National Native Title Tribunal

Registration test decision

Application name	Aileron
Name of applicant	Donald Campbell Peltharr, Eric Pananka, Mary Angal, Dorothy Ross Ampetyan, Archie Glenn Angal
State/territory/region	Northern Territory
NNTT file no.	DC 07/2
Federal Court of Australia file no.	NTD 20/2007
Date application made	19 December 2007
Name of delegate	Brendon Moore

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

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

For the purposes of s. 190D(3), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 7 October 2008

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Brendon Moore

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept or not accept, as the case may be, the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the court), but with the exception of amended applications that satisfy ss. 190A(1A) or 190A(6A). The application before me does not fall to be considered under either of these subsections.

Subsection 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met, in order for me to accept a claim for registration.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated his powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal, including myself, on 27 September 2007. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

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

A summary of the result for each condition is provided at Attachment A.

Application overview

The application is brought on behalf of three landholding groups over lands near Alice Springs in the Northern Territory. It is a new application, being filed on 19 December 2007 and is here tested for the first time.

Information considered when making the decision

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

Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

I also have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application.

Procedural fairness steps

Copies of the application and supporting documents were sent to the Government of the Northern Territory on 11 January 2008. By letter of 14 March 2008 the Northern Territory indicated that it did not wish to make any submissions.

There were no other parties to whom procedural fairness was owed.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

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

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) at page 14.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62.. If the application meets all these requirements, the condition in s. 190C(2) is met.

I note that in the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62', and in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of

s 190C(2), the Registrar may not go beyond the information in the application itself'—at [16] and [39].

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Result

The application **meets** the requirement under s. 61(1).

Reasons

As I have noted above in my comment, section 190C2 requires that I be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62. The text of s. 61(1) is set out above and thus I must

consider whether the application is brought on behalf of 'all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.' If the description of the native title claim group in the application indicates that not all persons in the native title group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration: *Attorney General of Northern Territory v Doepel* 203 ALR 385 ('*Doepel*') at [36].

Doepel (at [16], [37], [39] and [44]) is also authority for the proposition that when considering this question, I must consider only the information in the application and the affidavits filed in support of it. I am not required to make any merit assessment of the information.

The claim group description appears at schedule A

In my view there is nothing in the description in schedule A or otherwise on the face of the application to indicate that the group does not include, or may not include, all the persons who hold the particular native title in the area of the application.

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

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

Result

The application **meets** the requirement under s. 61(3).

Reasons

The name and address for service is provided in Part B.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

The application **meets** the requirement under s. 61(4).

Reasons

I must be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. Following *Doepel*, I am not required to make any merit assessment of those details and information beyond being satisfied that what is provided is, on its face, responsive to the requirement of the section.

It is my opinion, and I find, that the application provides a description of the persons in the native title claim group. Whether that description is sufficiently clear so that it can be ascertained whether

any particular person is one of those persons is considered by me in the merits test which is made at s. 190B(3).

Application in prescribed form: s. 61(5)

The application must:
(a) be in the prescribed form,
(b) be filed in the Federal Court,
(c) contain such information in relation to the matters sought to be determined as is prescribed, and
(d) be accompanied by any prescribed documents and any prescribed fee.

Result

The application **meets** the requirement under s. 61(5).

Reasons

The application is substantially in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998.

The application meets the requirements of s. 61(5)(c) and contains all information prescribed in s. 62. I refer to my reasons in relation to s. 62 below.

The application is accompanied by affidavits in relation to the requirements of s. 62(1)(a) from the persons who jointly comprise the applicant. I am satisfied therefore that the application has complied with s. 61(5)(d) in relation to prescribed documents. See also my reasons at s. 62(1)(a) below. I am not required to consider the Federal Court filing fee, if any.

This condition is met.

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

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.

Result

The application **meets** the requirement under s. 62(1)(a).

Reasons

In considering this section I note that *Doepel* at [73] and [74] does not require me to consider whether the persons comprising the applicant are in fact authorised.

Affidavits satisfying all five of the requirements of the section have been made by each of the persons comprising the applicant and filed.

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s. 62(2).

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains nine paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found at page 14 below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **meets** the requirement under s. 62(1)(b).

Information about the boundaries of the area: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

Result

The application **meets** the requirement under s. 62(2)(a).

Reasons

I am of the view that *Doepel* requires me not to make any merit assessment of the details and information provided under s. 190C(2), beyond being satisfied that, on its face, it is responsive to the requirements of the relevant section, and I do not.

A description is provided and the requirement of the section is met.

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

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **meets** the requirement under s. 62(2)(b).

Reasons

I am of the view that *Doepel* requires me not to make any merit assessment of the details and information provided under s. 190C(2), beyond being satisfied that, on its face, it is responsive to the requirements of the relevant section, and I do not.

A map is provided and the requirement of the section is met.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(c).

Reasons

The section was amended by s. 73 of the *Native Title Amendment (Technical Amendments) Act 2007*, adding to it the words 'by or on behalf of the native title group' after the words 'carried out'. The amendment applies to claims made from the date of commencement of the Act on 1 September 2007 and thus this claim.

