National Native Title Tribunal

Registration test decision

Application name:	DIERI #2
Name of applicant:	EDWARD LANDERS, RHONDA GEPP-KENNEDY, SYLVIA STUART, IRENE KEMP and DAVID MUNGERANNIE
State/territory/region:	SOUTH AUSTRALIA
NNTT file no.:	SC08/2
Federal Court of Australia file no.:	SAD163/2008
Date application made:	26 SEPTEMBER 2008
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: 4 November 2008

_____

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

Table of contents

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).

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 17 October 2008. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

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 named applicants are the same as those in Dieri Peoples' Native Title application SAD6017/1998. Each application is on behalf of the same claim group. This application extends the area claimed.

The making of the present application follows an agreement reached with the Adnyamathanha People on 20 June 2006 to share the area claimed. This application is made over the agreed area of the Adnyamathanha No. 1 application SAD6001/98 and was filed on 26 September 2008 pursuant to orders made by the District Court, with the intent that it would enable recognition of any claimed rights as part of the proposed Adnyamathanha consent determination.

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.

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

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

I have *not* knowingly considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

I also have *not* knowingly 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. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. There has been no requirement for procedural fairness to be made available.

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 13.

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*) at [16] 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'.

His Honour also said at [39] 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.'

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 190C(2) 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.'

Doepel (at [16], [37], [39] and [44]) is 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 required only to consider whether the information provided is responsive to the requirement of the section, but not to make any merit assessment of the information other than when 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. If so, the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration: *Doepel* at [36].

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 following information providing a name and address for service appears at Part B.

Camatta Lempens Pty Ltd Lawyers
Level 1, 345 King William Street
ADELAIDE SA 5000

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. I note that 'Doepel' says that I am not 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.

The application provides a description of the persons in the native title claim group at Schedule A. Whether that description is sufficiently clear such 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.

See also my reasons in respect of s. 62(1)(a) below.

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* says that I am not to consider whether the persons comprising the applicant are in fact authorised – at [73] and [74].

Affidavits have been declared and affirmed by each of the persons comprising the applicant. Each affidavit is filed and makes the statements and provides the information required by the five subsections.

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 9 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 13 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, the information provided is responsive to the requirements of the relevant section. The merit assessment is made at s. 190B(2).

A description is provided at schedule B of the application 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 that I not make any merit assessment of the details and information provided under s. 190C(2), beyond being satisfied that, on its face, the information is responsive to the requirements of the relevant section. Any merit assessment is made at s. 190B(2).

A map is provided at schedule C of the application, meeting the requirement of the section.

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.

Schedule D says that 'no searches have been carried out by the applicants to determine the existence of non-native title rights and interests in relation to the lands and waters in the Area covered by this application.'.

I have no reason to believe that the applicants have done other searches and not disclosed them.

The requirement of the section is 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

Schedule E has a description of the native title rights and interests claimed. Following *Doepel,* I make no merit assessment here other than to find that the description is 'not merely ... 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.'

The requirement of the section is satisfied.

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

A general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist appears at schedule F. Following *Doepel* I do not make any merit assessment of the information provided here, but do so at s. 190B(5)

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

Details of some activities carried out by members of the claim group appear at schedule G and I find the requirements of the section to be satisfied.

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

The applicant is only required to provide details 'of which the applicant is aware.'

Schedule H notes that the claim is overlapped by Adnyamathanha No. 1 SAD6001/98 SC91/1. I have no reason to believe that the applicants are aware of other applications which are not disclosed.

I find the requirement of the section to be 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 applicant is only required to provide details 'of which the applicant is aware.'

Schedule HA notes that 'the Applicants are not aware of any notifications given under this Act.'

I find the requirement of the section to be satisfied.

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 applicant is only required to provide details 'of which the applicant is aware.'

At schedule I the applicants note that they are unaware of any notices given under s. 29. Following that statement appears a table of expired notices, the last being dated August 2006. In my opinion these notices, being expired, no longer 'relate to the whole or any part of the area.'

