get bush food from the application area to ‘grind them up for flour’ and the ‘old men’ would get stone for implements and trees for spears from the application area.²⁵
- [46] The affidavit of [name deleted] deposes the deponent’s father was also born at Maryvale Station and went through ceremony (Young Man’s Business) in the application area.²⁶ The affidavit states the deponent’s father spent his life in and around the application area, hunting, camping and getting bush tucker.²⁷ The deponent’s father worked on Orange Creek pastoral station, within which the application area is located, as well as the adjacent stations of Maryvale and Deep Well.²⁸ The deponent states that he grew up living between Amoonguna and Maryvale station with his paternal uncle or ‘other father’, and that his ‘two old fathers’ would take him and his brother onto the application area to camp, hunt and learn

²¹ Affidavit of [name deleted] [7].

²² Ibid [13].

²³ Ibid [9].

²⁴ Ibid [9]–[10].

²⁵ Ibid.

²⁶ Ibid [10]–[11].

²⁷ Ibid [12].

²⁸ Ibid [15].

the Dreaming stories.²⁹ He further deposes that his two fathers showed him the old camping place in the application area and that people used to ‘come up from Oodnadatta and all over’ to do ceremony there.³⁰ The deponent states he has found over 30 grinding stones at the old camping place in the application area ‘so it must have been a big camp’.³¹

[47] The affidavit of [name deleted] states he has rights and interests in the application area through his grandmother.³² [Name deleted] was born in 1949 so I can infer his grandmother would likely have been born around 1890–1900.³³ The affidavit states the deponent’s grandmother was born ‘down the Hugh River’, which I can see runs from near Owen Springs to the north down to Titjikala in the south, and very close to the application area. He states that the camp in the application area was used by ‘the old women...while the men were over at the initiation site’.³⁴ The affidavit states the deponent’s father was born at Mt Burrell Bore on Maryvale Station and that he grew up and worked on surrounding stations including Horseshoe Bend, Lilla Creek and New Crown.³⁵ I can see that Maryvale Station lies directly to the south east of the application area and Horseshoe Bend, Lilla Creek and New Crown stations lie further to the south east, on the other side of Maryvale Station. The deponent states he grew up at Horseshoe Bend station, staying with his sister during school terms in Alice Springs, returning to Horseshoe Bend for holidays and returning permanently from the age of about 14 when he began working on the station himself.³⁶ He deposes that his father would take him out and teach him ‘how to survive on my country’, as well as teaching him the relevant Dreaming stories.³⁷

[48] I consider there is sufficient information in the factual basis material to support an assertion that the predecessors of the claim group have had an association with the application area since sovereignty. I have formed this view based on the information in the claimants’ affidavits about their parents and grandparents living and working at the stations surrounding the application area, and spending time on the application area camping, hunting, using implements made from the resources of the application area, and preparing bush foods using grinding stones. I also consider the information about a large camp and ceremonial ground on

²⁹ Ibid [13]–[15].

³⁰ Ibid [16].

³¹ Ibid.

³² Affidavit of [name deleted] [7].

³³ Ibid [10].

³⁴ Ibid [8], [17].

³⁵ Ibid [9].

³⁶ Ibid [10].

³⁷ Ibid.

the application area supports an assertion that the nature of the association that the predecessors had with the application area was of a physical and a spiritual nature.

How does the application support an association between the claim group and the area presently?

[49] With regards to the association of the current claim group with the application area, Schedule F states at paragraph 20(c) that ‘members of the native title claim group have a connection with the application area based on knowledge received from the ancestors, personal experience and their continuing acknowledgement and observance of traditional laws and customs’.

[50] The affidavit of [name deleted] deposes he and his brother were taught about Imarnte country by their ‘two fathers’.³⁸ He refers to locations in and around the application area including Maryvale Station, Titjikala community and Soakage Bore where they would camp, hunt and learn the Dreaming stories.³⁹ The deponent states that he was put through Law at Titjikala.⁴⁰ He explains that Rainbow Valley is a gender-restricted area and so ‘we didn’t camp right inside Rainbow Valley itself if my wife or my daughter was with me’.⁴¹ He states he continues to visit the application area to teach the young men and also to look after the sacred sites.⁴²

[51] The affidavit of [name deleted] deposes that throughout his life he ‘always worked around the boundaries of Imarnte country so I was near my country’.⁴³ The deponent states that he currently lives at Walkabout Bore which lies very close to the eastern boundary of the application area,⁴⁴ and that he has worked as a ranger in and around the application area for 17 years.⁴⁵ He deposes that he has taught his nephews ‘how to look after Rainbow Valley’ and he still goes around the country to check up on sites.⁴⁶

[52] Schedule F also refers to the information in Schedules G and M to support the assertion that members of the native title claim group have maintained their connection with the application area. Schedule G lists the activities undertaken by the members of the claim group and Schedule M summarises information about two of the claimants’ connections with the application area.

³⁸ Affidavit of [name deleted] [13].