The application at schedule D says:

> 1. Searches of existing tenure were made with the Northern Territory Registrar-General's Office and the Northern Territory Department of Planning and Infrastructure through the Northern Territory Public Service On-line System.
> 2. The searches are attached and labelled Attachment D. They indicate that NT Portion 703 is held under Perpetual Pastoral Lease No. 1097 by Waite River Holdings Pty Ltd (ACN 007 900 254) and that NT Portion 725 is held under Perpetual Pastoral Lease No. 1030 by the Northern Territory Land Corporation.

I have no information causing me to be aware that the applicants have made other searches but have not disclosed the results.

I am satisfied that the requirements of the section are met.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Result

The application **meets** the requirement under s. 62(2)(d).

Reasons

I am of the view, following *Doepel*, that I am not to make any merit assessment of the details and information provided beyond being satisfied that, on its face, it is responsive to the requirement of the section.

A description of the claimed native title rights and interests is found at Attachment E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

I am satisfied that the application contains a description of the native title rights and interests claimed.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result

The application **meets** the requirements under s. 62(2)(e).

Reasons

I am of the view, following *Doepel*, that I am not required by the section to make any merit assessment of the details and information provided beyond being satisfied that, on its face, it is responsive to the requirement of the section.

In *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*'Gudjala #2 FC'*) where the court described more fully what is required:

> Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. – at [92].

Schedule F refers to Attachment F and Table F, where a general description is given.

I am of the view that this material satisfies the three particular requirements of the section in accordance with *Gudjala #(2) FC.*

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result

The application **meets** the requirement under s. 62(2)(f).

Reasons

These details are provided primarily at schedule G, although the affidavits and other schedules such as F and M also provide details of activities.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result

The application **meets** the requirement under s. 62(2)(g).

Reasons

Schedule O states that:

> No other application has been made in relation to the whole or part of the area covered by the application. None of the persons who jointly are the applicant or any other member of native title claim group are in a native title claim group for any other application in relation to the area covered by the application.

As there are 'no other … applications of which the applicant is aware' listed, the section is satisfied.

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

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(ga).

Reasons

The application states at schedule HA 'not applicable', which I take to mean that there are no relevant notices. I have no reason to believe that the applicant is aware of notices but has not disclosed them.

I am satisfied that the application complies with the section.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result

The application **meets** the requirement under s. 62(2)(h).

Reasons

The section does not make the requirement absolute, but rather requires the application to contain details of which 'the applicant is aware'.

I also do not construe the section as requiring details of 'spent' s.29 notices. The note at the end of the section and the Explanatory Memorandum to the Act indicate that one purpose of the requirement is to ensure that the Registrar is made aware of the need to 'use his best endeavours to finish considering the claim by the end of 4 months after the notification day specified in the notice': see s.190A(2).

The application states at schedule I 'not applicable', which I take to mean that there are none. I have no reason to believe that the applicant is aware of notices but has not disclosed them.

I am satisfied that the application complies with the section.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it meets each of the subrequirements of s. 62(2)(a) to (h).

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

Subsection 190C(3)
No common claimants in previous overlapping applications

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

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

Result

The application **satisfies** the condition of s. 190C(3).

Reasons

There is no relevant previous application. It follows that I need not consider the issue of common members and I find the requirements of the section to be satisfied.

Subsection 190C(4)
Authorisation/certification

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

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

Result

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

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(a) are met.

Reasons

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application and to deal with matters arising in relation to it by the rest of the native title claim group.

The application has been certified by the Central Land Council (CLC), the only relevant native title representative body for the area, so I do not need to consider the requirements of s. 190C(4)(b) or s. 190C(5).

When considering certification I am not required to make any assessment of the information provided, other than to identify that the certificate complies on its face with the requirements of the section.

The certificate was executed on 17 December 2007 by the native title manager in accordance with resolution FC98:61 of the full council of the CLC, in which the land council delegated its certification power to the CLC's director and in his/her absence to the native title manager.

Section 203BE empowers a representative body to issue certificates, and subsections 2(a) and (b) require that the body form certain opinions:

> (2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion 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.

The CLC states at paragraph 3 of the certificate that it holds both these opinions and sets them out.

Section 203BE(4) further requires that:

> (4) 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).

The statement at paragraph 3 of the certificate, referred to above, satisfies subsection (4)(a).

Paragraphs 4(a), (b), (c) and (d) of the certificate provide relevant information about the authorisation of the applicant, thus satisfying subsection (4)(b).

Paragraph 4(e) of the certificate then sets out the 'reasonable efforts made to describe all persons in the native title claim group' by referring to anthropological and historical researches carried out by CLC, thereby satisfying subsection (4)(c).

As there are no overlapping applications, the provisions of subsection (4)(c) are not relevant.

I find that the application has been certified under Part 11 by the one representative Aboriginal/Torres Strait Islander body that could certify the application.

Merit conditions: s. 190B

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

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

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

Map of external boundaries: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result

The application **satisfies** the condition of s. 190B(2).

Reasons

In relation to s. 62(2)(a) the application states:

> (a) The area covered by the application
>
> 1. The area covered by the application is part of NT Portion 703 comprising an area of 82.4 square kilometres held under Perpetual Pastoral Lease No. 1097 by Waite River Holdings Pty Ltd (ACN 007 900 254) and part of NT Portion 725 comprising an area of 128.7 square kilometres held under Perpetual Pastoral Lease No. 1030 by the Northern Territory Land Corporation.