I find the requirements of the section to be satisfied.

Combined result for s. 62(2)

The application meets the combined requirements of s. 62(2), because it meets each of the subrequirements of ss. 62(2)(a) to (h), as set out above.

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) FCR 33 at [9].

For the purposes of s. 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application, i.e. the relevant time is not when the current application was made but when it is being considered under s. 190A—see *Western Australia v Strickland* 2000) FCR 33 at [53]-[56].

This application was filed in the Federal Court on 26 September 2008 For the purposes of s.190C(3)(b), the application is taken to have been 'made' on that date.

As a first step, s. 190C(3) requires identification of previous overlapping applications entered on the Register as a result of consideration of those applications under s.190A.

I note firstly that the Dieri People's Native Title Claim SAD6017 of 1998 SC97/4, which was accepted for registration on 25 November 2003, has a small overlap. That overlap is sufficiently small, in my opinion, to be disregarded, if it were relevant, under the de minimus rule. Further, I note that he purpose of the statutory condition is to ensure that claimants do not 'double-dip' by claiming rights in two competing claims. In the present circumstances the claimants are one and the same group, as are the applicants (see schedule R) so that the 'evil sought to be remedied' does not exist.

Details are provided at Schedule H of the Adnyamathanha No.1 SAD6001/98 SC91/1 native title claim which has been made in relation to whole or part of the area.

That application was entered on the Register (and has not been removed from it) following consideration under s. 190A on 31 March 1999, prior to the filing of the present application. It is, therefore, a 'previous overlapping application' for the purposes of the section.

I must then be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group in that application.

The claim group description in Adnyamathanha is too lengthy to set out here but comprises those persons named in the 'Adnyamathanha Genealogy' which appears at Attachment A(1) of that application, together with the descendants of the persons so named and persons adopted pursuant to traditional laws and customs.

I note that the Adnyamathanha Genealogy is held for inspection at the Adelaide Registry of the National Native Title Tribunal (and has been made available to me for the purposes of this test.).

The claim group description in the present application is set out in my reasons at s. 190B(3).

Schedule O of this application states that 'the applicants do not believe that any member of the Native Title Claim group is a member of any overlapping application.' In their affidavits each person comprising the applicant affirms on oath his or her belief that all of the statements in the application are true.

Although I do not believe the section requires me to go beyond the verified facts in the application, I have nonetheless considered the Adnymathanha Genealogy and can see nothing there to suggest common claimants.

I have no information or other reason to doubt what is said at schedule O and I therefore find that there are no persons included in the native title claim group for the current application who are members of the native title claim group for the previous application.

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.

Under s. 190C(5), if the application has not been certified, the application must:

(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and

(b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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)(b) are met, including that the condition of s. 190C(5) is met. .

Reasons

As the application has not been certified, I will first consider the provisions of s. 190C(5)(a) and (b), as if they are not satisfied I cannot in turn be satisfied under s. 190C(4). The requirements of the section are set out above.

The application sets out information about the authorisation process in schedule R which contains statements to the effect that the persons comprising the applicant are members of the native title claim group, as well as setting out a detailed account of the authorisation proceedings. I am satisfied by this that the requirement of s. 190C(5)(a) and (b) are met.

I now turn to consider s. 190C(4)(b)

The first 'leg' is that I be satisfied that the persons comprising the applicant are themselves members of it. Schedule R states that each is a direct descendant of one or more of the apical ancestors named in the claim group description. This statement is verified by the affidavits, so I am satisfied that each is a member. I note that they are also the persons comprising the applicant in the Dieri Peoples claim SAD6017 of 1998.

Secondly, I must be satisfied that they are 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.

Schedule R sets out the circumstances of the calling of a meeting at Port Augusta on 8 March 2008, following discussions in the group about the need to make a further application. The meeting of the claim group was called following an agreement made with the Adnyamathana people on 20 July 2006 during which, I gather, the two groups agreed to a shared area.