³⁹ Ibid [13]–[15].

⁴⁰ Ibid [17].

⁴¹ Ibid [15].

⁴² Ibid [21].

⁴³ Affidavit of [name deleted] [11].

⁴⁴ Ibid [12].

⁴⁵ Ibid [16].

⁴⁶ Ibid [18].

[53] In my view, the information in the claimants' affidavits about growing up on and around the application area, working on nearby stations in their youth and as rangers in more recent times, and visiting various parts of the application area, including with members of their families, provides a sufficient factual basis to show the physical association the claim group currently has with the application area. I also consider the information in the claimants' affidavits about learning the Dreaming stories of the application area from their predecessors and teaching them to younger generations, and acknowledging and looking after parts of the application area that are 'sacred', provides a sufficient factual basis to show the spiritual association the claim group has with the application area.

How does the application support an association, both past and present, with the entire area claimed?

[54] As summarised above, the claimants' affidavits contain numerous references to the application area and surrounding stations, both in terms of their predecessors, themselves and younger generations of the claim group. There are also references to claim group members living and working on the station that includes the application area, Orange Creek, as well as surrounding stations including Amoonguna in the north, Tempe Downs in the west, Maryvale and Horseshoe Bend in the south and Deep Well in the east.

[55] I also note the references to many smaller locations which I can see lie in or close to the application area, including:

1. Mushroom Rock
2. Walkabout Bore
3. Soakage Bore
4. Gumtree Bore
5. Mt Burrell Bore
6. Titjikala community
7. Hugh River
8. Hugh River Stock Route

[56] In my view, the claimants' affidavits provide examples of the assertion in Schedule F that the claim group have, and its predecessors had, an association with the application area as a whole. This is because there are references to locations which are spread across and around the application area, as well as to surrounding areas and locations on all sides, where claim group members and their predecessors were born, lived, worked and undertook activities such as hunting animals and gathering bush foods.

[57] In addition, I consider that there is a clear link between the association of members of the current claim group and the association of their predecessors with the lands and waters of application area. This is because the claimants' affidavits speaks of how they are physically

and spiritually connected to the Pertame estate, including the application area, through descent affiliation from one or more of the group's ancestors and to particular Dreaming stories of the estate. I consider it is clear that this current association has its origins in the preceding generations' association with the application area.

What is required to meet s 190B(5)(b)?

[58] To meet s 190B(5)(b), the factual basis must be sufficient to support an 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'. Section 223(1)(a) defines 'native title rights and interests' as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similarity between the provisions, I consider it appropriate to interpret s 190B(5)(b) in light of the judicial consideration of the meaning of 'traditional' in s 223(1). The High Court held in *Yorta Yorta* that in order for a law or custom to be 'traditional', it requires:

1. the origins of the content of the law or custom concerned to be found in the normative rules of a society that existed before the assertion of British sovereignty, and which has had a continuous existence and vitality since sovereignty;⁴⁷
2. the laws and customs to have been 'passed from generation to generation of a society, usually by word of mouth and common practice',⁴⁸ and have been acknowledged and observed 'substantially uninterrupted' since sovereignty.⁴⁹

[59] In *Gudjala 2009*, Dowsett J commented that 'to assert that current laws and customs are "traditional" is not to provide a factual basis for that assertion'.⁵⁰ His Honour considered how to assess the sufficiency of the factual basis of a claim, including that:

1. 'in order to identify the laws and customs that were acknowledged and observed before sovereignty, it is necessary to identify the persons who acknowledged and observed them, namely the relevant pre-sovereignty society';⁵¹ and
2. if descent from apical ancestors is the basis of membership to the group, 'then there must be some connection between them and the pre-sovereignty society' from which the laws and customs of the claim group are derived.⁵²

⁴⁷ *Yorta Yorta* [46]–[47].

⁴⁸ *Ibid* [46].

⁴⁹ *Ibid* [87].

⁵⁰ *Gudjala 2009* [53].

⁵¹ *Ibid* [37].

⁵² *Ibid* [40].

[60] Therefore, relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society or a society that existed prior to European settlement, acknowledging and observing normative laws and customs.

How does the application support the existence of a society at settlement?

[61] Schedule F asserts:

3. The Imarnte landholding group, whose members comprise the native title claim group, is part of a regional society which comprises all Pertame (Southern) Arrernte landholding groups, and their Arrernte neighbours with whom they have a close association, for example, through intermarriage, ceremonial connections and mutual estate recognition. Members of this society acknowledge and observe a common body of traditional laws and customs.

[62] As discussed above in relation to s 190B(5)(a), Schedule F asserts that sources confirm that at the time of settlement, people affiliated with the Pertame society occupied and used the application area. Schedule F references eight historical, ethnographic, anthropological and linguistic sources dating back to 1899. There are many source materials authored by TGH Strehlow and I note that one of the claimants recalls in his affidavit that his father and other predecessors of the claim group worked with Strehlow in the 1950s and 1960s.⁵³ Schedule F also asserts at paragraph 20 that, the Imarnte landholding group is affiliated with the Pertame (Southern) Arrernte language.