I find that this description, when read in conjunction with the map provided at Attachment C (on which the co-ordinates now appear), enables the identification of the boundaries of the area.

I should note that subsequent to filing, the Federal Court gave leave, on 6 February 2008, for the replacement of the original map with a new one on which the co-ordinates appear. It is that map I now consider.

Schedule B also provides information about any areas not covered:

> (b) Any areas within those boundaries that are not covered by the application
>
> 3. Subject to Schedule L, any 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.

I think that it well settled that exclusion of lands by tenure classes is acceptable and I find that areas within the boundaries that are not covered are identified by this description.

Finally, schedule C refers to the map at Attachment C.

> 2. The area covered by the application and its boundaries are shown on the maps referred to in Schedule C and labelled Attachment C.

I find that there is a description of the external boundaries and information about areas within that boundary which are not claimed. I find that there is a map.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result

The application **satisfies** the condition of s. 190B(3).

Reasons

I am of the view that for a group to be 'described sufficiently clearly' it is necessary that the description contain objective tests. If that were not so, and subjective criteria were used then it would provide no more than a description of eligibility and would require some further assessment or evaluation, beyond the description in the application, to identify a member. In *Doepel* the court noted that:

> Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so. – at [51]

The requirement for an objective test has been expressed in a number of different ways.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 the court required a 'set of rules or principles':

> First, the delegate's decision was not based on the proposition that it was necessary to identify each and every member of the claim group. The delegate clearly understood that the test was whether the group was described sufficiently clearly so that it could be ascertained whether any particular person was in the group i.e. by a set of rules or principles – at [25].

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594 the court approved a description which was in terms of 'all the biological descendants of', noting that 'a factual inquiry as to who all those persons are may be necessary to determine if any one person is a member of the group'. This 'factual enquiry' of which Carr J spoke was the consideration of the description's objective determinant or criteria, not a wider search – at [67].

Finally, in *Doepel* the court considered the Registrar's reasons for his decision at s. 190B(3), noting that they specifically required an 'objective means', and approved of that test:

> The Registrar was satisfied that the description of the native title claim group in the application provided an objective means of verifying the identity of members of the native title claim group. He was therefore satisfied that the condition imposed by s 190C(3)(b) was met – at [23].
>
> The attack upon the Registrar's conclusion under s 190B(3)(b), in my judgment, must also fail. I consider the Registrar addressed the issue which he was required to address, and reached a conclusion available to him – at [51].

However, in *Doepel* the court also said of s. 190B (3) that

> Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group – at [37].

I now turn to consider whether the description provided satisfies the requirement of the section in the light of these statements by the courts. In doing so I note that in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) a claim group description was provided which had, as does this one, reference to and details of the role of traditional law and custom, as well as an 'operative' paragraph similar to clause 7 of the description set out below. The material provided here in relation to law and custom is, however, far more extensive and detailed than that provided in the *Gudjala* application, where it consisted of a single paragraph.

The court in *Gudjala* was of the opinion that all the information relating to the description should be read together:

> The question is not without difficulty. The better view is that the identification of the claim group as the descendants of the apical ancestors is the asserted outcome of the correct application of traditional laws and customs observed by the Gudjala People, although those laws and customs are not identified. It is curious that laws and customs concerning physical, spiritual and religious association, genealogical descent and processes of succession should lead to the outcome that the only people who have 'communal native title' in the area are the descendants of four apical ancestors. One would have thought it more likely than not that some such descendants, although satisfying the laws relating to genealogical descent, would fail in connection with physical, spiritual and religious association and/or processes of succession. As the laws and customs in question are not identified, this curiosity cannot be resolved. However subs 190 B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification– at [33].
>
> If the two parts of the description are read discretely, then the problem identified by the Delegate arises. However it is consistent with traditional canons of construction to read the paragraphs as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open. The preferable construction of the description is that all members of the claim group are descendants of the four apical ancestors. Such membership, it is claimed, is based upon law and custom, but details are not given. Although I would not encourage a repetition of this approach to compliance with the requirements of subs 61(3), I am of the view that it sufficiently identifies the members of the claim group by reference to apical ancestors– at [34].

The description of the claim group provided at schedule A is a lengthy and complex one, and, as a result of *Gudjala,* and what I have said above, it is necessary to set it out in full.

1. The native title claim group comprises the members of the Ywel, Irrety and Anwenyengp landholding groups ("the landholding groups"). Those persons according to the traditional laws acknowledged and customs observed by them:

(a) have spiritual, physical and/or historical associations with the area described in Schedule B ("the application area") and are traditionally connected to the area through:

(i) descent from ancestors (including adoption) connected with the application area as described in paragraph 7(a) below; or

(ii) non-descent based connections as described in paragraphs 7(b), 9 and 10 below;

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

2. The application area is part of Anmatyerr territory. The common body of traditional laws acknowledged and customs observed by members of the native title claim group govern how rights and interests in land are acquired and who holds them in particular parts of Anmatyerr territory, including the application area. The landholding groups, which together comprise the native title claim group, constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole.

3. The term "estate" is used to describe the land and waters associated with a landholding group. The landholding groups are named after their respective estate areas and are affiliated to the following parts of the application area:

(a) Ywel (also known by the names "Arleyepm" or "Arlweyem"): western portion;

(b) Irrety: eastern portion;

(c) Anwenyengp: southern portion.