Notice was given to all the members of the group and a meeting was held which was attended by some 90 people (and a list of their names is provided). In my experience this is a substantial number of persons to have attend such a meeting and satisfies me that an opportunity was available for all members of the claim group to attend.

The meeting utilised a method of authorisation which has been agreed by the group and used by them in this and other matters. The method is not asserted to be traditional and mandatory, pursuant to s. 251B(a) and I therefore find that, on the information before me, that it was pursuant to s. 25B(b). It was a process clearly (and stated to be so) based on the groups' deference to the acknowledged elders with the selection of the elders then put to a formal vote, the result of which was unanimous. Each of the persons deposed as follows in their affidavits:

> I am able to say that the authorisation process is based upon traditional laws and customs of the Dieri People. It is a custom of the Dieri People to accept the authority of Dieri Elders particularly in relation to making decisions about the exercise of Native Title rights and interests on traditional Dieri Lands. According to Dieri law, the applicants are Elders whose age, knowledge of Dieri law, their position as head of a particular Dieri family gives a senior status that has enabled the applicants to speak on behalf of all Dieri People and to make this application.

I note that the named applicants are the same applicants for the Dieri People's Native Title Claim (SAD6017 of 1998). They are the acknowledged elders of the Dieri People and are the direct biological descendants of apical ancestors of the Native Title Claim group identified in Schedule A.

I find the requirements of the section to be satisfied.

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

The application contains a description of the area at Attachment B. That is a description of the external boundary of the claim primarily by geographical co-ordinates but including some references to other parcels and geographic features. The description was prepared by the National Native Title Tribunal and contains appropriate data references and sources and is datum referenced to GDA 94.

I find that this description satisfactorily describes the external boundary.

The application describes the areas within the external boundaries which are not claimed by the use of clauses excluding land by tenure description. There is no need to reproduce it here. It has been well settled since *Daniel for the Ngaluma People & Monadee for the Injibandi People v State of Western Australia* [1999] FCA 686 that such a form of description is acceptable in appropriate circumstances and I find that Attachment B enables the identification of any areas within the external boundaries which are not claimed.

A map is attached as Attachment C. It was created by the National Native Title Tribunal for the applicants. It provides a small-scale location diagram to show the general area of the application within the state, and a map of the claim area's external boundaries. Tenures are colour-coded, towns, lakes roads and tracks are depicted. Topographic and scale data is provided.

I note that a geospatial assessment and overlap analysis has been prepared by the Tribunal's Geospatial Services which concludes that 'the description and map are consistent and identify the application area with reasonable certainty.'

That is also my own conclusion from the information provided and I find that the requirements of s. 62(2)(a) and (b) are satisfied.

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 described 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

The claim group is described at schedule A. It is in the common 'descent from apical ancestors form' approved of in *State of Western Australia v Native Title Registrar* [1999] 95 FCR 93.

The description is as follows.

> The Dieri Native Title Claim Group comprises those people who hold in common the body of traditional law and custom governing the area that is the subject of the claim and who:-
> 1. Are related by means of the principle of descent to the following apical ancestors:
> 1.1 Ruby Merrick and Tim Maltalinha (also known as Tim Merrick) who are the parents of the sibling set – Martin, Gottlieb, Rebecca, Selma (or Thelma);
> 1.2 Kuriputhanha (known as 'Queen Annie') mother of Karla-warru (also known as Annie);
> 1.3 Mary Dixon (born at Killalpaninna) mother of the sibling set – Dear Dear (known as 'Tear'), Jack Garret, George Mungerannie, Joe Shaw, and Henry;
> 1.4 Bertha mother of the sibling set – Johannes and Susanna
> 1.5 Walter Kennedy husband of Selma (also known as Thelma) nee Merrick;
> 1.6 Florrie wife of Martin Merrick, and;
> 1.7 The man Pinngipania (born at Lake Hope) and the woman Kulibani (born at Kalamarina) who are the parents of Sam Tintibana (or Dindibana Ginjmilina).