[63] I note that the factual basis material must address a link between the claim group and the application area, which may involve establishing a link between the apical ancestors by which the group is described, and the society in the application area at settlement. In this regard, the claimants' affidavits assert:

1. at settlement or soon after, the 'main corroboree place' was in Rainbow Valley... [and] my grandfather, who was boss, used to go there for ceremony';⁵⁴
2. that 'Rainbow Valley was a main ceremony place before [the deponent's] grandfather's time. Many people from all over used to come in to do ceremony there';⁵⁵
3. in addition to the ceremonial grounds, 'the big camps were there [on the application area], where the rockholes are';⁵⁶
4. that not far from the application area is a place where red ochre is sourced for ceremonies and '[i]n the old days they used to trade it with people from Tempe Downs';⁵⁷

⁵³ Affidavit of [name deleted] [23].

⁵⁴ Ibid [10].

⁵⁵ Ibid [16].

⁵⁶ Affidavit of [name deleted] [17].

5. the application area is where ceremonial objects were stored 'during my grandfather's time',⁵⁸
6. there are old paintings and carvings,⁵⁹ and 'old stone arrangements'⁶⁰ throughout Imarnte country including in the application area.

[64] I consider that the significant number of historical sources referenced in Schedule F that relate to the Central Desert region including the application area, support the assertion that predecessors of the claim group were part of a regional society identified as 'Arrernte' by virtue of their language, laws and customs.

[65] I note that as settlement in the application area is asserted to have occurred barely one generation outside of living memory, in the late nineteenth or early twentieth century, the information in the affidavits of the claimants about 'big camps' in the application area at which people gathered for ceremonial purposes is relevant to my consideration of whether or not a society existed at settlement which included the application area. I consider that it is reasonable to infer that these camps likely existed at the time of settlement because of the information about their extended use, demonstrated in part by the number of grinding stones the claimants have observed at camp locations, as discussed above.⁶¹ Trade of ochre with neighbouring groups is also relevant to the assertion of a society at settlement, as is the predecessors' observation of normative rules such as the restriction on access by women to the places in the application area including the ceremonial ground, which is also described as a 'sacred men's site'.⁶² The widespread use of the Pertame language across the south Arrernte region, as asserted in Schedule F, is also relevant.

[66] Based on the information in Schedule F and the claimants' affidavits, I consider the factual basis is sufficient to support the assertion that there was a regional society at settlement which included the application area, and that the ancestors of the claim group were members of that society.

How does the application support the existence of traditional laws and customs?

[67] Schedule F describes the following features of the system of laws and customs observed by the ancestors of the claim group at settlement:

⁵⁷ Affidavit of [name deleted] [27]. I note Tempe Downs station lies adjacent to Orange Creek station to the west.

⁵⁸ Ibid [10].

⁵⁹ Affidavit of [name deleted] [18].

⁶⁰ Affidavit of [name deleted] [31].

⁶¹ Ibid [16].

⁶² Affidavit of [name deleted] [17]. See also affidavit of [name deleted] [15], [22].

1. Foundations of the law in the *Altyerre* or *tnengkarre* (Dreaming);
2. The existence of a kinship system which incorporates actual and classificatory kin relations between people and also metaphoric relationships between people, their ancestral country and the *Altyerre*; with a further level of social classification based on subsections and moieties;
3. A land tenure system inherited by patri-, matri- or combined descent, or conferred on non-descent based members by senior descent based members of the group; with particular roles assigned to individuals with particular connections. For example, persons affiliated to an estate through their mother's father are called *kwertengerle* which translates as 'custodian' or 'helper' for the particular estate;
4. Transmission, acknowledgement and observance of traditional laws and customs by traditional modes of oral transmission, teaching and common practice; and
5. The observance of spiritual practices relating to 'Dreaming tracks' associated with sites of significant, the main site in the application area being *Wurre*.

[68] The claimants' affidavits give examples of the way in which knowledge of laws and customs has been transmitted through the generations to the members of the group. For example, one claimant says:

One night when we were camping there [in the application area] my brother and I did a little corroboree and the two old men were singing. They were teaching us.⁶³

[69] Claimants depose how laws and customs about access to the application area are observed in accordance with the *Altyerre*. One claimant deposes, for example:

When I was growing up I was too young to visit sacred sites in Rainbow Valley...I can go now because I've been through the Law and I have the knowledge.⁶⁴

The old men told us where [outsiders] could go. We had to keep them away from the sacred sites and other places. Only men can go to the sacred sites at Rainbow Valley, not women.⁶⁵

[70] In addition, the laws and customs acknowledged and observed by the claim group today, as described by claimants in their affidavits, include those acknowledged and observed by the society at settlement as asserted in Schedule F. For example, the claimants' affidavits speak about their observation of the kinship system and land tenure system described in Schedule F, including their role in those systems. One claimant deposes that his grandfather 'who was boss' had responsibilities in the application area; similarly his father was responsible for providing evidence for a nearby Imarnte land claim in the 1980s because 'that was his job as

⁶³ Affidavit of [name deleted] [13].