4. The application area is located in Anmatyerr linguistic territory. Under the traditional laws acknowledged and customs observed by members of the native title claim group rights in land are not acquired through membership of a language group. Accordingly, linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters.

5. The Anwenyengp (then spelt "Ngwenywenpe") group were found to satisfy the requirements of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in the Ti-Tree Station Land Claim (Report No. 24, Report by the Aboriginal Land Commissioner Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory, Australian Government Publishing Service, Canberra, Commonwealth of Australia 1986). Members of the Ywel landholding group are claimants in the Pine Hill Station application (NTD 6004/99).

6. The persons authorised to make the application are members of the Ywel, Irrety and Anwenyengp landholding groups.

Membership of the native title claim group

7. In accordance with the claimants' system of traditional laws and customs in relation to membership of a landholding group and the possession of rights and interests in land the native title claim group comprises all those persons who are:

(a) descendants (by birth or adoption) of one or more of the following named and unnamed ancestors of the landholding groups ("the ancestors"):

(i) Ywel: Four siblings: Tywenp-arrwengeny Angal (father's father for Archie Glenn Angal), Tyartepwet Kwaty-arrengeny Angal (father for Dorothy Ross Ampetyan),

Tywel-arrwengeny Angal (mother's father for Abbott George and father's father for Kathleen Angal);
(ii) Irrety: Unnamed Nungarrayi (father's mother for Archie Glenn Angal, Maureen Glenn Angal and Charlie Glenn Angal);
(iii) Anwenyengp: Three siblings: Arrenge Peltharr (father's father for Mickey Briscoe Peltharr), Jack Nyimanyimarra Peltharr (father's father for Donald Campbell Peltharr), unnamed Peltharr (father's father for Bruce Brown Peltharr);

(b) accepted as members of one (or more) of the landholding groups by senior descent based members of the native title claim group on the basis of their non-descent connections to an estate including those recruited in accordance with traditional succession processes.

8. The ancestors identified in paragraph 7(a) are the uppermost generation of the known ancestors of members of the native title claim group.

9. Under the claimants' system of traditional laws and customs a person who is not descended from the ancestors becomes a member of a landholding group when accepted by senior descent based members of the group on the basis of non-descent connections to an estate or when recruited in accordance with traditional succession processes on the basis of such connections. The non-descent connections considered relevant in the recruitment of a particular individual are:

(a) spiritual identification with and responsibility for an estate;
(b) conception and/or birthplace affiliation with an estate;
(c) long-term residence in an estate;
(d) close kinship ties, including intermarriage;
(e) shared sub/section and/or moiety affiliation;
(f) more distant ancestral connections to an estate, for example, mother's father's mother;
(g) possession of secular knowledge of an estate;
(h) possession of traditional spiritual knowledge, authority and responsibility for an estate;
(i) authority and responsibility for shared Dreaming tracks and/or places of significance connected with an estate;
(j) seniority in traditional matters concerning the landholding group and/or the estate.

For example, Eric Pananka, Bruce Brown Peltharr and Albert Campbell are accepted as members of the Irrety landholding group on the basis of their non-descent connections to the estate: Eric Pananka: apmerek-artwey due to the non-descent based apmerek-artwey status of his father, Tommy Pengart, on the basis of knowledge and long-term residence and that he is a senior knowledge holder in his own right, belongs to the correct patri-moiety to be apmerek-artwey, has descent connections with neighbouring estates and has lived nearby all his life; Bruce Brown Peltharr: kwertengerl on the basis of knowledge; Albert Campbell: birthplace affiliation.

10. Succession rules form part of the claimants' system of traditional laws and customs and are directed to ensuring the maintenance of both knowledge and connections to land, and its spiritual properties. The land and identity of the original group is safeguarded and re-established in accordance with traditional laws and customs, a process which commonly includes transmission of interests, entitlements and cultural knowledge to descendants of the succeeding group. The following elements usually form the basis for succession:

(a) increased role for existing kwertengerl when there are no or reduced numbers of apmerek-artwey;
(b) activation of interests and entitlements based on descent connections other than through one of the four grandparents, that is, through a great grandparent;

(c) shared Dreaming track or other spiritual affiliations;
(d) acquisition of interests and entitlements in atywerreng (such as through spiritual conception);
(e) other personal history factors such as initiation, adoption, conception/birth place affiliation, intermarriage;
(f) shared subsection and moiety affiliation.

Traditional succession processes have been documented in relation to land in the region of the application area (see Elliott, C. Pine Hill Native Title Application: Consent Determination Report (2004) pp.58–60, appended at 'Attachment A') and these processes have informed recruitment of members to the Irrety landholding group whose descent based membership is limited to Archie Glenn Angal and his siblings who act as kwertengerl for the estate. As there were no apmerek-artwey for the estate Eric Pananka's father, Tommy Pengart, and other senior knowledgeable men of his generation were recruited to look after Irrety country and to become apmerek-artwey. Eric was taught about Irrety traditions by his father and those other men and is now accepted as apmerek-artwey for the estate through his father and on the basis of his own non-descent connections to Irrety.