I understand the words 'the principle of descent at point 1 as meaning 'are the descendants of'. I have taken that view both because the application contains nothing to suggest otherwise, as well as because that interpretation is the one most beneficial to the claim group. In that regard I note *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55], *Commonwealth v Yarmirr* (2001) 184 ALR 113 at [124] to [125], and what was said in *Kanak v National Native Title Tribunal.* Although those cases refer, of course, to legislation, adoption of the same principle seems appropriate here, so I give the benefit of any necessary interpretation to the applicants.

On the basis of the law as expressed in *State of Western Australia v Native Title Registrar* I find that the persons in the group are described sufficiently clearly 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

The claim to rights is set out in Attachment E and is reproduced in my reasons at s. 190B(6).

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 screen out claims that describe native title rights and interests in a manner which is vague, or unclear, and 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 Queensland legislation, an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.

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 regulate disputes amongst members cannot be readily identified 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.

I am of the view that all the rights claimed here 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 24 below.

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)

The following comments, as will be seen, refer to my approach to s. 190B(5) as a whole, not just this subsection.

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]. 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 when considering compliance with the requirement of this section 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.

More recently, in *Gudjala People FC* the court, at [83], specifically approved of the court's reasoning in *Doepel,* citing the passage at [17] which I have just reproduced.

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 Full 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]).

In this application there is a general description given, but it is insufficient for me to make a 'genuine assessment'.

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]. 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 power to look beyond the application is at s. 190A(3), which allows the Registrar to 'have regard to such other information as he or she considers appropriate.'

Whilst the material in the application itself is thin, I am provided with an expert report of more than 200 pages entitled 'Dieri Connections to the Adnyamathana Overlap and Shared Country', prepared by Rod Lucas, consultant anthropologist. He has also prepared or been involved in the preparation of several more substantial Dieri reports (that is, reports considering the people as a whole and not just in relation to the overlap area).

The information provided in this report far exceeds what I might require to be satisfied under the 'tests' I have described above and for that reason is particularly valuable. A letter from the solicitors representing the applicant requests that 'the report be kept confidential save and except for those parts that are necessary for the delegate to carry out the delegate's duties.' I note also

that the author (at paras 478 – 479) identifies a deep reluctance by some Dieri to reveal culturally disseminated information, and even to deny its existence (including, possibly, to their own anthropologists) in case it were to find itself revealed by such processes as the present. For those reasons I will avoid using the names of persons, families and places so far as possible. For the same reason I will avoid identifying details of spiritual beliefs.

I now turn to consider the requirement of this subsection.

The application contains a brief, general description. It is verified by the applicants and must be described as formulaic. Nonetheless, at schedule F it is said that :

'The native title claim group and their ancestors have, before and since British sovereignty was asserted over the area, possessed, occupied used and enjoyed the area the subject of the native title claim.'

In section 3 of the report (pages 82 to 132) there is extensive factual information about the association of the claim group and its predecessors with the area. To summarise the information given, the report demonstrates that:

- Genealogical memory is often, but not always, restricted to about two generations.
- Current members have detailed recollections of their families on country back to that period and occasionally further. Some younger members have gained more knowledge from modern anthropology.
- People know the particular places within the whole area with which their forebears were associated.
- There has been considerable research of archival material (which is more fully detailed in earlier reports) from such sources as Howitt (1904), Siebert (1910) and to a lesser extent, Reuther (trans. 1981), all of whom discuss and describe the Dieri in the area at that time and before. Reuther, a missionary in the area from 1888 to 1906 left voluminous records.
- That earlier research allows for construction of some genealogies from the present back well into the 19th century. Examples are provided. This evidence puts the Dieri in this country over that period of time.
- Howitt's 'Table of Dieri marriages and Descents', published in 1904, evidences Dieri occupation back to a period prior to the appearance of white settlers in the area in about 1855. I am prepared to draw the necessary inferences that the Dieri were in the area at the time of legal sovereignty.
- At 3.5.1, paragraphs 255 to 265, the report provides information about particular families and their association with different places within the area by considering primary sources consulted by Howitt. This material confirms the existence of the Dieri as a whole at various places, both early white-owned stations as well as places identified by geographical features, as well as confirming the existence of other groups.
- There is a schedule of photographs of particular members or their forebears at various named places, sometimes on or near those stations, sometimes in the bush.