⁶⁴ Affidavit of [name deleted] [13].

⁶⁵ Ibid [20].

pmerekertweye [boss].⁶⁶ The claimant has taken on the role previously held by his father and grandfather, stating ‘I am *pmerekertweye* [boss] through them’ and that, as with his father’s provision of evidence in land claims in the 1980s, ‘it is my job...to give the information... for this native title claim’.⁶⁷

[71] The claimants’ affidavits also explain how the traditional laws and customs with regards to the operation of the kinship system and land tenure system are observed across the south Arrernte regional society, for example:

If the decision concerns more than one estate group, senior, knowledgeable *pmerekertweye* and *kwertengerle* of each landholding group must be present.⁶⁸

[72] From the information in Schedules A and F, the examples above and other examples found in the claimants’ affidavits, I am satisfied the factual basis is sufficient to support the assertion that the laws and customs acknowledged and observed today by the native title claim group are rooted in the laws and customs of the pre-sovereignty south Arrernte society. The material demonstrates that claim group members continue to follow a system of social organisation and kinship that governs relationships in the Arrernte society including in relation to the application area.

[73] The material addresses the ways in which the laws and customs have been handed down through the generations to the members of the claim group. Current members of the claim group have been taught by their predecessors about how to gather bush foods, find water, hunt, practice bush medicine and protect sacred sites, amongst other things, through oral transmission and common practice. As the laws and customs have been passed onto the claim group members by their parents and other members of the preceding generations who were themselves children of the named ancestors, I can infer that these ancestors would have practiced the same or similar modes of teaching. This leads to the conclusion that the laws and customs observed currently are ‘traditional’ in the sense described in *Yorta Yorta*, as they derive from the laws and customs observed by the members of the society that existed in the application area at the time of settlement. There are examples in the affidavits that illustrate aspects of the claim group’s traditional laws and customs with respect to the application area, such as those pertaining to family and ancestors, rules of affiliation to landholding groups and estates, sacred places, hunting and gathering and the passing on of traditional and cultural knowledge. Therefore, I am satisfied the material provides a sufficient factual basis for the

⁶⁶ Affidavit of [name deleted] [10], [24].

⁶⁷ Ibid [7], [24].

⁶⁸ Affidavit of [name deleted] [5], affidavit of [name deleted] [5].

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.

What is required to meet s 190B(5)(c)?

[74] Meeting the requirements of this condition relies on whether there is a factual basis supporting the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.⁶⁹ It also requires a factual basis supporting an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement.⁷⁰

How does the application support the continuity of traditional laws and customs?

[75] As discussed above, I am satisfied that the factual basis is sufficient to support an assertion of a society at settlement in the application area acknowledging and observing laws and customs from which the present laws and customs of the native title claim group are derived. It is also my view that the factual basis is sufficient to support an assertion that those laws have been continually acknowledged and observed by the intervening generations since settlement without substantial interruption.

[76] I have formed this view based on the information in the claimants' affidavits about how they and their predecessors, over the period since settlement, have maintained a physical presence in the area, predominantly through their work in the surrounding region as station hands and rangers, and how sites in the application area continue to hold significant spiritual importance to the members of the claim group. As discussed at s 190B(5)(a) above, the claimants' affidavits provide examples of claim group members and their predecessors residing in the surrounding areas, and frequenting the application area to camp, hunt, collect bush foods and medicines and particularly to participate in ceremonies.

[77] My view is also based on the information in the claimants' affidavits about how laws and customs were taught to them by their predecessors, which in turn are now passed onto the younger generations. For example, one claimant deposes:

[Senior claim group members, now deceased] told me some stories for my country when I was younger. We would sit down at Walkabout Bore and listen to them sing corroboree. My father and [a senior man] were two of the main men for Imarnte country; they knew that law all that right through [sic].⁷¹

⁶⁹ *Gudjala 2009* [29].

⁷⁰ *Gudjala 2007* [82].

⁷¹ Affidavit of [name deleted] [14].

- [78] Another deponent explains how he learned the Imarnte law from his predecessors including the Two Emus Dreaming. He deposes that he is teaching his sister's sons, his grandson and other younger men the Two Emus Dreaming 'the same way I was taught'.⁷²
- [79] I note there are examples in the claimants' affidavits of learning about hunting and gathering particular foods in the application area from their predecessors,⁷³ and that the practice of hunting has been curtailed in recent times. As one claimant deposes '...we can't hunt inside the boundary [of the application area] anymore because it is a reserve'.⁷⁴ Another claimant deposes that gathering of some bush foods still occurs 'like witchetty grubs, but you can't go hunting with a rifle anymore'.⁷⁵ I understand that the application area was declared a reserve in 1990 and I consider that the information in the affidavits supports a conclusion that the changes to hunting practices is a reasonable adaptation that has occurred as a result of the application area being declared a reserve, but has not substantially interrupted the continued observance of traditional laws and customs.⁷⁶
- [80] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title in accordance with traditional laws and customs. This is because the information in the application demonstrates that current claimants possess knowledge about how the generations since the apical ancestors have acknowledged and observed their laws and customs in relation to the application area since around the time of settlement.