11. Under the claimants' system of traditional laws and customs descent is the most important basis for the possession of rights and interests in land. Subject to individual circumstances members of the landholding groups who are descended from one of the ancestors possess and transmit a wide range of traditional rights and interests in their respective estates.

12. Under the claimants' system of traditional laws and customs rights and interests in land are inherited through all four grandparental lines. However, the members of a landholding group with descent connections through father's father and mother's father are generally able to activate the widest range of rights and interests in relation to the estate.

13. Under the claimants' system of traditional laws and customs the range of rights and interests in land possessed by members of a landholding group who are not descended from the ancestors depends on individual circumstances, including the nature and extent of their non-descent connections to the estate. Although such rights and interests are usually limited to the individual there are instances of transmission to succeeding generations (e.g. Eric Pananka in relation to Irrety).

14. A number of members of the native title claim group are members of more than one landholding group, for example, due to different grandparental links to multiple estates, and/or a mix of descent and non-descent based affiliations.

It will be clear that many paragraphs do not deal solely with the description of the membership but provide more general information about the claim group's society. The final sentence of paragraph [33] from *Gudjala* above indicates that I am not required here to consider the basis upon which persons qualify for membership so I will not take into account information which might be so characterised. I would identify the operative paragraphs, in which the criteria for membership are given, as being numbers 1, 7 and 9. The balance of the paragraphs seem to me to to be related to the bases for membership and do not function as 'identifiers'.

Paragraph 7(a) sets out details of how and from whom those of the members who have descent based membership descend. Names or descriptions of ancestors are provided for each of the groups comprising the claim group. The Ywel group described at 7(a)(i) seems to me to identify only three of the 'four siblings' mentioned, but I do not think that matters; it may be my

misunderstanding. The format however is similar to that approved by the court in *State of Western Australia v Native Title Registrar & Ors*[1999] FCA 1591 and I find that this portion of the description satisfies the requirement of s. 190B(3).

I must now consider whether the balance of the description – that setting out the non-descent based membership – is satisfactory in terms of the section.

In addition to the information in schedule A, there are long form affidavits from each of the persons comprising the applicant, and each of them provides detailed and valuable information as to how the deponent is qualified to speak for country under the relevant laws and customs relating to their membership of the group, and how the processes for transmission of that knowledge operate to give rise to rights in both descent and non-descent based members. The level of detail provided in paragraph 9 about the factors which are relevant to the recognition of a non-descent members is such that I find that there are appropriate criteria provided, and I find that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Subsection 190B(4)
Native title rights and interests identifiable

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

Result

The application **satisfies** the condition of s. 190B(4).

Reasons

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.

Section 62(2)(d) requires that the application contain "a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law". This terminology suggests that the legislative intent of the provision is to require applicants to claim them with some specificity.

The phrases 'native title' and 'native title rights and interests' are defined by s. 223(1) which provides as follows:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

Rights which the courts have indicated are not readily identifiable as native title rights include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters, rights to minerals and petroleum under relevant legislation, an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters. Similarly, rights which are not rights in lands or waters, such as rights to receive a portion of a catch, rights to uphold and enforce traditional laws and customs, and rights to determine and regulate membership of a claim group cannot be readily identified, for that reason, as native title rights.

In *Doepel* His Honour Justice Mansfield suggested this test:

> In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning— at [123].

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The rights claimed are set out in full in my reasons at s. 190B(6).

I find that all the rights claimed are readily identifiable

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to combined result for s. 190B(5) at page 29 below.

When considering s.190(B)(5), the Registrar is not limited to the statements contained in the application but may refer to additional material supplied to the Registrar: *Martin v Native Title Registrar* [2001] FCA 16 [23]. I have had regard to the application as a whole and note again here

the detailed information made available. I have not, as a result, needed to consider information beyond the application other than to formally confirm the accuracy of some of the anthropological/ethnographical sources quoted in schedule F at paragraph 16. In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that '[s]ection 190B (5) may require more than [s. 62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.'

The task of the Registrar was considered in *Doepel* where the court said:

> Section 190B(5) … requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests … The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17] and
>
> It does not itself require some weighing of that factual assertion whether the asserted facts can support the claimed conclusions (at [127]).
>
> For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the rights and interests.

In *Gudjala People FC* the court, at [83], specifically approved of the court's reasoning in *Doepel* where the lower court said:

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

It went on to note at [84] that, unlike ss 190B(6) and (7), s. 190B(5) does not require 'some measure of substantive (as distinct from procedural) quality control upon the application.' The use of the word 'procedural' suggests that so long as the information provided is, on its face, responsive to the wording of the section, no further assessment need be made. At [92] the court also had this to say:

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is

> not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.

I understand the court to be saying that the 'test' is such that an application will satisfy the requirements of s. 190B(5) so long as there is some specificity in the general description (i.e. not merely 'assertions at a high level of generality') and that nothing more than 'a general description' is required. Finally, it seems, from *Doepel* at [17] and [127] (quoted above), that the task is not to 'weigh' the information provided, so that I should not consider adverse material here (see also paragraphs [126], [127] and [132]).

The information provided in this application at schedule F consists of far more than'assertions at a high level of generality'; it is detailed, specific and comprehensive.