These facts are in my view sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

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)

The report deals with the laws and customs of the people at Section 4, from page 133 to 141, and in Section 5 from page 142 to 204. Again it is only necessary for my enquiry to summarise the factual base provided by this information. I intend no disrespect in doing so.

The report describes a Dieri concept (the Dieri name of which it gives), documented also by Reuther, which might be translated/glossed as the 'way, manner, custom, habit, business, occupation etc' and regards that concept as being, in effect, a Dieri way of expressing the concept of normative behaviours, laws or customs.

The concept extended to transmission of those cultural norms.

It includes notions relating to: the passage of the person or body through birth, transition to maturity, initiation into various sequences of knowledge and/or responsibilities, old age, and death; knowledge, techniques and technologies to support subsistence; culturally appropriate ways to be on and occupy country; appropriate interpersonal relations; teaching, and; religious knowledge and experience.

At 4.2 paras 309 to 315 the author moves to considering the practice of laws and customs which give rise to rights, which he details. He describes the rights in relation to certain 'key domains', which are:

- Laws in respect of death practices,
- Laws in respect of natural resources,
- Laws in respect of occupation,
- Laws in respect of language,
- Laws in respect of a particular set of religious or spiritual beliefs.

The report then shows how particular laws and customs derive from those key domains. For example, to choose one of the above, it notes that in respect of occupation the Dieri:

- Knew, utilised and lived on particular country,
- Named country in ways which incorporated its spiritual origins in the actions of the creative beings, and
- Had conceptual notions of place and boundaries.

Arising out of this came laws such as the right of access, to occupy, to camp, to erect shelters, to move about, and to control access and occupation. Examples of the laws arising from their philosophical underpinnings are given in relation to each of the categories above.

In Section 5, at pages 142 to 204, these concepts are considered in considerably more detail that is required for the purposed of the test.

That these concepts and the laws arising were noted by Reuther from 1888, and given that white occupation was perhaps 30 years long by that time, I draw the inference and conclude that the laws and customs may be accepted as 'traditional' in the sense that *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 ('*Yorta Yorta*') requires, and I so find.

I find that there is a sufficient factual base to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest

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)

It will be apparent from my findings above that there is a sufficient factual base for the assertion that there are laws and customs giving rise to rights in lands and waters. At paragraph 323 the author summarise how contemporary society is a 'system encompassing many of the same elements as the traditional society. In this regard he notes, inter alia, the following facts;

- The kinship system, although having adapted in some ways to the changed external world, still informs various rights and responsibilities, including 'close' marriages, a regard for genealogical knowledge, and means of mutual assessment leading to a 'capacity to direct, control or limit' behaviours.
- 'Experiences of living in, growing up in, working at and growing others up in specific places remains ... central.'
- Ritual remains important and can be a primary vehicle affirming connections between people and place, and of exercising rights and obligations.
- Being on and knowing country is still of social importance and reinforces notions of authority and respect, as does the practice of teaching and learning, especially on country.
- Transmission of knowledge, and the restriction of it - particularly on country – remain features of Dieri life.

Dr Lucas' own conclusion is that 'there is a contemporary society that operates by way of specific laws and customs – giving rise to rights and obligations to persons and to land – which derive from and evidence a specific continuity with traditional Dieri society.'

Section 5 of the report, pages 142 to 204, contains extensive information about what may be described here as spiritual or religious cultural knowledge and beliefs concerning the creation of both the country and the Dieri and the roles of mythological ancestor/creators. This knowledge manifests itself in the arrangement of society, it orders ritual and ceremonial lives, it governs relationships within the society, and provides means of transmission of rights and obligations (including relating to land), amongst other things. I need say no more about these matters here, but they are certainly of importance in my conclusion.