Prima facie case – s 190B(6): condition met

- [81] Because I am satisfied there is sufficient factual basis material to support the assertion of the existence of traditional laws and customs as required by s 190B(5)(b), I am satisfied there is sufficient information to show that, prima facie, the native title rights and interests claimed can be established. This is because, according to the definition in s 223(1), a native title right or interest is one that is held under traditional laws acknowledged and traditional customs observed. I am also satisfied the application contains sufficient information about each of the rights claimed. I therefore consider the claimed rights and interests have all been established on a prima facie basis and so s 190B(6) is met.

⁷² Affidavit of [name deleted] [20].

⁷³ Ibid [13].

⁷⁴ Ibid [15].

⁷⁵ Affidavit of [name deleted] [12].

⁷⁶ *Yorta Yorta* [87]–[89].

What is required to meet this condition?

[82] 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. I note Mansfield J's comment that s 190B(6) imposes a more onerous test to the individual rights and interests claimed.⁷⁷

Which of the claimed native title rights and interests can be established on a prima facie basis?

[83] Schedule F includes a table of the 'Rights Claimed' as per the list in Schedule E and the 'Evidence in Affidavits' to support the existence of those rights, which is helpful to my task at s 190B(6). I have considered the information in the claimants' affidavits to determine whether each of the claimed rights:

1. exist under traditional law and custom in relation to any of the land or waters claimed;
2. are 'native title rights and interests' in relation to land or waters (in accordance with s 223(1)); and
3. have not been extinguished over the whole of the application area.

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

[84] Throughout the claimants' affidavits there are examples of claim group members and their predecessors accessing and travelling through the application area. [Name deleted] states that his grandfather, his father and uncles, he and his brother, his nephews and other claim group members have accessed and continue to access the lands and waters of the application area.⁷⁸

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

[85] There are examples of claimants and their predecessors living on the application area, camping and erecting shelters such as 'windbreaks'.⁷⁹

The right to hunt, gather and fish – established

[86] There are examples of claimants and their predecessors hunting and gathering a number of different foods in the application area, including euro,⁸⁰ kangaroo, bush tomatoes and bush onions.⁸¹

⁷⁷ Doepel [132].

⁷⁸ Affidavit of [name deleted] [9], [11]–[13], [20].

⁷⁹ Ibid [12].

⁸⁰ Ibid.

⁸¹ Affidavit of [name deleted] [12].

[87] Although I can find no specific information about fishing, I consider that I can infer that fishing is a right held in accordance with traditional laws and customs, given the multiple references to natural water sources such as rivers, springs and soakages, and the references to claimants and their predecessors obtaining 'bush food' and 'bush tucker' which I infer would have included food from the water sources in the application area.⁸²

The right to take and use the natural resources – established

[88] There are examples of claimants and their predecessors taking and using natural resources from the application area, including stones, wood and ochre.⁸³

The right to access, take and use natural water on or in the land - established

[89] As discussed above, there are numerous references throughout the affidavits to soakages and rockholes in the application area and to claimants and other claim group members accessing, taking and using the natural water for various purposes. One claimant deposes '[m]y father told me where to find soakages and rockholes'⁸⁴, and another: '[the old people] used to get water from the rockhole in Rainbow Valley after rain time'.⁸⁵

The right to light fires for domestic purposes – established

[90] One claimant recalls his father making fires for cooking food,⁸⁶ and another deposes 'we would go camping and hunting, light a fire...mainly in that area of Orange Creek and Maryvale'.⁸⁷ As noted above, the application area lies within Orange Creek pastoral station.

The right to share and exchange natural resources, including traditional items made from the natural resources – established

[91] There are references throughout the affidavits to the predecessors and current members of the claim group sharing and exchanging a variety of natural resources including kangaroos and ochre.⁸⁸

The right to access and to maintain and protect sites and places that are important under traditional laws and customs – established

[92] Claimants' affidavits emphasise the importance of protecting sacred sites on the application area. For example, one claimant talks about how his father and uncle taught him about the

⁸² Ibid

⁸³ Affidavit of [name deleted] [10], [12], [27]; affidavit of [name deleted] [17].

⁸⁴ Affidavit of [name deleted] [12].

⁸⁵ Affidavit of [name deleted] [12].

⁸⁶ Ibid.

⁸⁷ Affidavit of [name deleted] [11].

⁸⁸ Ibid [12], affidavit of [name deleted] [18], [27].