Result re s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Reasons re s. 190B(5)(a)

- Paragraphs 2 and 3 assert that the claimants have held their rights since sovereignty and first contact.
- Paragraph 4 of schedule F details the relationship of the Anmatyerr language group, to which the members belong, to the Altyerr, and thereby to the creation of the country, its landforms, the kinship rules, religious systems and much more. The three land-holding groups, the Anwenyengp, Irrety and Ywel share this culture. It notes the unchanging and elemental aspects of those beliefs.
- Paragraphs 7, 8 and 9 provide information about the kinship system and how one of its functions is to metaphorically reproduce the association of the members with their country.
- Paragraph10 and 11 similarly provide information on the rights and obligations of members, and particularly the land-holding apmerek-artwey/kwertengerl system of 'owners and managers'.
- Each of the persons comprising the applicant has sworn or affirmed affidavits in which they give first-hand histories of their occupation and use of the claim area during their own lives, those of their parents and grand parents, and of the group as a whole. Each affidavit is of some 15 to 20 paragraphs and all but a couple of paragraphs in each, no matter what the principal subject of the paragraph may be, refer to the lives and activities of the members on the claimed area.
- Paragraph 16 details historical and scientific writings in various disciplines about the transmission of rights since sovereignty.
- Schedules G and M contain material about current associations.

I find that there is a satisfactory factual base provided to support the assertions described by s. 190B(5)(a).

Result re s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Reasons re s. 190B(5)(b)

There must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the native title claim.

Gudjala held that the factual basis must be capable of demonstrating that:

- there are traditional laws and customs;
- acknowledged or observed by the native title claim group; and
- giving rise to the group's claim to native title rights and interests – at [62].

The court also said:

> The decision in Yorta Yorta (supra) demonstrates that the requirement that the laws and customs be traditional means that they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society. The applicant submits that this does not lead to the conclusion that the apical ancestors must have comprised a society. I accept that submission – at [63] and
>
> The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860 – at [66] and,
>
> … at some point the applicant must explain the link between the claim group and the claim area. That process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage – at [66].

Insofar as *Gudjala People FC* approved of the test in *Gudjala* I understand this to be still applicable.

The application contains considerable and detailed information about the native title claim group, their society and their country. This is primarily to be found in schedules A, G, F and M, although material going to the current exercise of the applicants' rights appears in their long-form affidavits, which support the schedules by providing extra detail.

I am satisfied that the facts provided in the application, particularly at schedule F where there is a detailed, five page, account of the laws and customs on which the applicants rely, are sufficient to support the assertions.

The material describes how the laws and custom were established during the Altyerr (the time of the Dreaming) by the spiritual ancestors, and that the beliefs, laws and customs currently held are accepted by the group as being unchanged since that time. These laws and customs, which I do not need to set out in full here, but which are well detailed in the application, govern all aspects of the life of the group and their relationship to land. There are laws, for example, relating to land,

social order between people, marriage, kinship, moieties and skin, with examples of their operation being provided.

The table provided at point 19 of schedule F provides information about the ongoing operation of those laws and customs and their observance, linked to the rights claimed.

The laws and customs are held to be immutable and to have been put on the earth during the Altyerr, being accepted by the group as the rules by which they must order their society. In the values of the group, then, the laws and customs are asserted to be what was described in *Yorta Yorta* as 'traditional', that is, normative, unchanged and unchangeable since the Altyerr, and certainly before either first contact or sovereignty.

That the group descends from an Indigenous society at sovereignty is also supported by the anthropological and other writings from that time until the present. Finally, it can be seen from the matters considered above that those laws and customs, which amongst other things specifically deal with the group's relationship to country, supports the assertion that they give rise to the native title rights.

I find that there is a sufficient factual basis for the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the native title claim.

Result re s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Reasons re s. 190B(5)(c)

Of this subsection *Gudjala* observed

> Subsection 190B(5) required that there be a factual basis supporting the assertion that the Native Title claim group have continued to hold Native Title in accordance with traditional laws and customs. This implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty – at [82].

I think that it follows from my findings and my consideration of the material in assessing compliance with s. 190B(5)(b), above, that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The long-form affidavits provide ample examples of their continuing observation, evidenced not least by the manner in which one of the applicants comes to be speaking for a particular landholding group.

Facts to support the continuity of tenure according to the laws and customs of the group since prior to sovereignty are supplied at points 2, 3, and 14 - 18 of schedule F.

I find that there is a sufficient factual basis to support the assertions required by the subsection.

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Subsection 190B(6)
Prima facie case

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

Result

The application **satisfies** the condition of s. 190B(6).The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Reasons

Under s.190B(6) I must consider that, prima facie, at least some of the native rights and interests claimed, as defined at s. 223 of the Act, can be established. The term 'prima facie' was considered by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595. In that case, the majority of the court noted:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989].'

And at 35:

> However, the notion of a good prima facie claim which, in effect, is the concern of s. 63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.

This test was explicitly considered and approved in *Doepel*:

> Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 ('Waanyi') was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: ... 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'— at [135].

In considering this application and in deciding which native title rights and interests claimed can be established prima facie I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claim's success' and a claim which is arguable, 'whether involving disputed questions of fact or disputed questions of law it should be accepted on a prima facie basis'.

In *Doepel* His Honour Justice Mansfield considered the task of the Registrar in these terms, noting that an evaluative approach is to be taken and that it may be necessary to consider adverse material in weighing up the factual evidence – at [126] - [127] and [132].

> Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim— at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6). As counsel for the Territory also pointed out, addressing s 190B(6) may also require consideration of controverting evidence— at [127].
>
> Having been satisfied of the particular requirements, of s 190B(5), and because s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed, it follows that the Registrar is not shown to have erred in his consideration of s 190B(5) in the manner asserted by the Territory— at [132].

Gudjala People FC at [84] noted with approval what had been said in the court below about the approach to be taken to s. 190B(6)) and (7) :

> It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) qualify control upon the application if it is to be accepted for registration– at [18].

Native title rights are defined at s. 223 and are those communal, group or individual rights in relation to lands and waters held by the native title claim group. In this application the claim to rights is set out in schedule E as follows:

> 1. The native title rights and interests claimed in relation to the application area are the rights set out below including the right to conduct activities necessary to give effect to them:
>
> (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, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land;
>
> (d) the right to access, maintain and protect places and areas of importance on or in the land and waters;
>
> (e) the right to do the following activities on the land:
>
> (i) engage in cultural activities;
>
> (ii) conduct ceremonies;
>
> (iii) hold meetings;

(iv) teach the physical and spiritual attributes of places and areas of importance;

(v) participate in cultural practices relating to birth and death including burial rites;

(f) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the claimants;

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

2. All the rights and interests listed in paragraph 1 existed and continue to exist in relation to the application area as a whole.

3. The native title rights and interests claimed do not confer possession, occupation, use and enjoyment of the application area to the exclusion of all others.

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

5. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and 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.

Schedule F point 19 of the application contains a most helpful table setting out each of the rights claimed referenced to the relevant paragraphs in the long-form affidavits which provide information supporting the existence and practice of those rights.

Prior to assessing that table I made an independent analysis of the same material and in all but two instances came to the same conclusions, so I accept the table as an accurate summary of where relevant information appears in the affidavits. There is also useful material, which I have taken into account, at schedules A, F, G and M.

There is properly, given the tenures, no claim to exclusive possession, it being eschewed at schedule E 3. The remaining rights sought are non-exclusive in nature.

On considering these rights I note that (c) and (g) define 'resources' as both 'natural' and 'traditional' and thus set out the nature and extent of the rights. The use of the word 'including' in (g) does not seem to me, in its context, to be offensive, in that the nature and extent of the right would not be altered were that second part to be absent.

In relation to (b), I note that it was said in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) that such a right need not necessarily imply exclusive possession.

Alyawarr however also said, at [151] that a right such as that at (f) might not be acceptable other than in certain circumstances, such as those applying in *De Rose v State of South Australia* [2002] FCA 1342 (*De Rose)*. The information available to me is not sufficient for me to make that assessment, and accordingly I find it not established under the circumstances. I note that the applicants may provide further information to the Registrar under s. 190(3A), and for that reason I have considered it the evidentiary material provided and reached a limited conclusion.

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

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka sworn 12.11.07 at paragraphs 5, 7, 10, 15, 16, 18
- Affidavit of Archie Glenn Angal sworn 21.11.07 at paragraphs 5, 7, 9, 10, 11, 12, 13, 14, 17
- Affidavit of Dorothy Ross Ampetyan sworn 12.11.07 at paragraphs 5, 7, 8, 9, 12, 15
- Affidavit of Donald Campbell Peltharr sworn 2.12.07 at paragraphs 5, 7, 11, 14, 15, 16, 18
- Affidavit of Mary Angal sworn 29.11.07 at paragraphs 5, 7, 8, 9, 10, 12, 16

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

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka, pars 5, 7, 10, 15, 16
- Affidavit of Archie Glenn Angal, pars 5, 7, 9, 12, 13, 14, 17
- Affidavit of Dorothy Ross Ampetyan pars 5, 7, 8, 9, 12
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11, 14, 15, 18
- Affidavit of Mary Angal, pars 5, 7, 8, 10, 11, 12, 16

(c) The right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land.

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka, pars 5, 7, 10, 15, 16
- Affidavit of Archie Glenn Angal, pars 5, 7, 11, 14, 17
- Affidavit of Dorothy Ross Ampetyan pars 5, 7, 8, 9, 12, 15
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11, 18
- Affidavit of Mary Angal, pars 5, 7, 8, 9, 10, 11, 12, 16

(d) The right to access maintain and protect places and areas of importance on or in the land and waters.

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka, pars 5, 7, 10, 11, 18
- Affidavit of Archie Glenn Angal, pars 5, 7, 9, 10, 12, 13, 17
- Affidavit of Dorothy Ross Ampetyan pars 5, 7, 8, 9, 14
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11, 14, 15, 16
- Affidavit of Mary Angal, pars 5, 7, 8, 15, 17

(e) The right to do the following activities on the land:

1. engage in cultural activities;
2. conduct ceremonies;
3. hold meetings;
4. teach the physical and spiritual attributes of places and areas of importance; and
5. participate in cultural practices relating to birth and death including burial rites.