'old stone arrangements' in Imarnte country and how it is his job to protect them. This work is also done by his nephews who have been involved in erecting fences to protect a particular sacred site in the application area.⁸⁹ The affidavits also emphasise the enduring spiritual importance of the places and sites in the application area under traditional laws and customs.⁹⁰

The right to conduct and participate in the following activities:

- 1. Cultural activities – established*
- 2. Ceremonies – established*
- 3. Meetings – established*
- 4. Cultural practices relating to birth and death including burial rites – established*
- 5. Teaching the physical and spiritual attributes of sites that are important under traditional laws and customs – established*

[93] I consider the activities listed in paragraphs 2–5 of this right can all be broadly described as 'cultural activities'. There are examples of ceremonies occurring in the application area as a result of the sacred men's site 'used for initiations and big ceremonies' there.⁹¹ There are also examples of meetings occurring in the application area.⁹²

[94] There is no specific information regarding cultural practices relating to birth and death including burial rights, however I consider it reasonable to infer from the information in the application that such practices are observed in the application area in accordance with traditional laws and customs. I consider that the ceremonies referred to throughout the claimants' affidavits arguably include such cultural practices. I note that Mansfield J found the use of the words 'prima facie' in s 190B(6) means 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.⁹³ The paucity of material about this component of the right may perhaps be a result of the affidavits all being deposed by male members of the claim group. The statement that '[t]here are places inside the Reserve where women and children cannot go' indicates to me that some knowledge may be gender-restricted and it is possible that knowledge about cultural practices relating to births may be held primarily by women.⁹⁴ Considering the information in the application about other cultural practices, and applying the

⁸⁹ Affidavit of [name deleted] [30]–[31].

⁹⁰ Ibid [21]–[22].

⁹¹ Affidavit of [name deleted] [17].

⁹² Affidavit of [name deleted] [29].

⁹³ *Doepel* [135].

⁹⁴ Affidavit of [name deleted] [22].

guidance provided by Mansfield J, I consider the claim to a right to undertake cultural practices relating to births and death including burial rights is arguable and therefore should be accepted on a prima facie basis.

[95] There are many examples in the affidavits of the deponents learning from their older siblings, parents and senior claim group members about the spiritual and physical attributes of their country, including the application area.⁹⁵ Many of these are referred to above in my consideration of s 190B(5).

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 – established

[96] One claimant deposes:

If other Aboriginal people wanted to come in... [to] Rainbow Valley or other Imarnte country they have to speak with us first and we would make a decision... We would also tell them the places where they have to stay away from.⁹⁶

[97] Based on the claimants' affidavits, as well as information in Schedule F and Schedule A, I understand this right is connected to the positions of authority within the claim group. I note 'native title rights and interests' are defined in s 223(1) as 'the communal, group or individual rights and interests of Aboriginal peoples'. I also note the Full Court's finding in *De Rose FC2* that whether native title can be claimed or held by an individual or group must be reached by reference to the body of laws and customs of the relevant society.⁹⁷ I consider this right is claimed to be held by particular individuals within the claim group, being the 'helpers' and 'bosses' of the landholding groups. I also consider there is sufficient information to show the right is held in accordance with traditional laws and customs, noting the assertions in Schedule F and the explanations in the claimants' affidavits of how they hold their particular positions of authority through their predecessors and their observance of the rules of the Arrernte kinship system.⁹⁸

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

1. People required by traditional laws and customs for the performance of ceremonies or cultural activities – established

⁹⁵ Affidavit of [name deleted] [15].

⁹⁶ Affidavit of [name deleted] [28].

⁹⁷ *De Rose FC2* [31].

⁹⁸ *Ibid.*

2. *People who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders – established*
3. *People required by the native title holders to assist in, observe or record traditional activities on the areas – established*

[98] I understand the group of people described in paragraph 1 are people who observe Arrernte laws and customs but are not part of the claim group. I understand the people described in paragraph 2 include, but may not be limited to, extended family members who do not form part of the claim group, as there are explanations in the affidavits about how men holding the requisite authority must accompany ‘my wife or my daughter’ and other people who want to go hunting on the application area.⁹⁹ I understand the people described in paragraph 3 include, but may not be limited to, people undertaking anthropological and cultural heritage work.

[99] In relation to the people described in paragraphs 1 and 2, I note the comments of the Full Court in *Alyawarr* that with recognition of such rights regarding restriction of access, ‘[t]here is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality’.¹⁰⁰ As the laws and customs of the Arrernte people are asserted to be observed by a wider group than the native title claim group, this application presents a similar difficulty as existed in *De Rose*. That matter concerned the *nguraritja* (traditional owners) of the claim area and a wider group Western Desert Cultural Bloc people who observed the same or similar laws and whose access to the claim area the claim group sought to control, despite the absence of a claim of exclusive possession. Similarly, a right of exclusive possession is not claimed in this application. However, it is not my role to determine the content or extent of the claimed right, or resolve any potential inconsistencies. My role extends only to consider whether there is information in the application which allows me to be satisfied that the right can be established, in accordance with traditional laws and customs, on a prima facie basis. I am satisfied that the application contains sufficient information of this type.