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka, pars 5, 7, 10, 11, 15, 16, 18
- Affidavit of Archie Glenn Angal, pars 5, 7, 10, 13, 15, 17
- Affidavit of Dorothy Ross Ampetyan pars 5, 7, 8, 12, 13, 14
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11, 14, 15, 16, 17, 18
- Affidavit of Mary Angal, pars 5, 7, 8, 14, 15, 16, 17

(f) The right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the claimants.

This right is evidenced as follows but is not prima facie established for the reasons set out above in my introduction. I have, however, considered the information and find that if further material were to be provided about who might be the subject of the right (as discussed in *Alyawarr*), it is possible that the right could be established.

- Affidavit of Eric Pananka, pars 5, 7, 10, 11, 16, 17
- Affidavit of Archie Glenn Angal, pars 5, 7, 9, 15, 16, 17
- Affidavit of Dorothy Ross Ampetyan pars 5, 7, 8
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11, 14, 15, 16, 18, 19
- Affidavit of Mary Angal, pars 5, 7, 8, 12, 16, 17

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

This right is evidenced as follows and is prima facie established.

- Affidavit of Eric Pananka, pars 7, 10
- Affidavit of Archie Glenn Angal, pars 7, 17
- Affidavit of Dorothy Ross Ampetyan pars 7, 8, 9
- Affidavit of Donald Campbell Peltharr, pars 5, 7, 11
- Affidavit of Mary Angal, pars 5, 7, 8, 12

Subsection 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
   (i) the Crown in any capacity, or
   (ii) a statutory authority of the Crown in any capacity, or
   (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result

The application **satisfies** the condition of s. 190B(7).

Reasons

I came to the conclusion when considering s. 190B(5) that there is a sufficient factual base to support the assertion that the persons in the claim group have continued to hold native title in accordance with traditional laws and customs. I understand the word 'traditional', when used here, to have the same meaning given to it in *Yorta Yorta.*

Gudjala FC said this of how the section is to be considered

> His Honour distinguished the task imposed on the Registrar by s 190B(5) from that imposed by s 190B(7). As his Honour pointed out, the latter subsection requires the Registrar to be satisfied of a particular fact or particular facts and therefore requires the presentation of evidentiary material. His Honour, however, qualified that observation (at [18]):
>
> > The focus is, however, a confined one. It is not the same focus as that of the court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [84].

The application at schedule M gives considerable information about the traditional physical connections of each of the persons comprising the applicant with the area, and is of course verified by the s. 62 affidavits of the applicants. It describes activities carried out on the land by each of them and their families pursuant to their laws and customs.

Each applicant has also provided a long-form affidavit in which they detail their lives on the land, their travels over it, the uses made of it and its resources, the foods gathered or hunted and other details of how they lived there. They each express that they acknowledge and observe the laws which come from the Altyerr in all these activities.

I find that each of the persons comprising the applicant had, and still has, a traditional physical connection with the land, such that the requirement of the section is satisfied.

Subsection 190B(8)
No failure to comply with s. 61A

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s. 61A (which forbids the making of applications where

there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result at page 36.

No approved determination of native title: s. 61A(1)

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

Result

The application **meets** the requirement under s. 61A(1).

Reasons

There is no relevant determination, and schedule O notes that there are no other applications over all or part of the area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which
(a) a previous exclusive possession act (see s. 23B)) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:
(a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Reasons

The application expressly excludes any such claim, subject to s. 47, s. 47A and s. 47B, at schedule B (b) 3.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or
    (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

Reasons

The application expressly excludes any such claim at schedule E paragraph 3.

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Subsection 190B(9)
No extinguishment etc. of claimed native title

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

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

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result at page 37.

Result re s. 190B(9)(a)

The application **satisfies** the subcondition of s. 190B(9)(a).

Reasons re s. 190B(9)(a)

The application expressly excludes any such claim at schedule Q.

Result re s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Reasons re s. 190B(9)(b)

The application covers an area in Central Australia and no offshore place is subject to it.

Result re s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

Reasons re s. 190B(9)(c)

I have no information before me which suggests, nor any other reasons to believe, that the claimed native title rights have otherwise been extinguished.

Combined result for s. 190B(9)

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

Attachment A
Summary of registration test result

Application name	Aileron #2
NNTT file no.	DC07/2
Federal Court of Australia file no.	NTD20/07
Date of registration test decision	August 2008

Test condition (see ss.190B and C of the Native Title Act 1993)	Subcondition/requirement	Result
s. 190C(2)		Combined result: Met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Met
	re s. 62(2)(a)	Met
	re s. 62(2)(b)	Met
	re s. 62(2)(c)	Met
	re s. 62(2)(d)	Met
	re s. 62(2)(e)	Met
	re s. 62(2)(f)	Met

	re s. 62(2)(g)	Met
	re s. 62(2)(ga)	Met
	re s. 62(2)(h)	Met
s. 190C(3)		Met
s. 190C(4)		Met
s. 190B(2)		Met
s. 190B(3)		Met
s. 190B(4)		Met
s. 190B(5)		Combined result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)		Met
s. 190B(8)		Combined result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Combined result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

Attachment B
Documents and information considered

The following lists **all** documents and other information that were considered by the delegate in coming to his/her decision about whether or not to accept the application for registration.

I have considered all the material in the registration file number DC07/2 Volume 1 (also referred to as 2008/00289 Vol 01) which was prepared for me by the Case Manager, in accordance with the tribunal's procedures.

[End of document]