[100] As with the right to make decisions about the use and enjoyment of the application area discussed above, I understand this right is exercised by the individuals in the claim group with the requisite cultural authority. I have formed this view on the basis of information in the claimants’ affidavits, for example:

⁹⁹ Affidavit of [name deleted] [28].

¹⁰⁰ *Alyawarr* [151].

I used to work in the [application area] and I got involved because it is my country through my father and grandmother. I am [the manager] and that means I have to be involved in looking after and making decisions about that area on my country.¹⁰¹

Physical connection – s 190B(7): condition met

[101] I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area, and so s 190B(7)(a) is met.

What is required to meet this condition?

[102] To meet the condition in s 190B(7), 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 have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[103] I note that this condition requires the material to satisfy the Registrar of particular facts and evidentiary material is therefore required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.¹⁰²

Does a member of the claim group have a traditional physical connection?

[104] Schedule M of the application summarises the connection that two claim group members have with the application area. Having read the summary in Schedule M and his affidavit that accompanies the application, I am satisfied claim group member [name deleted] holds the requisite traditional physical connection. I have formed this view based on the information about:

1. His time on and around the application area as a child, including camping in a windbreak at Rainbow Valley and learning hunting, gathering, digging for water and ceremonies from his 'two fathers';¹⁰³
2. His work on neighbouring Maryvale station from the age of 15 and initiation at 18 at Titjikala;¹⁰⁴
3. His role as a 'boss' for the Imarnte estate and the responsibilities he carries as a result of that role, including looking after sacred sites in the application area;¹⁰⁵

¹⁰¹ Affidavit of [name deleted] [18].

¹⁰² *Doepel* [18], *Gudjala 2009* [84].

¹⁰³ Affidavit of [name deleted] [12]–[14].

¹⁰⁴ *Ibid* [17].

4. His ongoing use of the application area, including camping and making fires;¹⁰⁶ and
5. His observance of Pertame laws and customs.¹⁰⁷

[105] From this information, I am satisfied that [name deleted] has a physical connection to parts of the application area. I infer from his affidavit that he has spent his entire life on or nearby to his traditional country. I am also satisfied that the material demonstrates that [name deleted]'s connection with the application area is 'traditional' in the sense required by s 190B(7). I am satisfied his knowledge of the application area has been passed to him from the predecessors of the claim group while spending time on his country, including the application area. As I consider that the factual basis material is sufficient to support an assertion that traditional laws and customs acknowledged and observed by the predecessors of the claim group have been passed down to the current members of the claim group, it follows that I am satisfied that [name deleted]'s connection with the application area is in accordance with those traditional laws and customs.

No failure to comply with s 61A – s 190B(8): condition met

[106] I am satisfied the application complies with ss 61A(1)–(3) and so s 190B(8) is met:

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	Geospatial report, my own searches	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph 3	Met
s 61A(3)	Claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E	Met

No extinguishment etc. of claimed native title – s 190B(9): condition met

[107] I am satisfied s 190B(9) is met:

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met

¹⁰⁵ Ibid [29]–[31].

¹⁰⁶ Ibid [29].

¹⁰⁷ Ibid [5], [22], [24], [26]–[32].

s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is no information in the application that discloses that native title rights and interests in the application area have otherwise been extinguished	Met

Procedural and other matters (s 190C)—Conditions met

Information etc. required by ss 61–2 – s 190C(2): condition met

[108] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.¹⁰⁸

Section 61

[109] I am satisfied the application contains the details required by s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group has authorised the applicant	Schedule A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

[110] I am satisfied the application contains the information required by s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment A	Met
s 62(2)(c)	Searches	Schedule D, Attachment C	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

¹⁰⁸ *Doepel* [16], [35]–[39].

No previous overlapping claim group – s 190C(3): condition met

[111] I am satisfied that no person in the native title claim group for this application was also a member of the native title claim group for any previous overlapping application, which means s 190C(3) is met.

What is required to meet this condition?

[112] 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’.¹⁰⁹ To be a ‘previous application’:

- (a) the 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 (the Register) 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.

[113] If there are no ‘previous applications’, then this requirement is not triggered.¹¹⁰

Are there any relevant ‘previous applications’?

[114] The geospatial report states there were no applications on the Register of Native Title Claims (Register) which fell within the external boundary of this application area as at 5 July 2018, when the geospatial report was completed.

[115] My own searches of the Register confirm there were no applications that overlap the current application when this application was made. This means that I do not need to consider whether there are any claimants in common between the current claim group and any overlapping group.

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

[116] I am satisfied the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; which means s 190C(4)(a) is met.

What is required to meet this condition?

[117] To meet s 190C(4), the Registrar must be satisfied that either:

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or

¹⁰⁹ Emphasis in original.

¹¹⁰ *Strickland FC* [9].

- (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.

[118] Schedule R of the application provides a certification, so I must be satisfied that the certificate:

- (a) identifies the relevant representative body;
- (b) identifies the representative body's power under Part 11 to issue the certification; and
- (c) meets the requirements of s 203BE(4).¹¹¹

Which representative body has been identified?

[119] The certificate states that it is provided by the Central Land Council (CLC). It is dated 28 June 2018 and signed by the Director. I am satisfied that the relevant representative body has been identified.

What power under Part 11 does the representative body have to issue the certification?

[120] The geospatial report confirms that the CLC is the only representative body for the whole of the area covered by the application. I have verified this information against the Tribunal's national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows the CLC to be the recognised representative body for the area covering the application area, pursuant to s 203AD. As a recognised representative body, the CLC can perform all of the functions listed in s 203B, including, relevantly, the certification functions in s 203BE.¹¹² I note also that the heading of the certificate and paragraph 1 therein states that the application is certified in accordance with s 203BE(1)(a). I am satisfied that the CLC has power to issue the certification under Part 11.

How does the certification meet the requirements in s 203BE?

[121] Section 203BE(4) provides that '[a] certification of an application for a determination of native title by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3)'.

[122] I have considered these requirements in turn below.

¹¹¹ *Doepel* [80]–[81].

¹¹² Section 203B(1)(b).

Section 203BE(4)(a)

[123] Section 203BE(4)(a) requires a representative body to state in its certification that an application meets the requirements of ss 203BE(2)(a)–(b).

[124] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all 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.

[125] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that 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.

[126] The certificate states:

Statement [s 203BE(4)(a)]

3. The Central Land Council is of the opinion that the requirements of section 203BE(2)(a) and (b) have been met, namely, that:

- (a) 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
- (b) 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.

[127] I am satisfied these statements meet the requirements of s 203BE(4)(a).

Section 203BE(4)(b)

[128] The certificate provides the following regarding the authorisation of the applicant:

Reasons [s 203BE(4)(b)]

4. The Central Land Council is of this opinion for the following reasons:

Authorisation of the Applicant

- (a) A meeting was held at Rainbow Valley Reserve on 9 November 2017 to obtain instructions from the native title claim group in relation to the application ("the claimant meeting"). The meeting was organised and facilitated by the Central Land Council and attended by claimants, including all senior members of the native title claim group. Central Land Council legal and anthropology staff attended the meeting.
- (b) Under the traditional laws and customs of the native title claim group there is a process of decision-making that must be complied with in relation to authorising things of this kind and in accordance with that process the persons who attended the claimant meeting had authority to make decisions relating to the application and authorised the following persons to make the application and to deal with matters arising in relation to it for so long as they are willing and able to do so:

Eric Braedon

Peter Kenny
- (c) Central Land Council staff consulted the claimant meeting about the application and received instructions from claimants agreeing with its contents. The persons authorised to make the application were also consulted about its contents.

- (d) Each of the persons authorised to make the application subsequently signed an affidavit pursuant to section 62(1)(a) acknowledging that they are authorised by the native title claim group to lodge the application and deal with the matters arising in relation to it.

[129] The certificate also includes the following with regards to the efforts made to describe all the persons in the claim group:

All reasonable efforts made to describe all persons in the native title claim group

- (e) The Central Land Council has conducted anthropological and historical research in relation to the persons who hold the claimed native title rights and interests in the application area. That research indicates:
 - (i) the members of the native title claim group described in the application are the only persons who assert and are entitled to claim native title rights and interests in the application area and that this is acknowledged by the wider Aboriginal community; and
 - (ii) the description of the persons and criteria for membership of the native title claim group accords with the traditional laws acknowledged and customs observed by those persons and identifies or describes all the persons who hold the common or group rights comprising the native title claimed in the application area.

[130] I am satisfied these statements meet the requirements of s 203BE(4)(b).

Section 203BE(4)(c)

[131] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3). Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, then representative body must make all reasonable efforts to:

- (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) minimise the number of applications over the land or waters.

[132] As discussed above at s 190C(3), there are no applications which overlap this claim, meaning s 203BE(3) is not applicable. Regardless, the certificate includes the following to meet the requirement of s 203BE(4)(c):

No overlapping applications [s 203BE(4)(c)]

- 5. The Central Land Council is not aware of any other application or proposed application that partly or wholly covers the application area.

[133] I am satisfied this statement meets the requirements of s 203BE(4)(c).

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Rainbow Valley
NNTT No.	DC2018/004
Federal Court of Australia No.	NTD24/2018

Section 186(1): Mandatory information

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

Application filed/lodged with: Federal Court of Australia

Date application filed/lodged: 28 June 2018

Date application entered on Register: 2 October 2018

Applicant: As per Schedule

Applicant's address for service: As per Schedule

Area covered by application: As per Schedule

Persons claiming to hold native title: As per Schedule

Registered native title rights and interests: As per Schedule

Katy Woods

2 October 2018

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.