I find that there is a sufficient factual base for the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

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 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 Registrar takes the view that this requires only one right or interest to be registered.

The term '*prima facie*' was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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 *Northern Territory v Doepel* 2003 FCA 1384 at paras 134 - 5:

> '134. 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: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided
>
> 135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, 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.'

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 claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis' .in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

The rights and interest claimed are set out at schedule E and are as follows:

> 1. The nature and extent of the native title rights claimed and interests in relation to the Claim Area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs, the land and waters of the Claim Area, being:
>
> (a) the right to access and move about the Claim Area;
> (b) the right to hunt and fish on the land and waters of the Claim Area;
> (c) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, stone, resin, ochre and feathers;
> (d) the right to use the natural water resources of the Claim Area;

(e) the right to live, to camp and to erect shelters on the Claim Area;
(f) the right to cook on the Claim Area and to light fires for all purposes other than the clearance of vegetation;
(g) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;
(h) the right to conduct ceremonies and hold meetings on the Claim Area;
(i) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;
(j) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Claim Area;
(k) the right to distribute, trade or exchange the natural resources of the Claim Area;
(l) the right to be accompanied on to the Claim Area by those people who, though not Native Title Holders, are:

(i) spouses of native title holders; or
(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area; or
(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders; or
(iv) people required by native title holders to assist in, observe, or record traditional activities on the Claim Area; and

(m) the right to speak for and make decisions about the use and enjoyment of the Claim Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.

I will now consider whether each of these rights may be established on a prima facie basis.

I note that the information in the report about the basis for many of these rights is in the domain of religious/spiritual belief and in the actions and travels of the creative beings who created the rights. Some of these are shared with or connect to similar rights and beliefs held by others in this shared country. The report stresses on a number of occasions that knowledge of some of these matters is tightly held and rarely disclosed. Given the confidentiality requested, I propose to identify relevant passages in the report when necessary rather than publicly disclose their substance here.

The application contains a schedule of activities currently being carried out at schedule G and details of traditional physical connection at schedule M. These schedules are, of course, verified by the affidavits of the applicants and so may be taken and relied upon as facts sworn to by each of them.

The report has been of great assistance in my making the required assessments, as it provides a wealth of information. In *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (‘*Gudjala #2 FC’*) at [93] – [96] the court discussed the nature of expert reports and said that the opinions of the experts could be accepted as reliable without the necessity for the underlying facts to be laid out. I will in many cases below cite the report as a whole, and do so because to identify individual passages or pages would involve unreasonable use of administrative resources: for example, the right of claimants to be on country and the exercise of that right is referred to, mentioned, or simply taken for granted on page after page of the report as it describes and examines the Dieri way of life and its history. Where there are useful specific mentions I identify the page.

<u>(a) the right to access and move about the Claim Area;</u>
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators. By this I mean that the Dieri hold that this right is fundamental to and inextricably intertwined in the creation of the Dieri’s existence.
- The report as a whole.

- P.135-7
- P.140
- P.158
- P.193
- P.204-5
- Schedule G
- Schedule M

Established

(b) the right to hunt and fish on the land and waters of the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators.
- The report as a whole
- P.135-7
- P.158
- P.193
- P.204-5
- Schedule G
- Schedule M

Established

(c) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, stone, resin, ochre and feathers;
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators
- The report as a whole
- P.135-7
- P.158
- P.193
- P.204-5
- Schedule G

Established

(d) the right to use the natural water resources of the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators
- The report as a whole
- P.135-7
- 158
- P.193
- 204-5
- Schedule G
- Schedule M
-

Established

(e) the right to live, to camp and to erect shelters on the Claim Area;

This right is held by virtue of the activities of the creators
Information evidencing the existence and exercise of this right can be found at:

- The report as a whole
- P.135-7
- P.140
- P.158
- P.204-5
- Schedule G
- Schedule M

Established

(f) the right to cook on the Claim Area and to light fires for all purposes other than the clearance of vegetation;
Information evidencing the existence and exercise of this right can be found at:

- The report as a whole
- P.135-7
- 204-5
- Schedule G
- Schedule M

Established

(g) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators
- The report as a whole
- P.135-7
- P.140
- P.158
- P.193
- P.204-5
- Schedule G
- Schedule M

Established

(h) the right to conduct ceremonies and hold meetings on the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- This right is held by virtue of the activities of the creators
- P.135-7
- P.193
- P.204-5
- Schedule G
- Schedule M

Established

(i) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- P.140
- P.158
- P.204-5
- Schedule G
- Schedule M

Established

(j) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- The report as a whole
- P.158,
- P.162
- P.193
- P.204-5
- Schedule G
- Schedule M

Established

(k) the right to distribute, trade or exchange the natural resources of the Claim Area;
Information evidencing the existence and exercise of this right can be found at:

- Schedule G

Although there is a brief mention made here of trade, the details are few. There is no express information concerning distribution or exchange, and as a result this right is not established

Not Established

(l) the right to be accompanied on to the Claim Area by those people who, though not Native Title Holders, are:

(i) spouses of native title holders; or
(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area; or
(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders; or
(iv) people required by native title holders to assist in, observe, or record traditional activities on the Claim Area; [and]

There is insufficient information available to evidence the existence and exercise of this right.

Not Established

(m) the right to speak for and make decisions about the use and enjoyment of the Claim Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.
Information evidencing the existence and exercise of this right can be found at:

- p. 158,
- p. 162

Nonetheless, despite some references to speaking for country, the right as claimed is a complex one, and I am unable to find sufficient information for it to be established. I do not therefore consider whether it is available as a native title right, an open question still.

Not Established

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

At schedule M of the application is this verified statement:

Members of the native title claim group currently have (and have continuously had) a traditional physical connection with the claim area or parts of it. Members of the claim group and their antecedents have and continue to, carry out those activities referred to in Schedule G of this application.

Members of the claim group also frequently visit the area. They attend to cultural responsibilities and are involved in protecting their heritage and significant sites in the claim area. They go camping and hunting, and enjoy sharing their heritage with their children, grandchildren and others as well as engaging in other activities as referred to in Schedule G.

Members of the claim group maintain their connection in the area, and use and enjoy the area as indicated above because it is their ancestral land. They do so in accordance with the traditional laws and customs as taught to them by their Elders.

In the report there are many references to members of the claim group leading lives according to the laws and customs of the Dieri. I have already found, at s. 190B(5), that there is a sufficient factual base for that assertion.

On the basis of the material in schedule M and in the report, I am satisfied that the requirement of this section is met.

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 32.

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.

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

Any such areas are excluded at schedule B point 2.

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

No claim is made for rights of exclusive possession

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 33.

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

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

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

In this application no claim is made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State. See 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 is made over land in northern South Australia and thus there are no offshore waters

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

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

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

Any such claim is excluded at schedule B at point 3.

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:	**Dieri No. 2**
NNTT file no.:	**SC08/2**
Federal Court of Australia file no.:	**SAD136/08**
Date of registration test decision:	**November 2008**

Section 190C conditions

Test condition	**Sub-condition/requirement**		**Result**
s. 190C(2)			**Aggregate 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)		**Aggregate result:** **MET**
		s. 62(2)(a)	**MET**
		s. 62(2)(b)	**MET**
		s. 62(2)(c)	**MET**
		s. 62(2)(d)	**MET**
		s. 62(2)(e)	**MET**
		s. 62(2)(f)	**MET**
		s. 62(2)(g)	**MET**

Test condition	Sub-condition/requirement		Result
		s. 62(2)(ga)	MET
		s. 62(2)(h)	MET
s. 190C(3)			MET
s. 190C(4)			Overall result: MET
	s. 190C(4)(a)		MET
	s. 190C(4)(b)		MET

Section 190B conditions

Test condition	Sub-condition/requirement	Result
s. 190B(2)		MET
s. 190B(3)		Overall result: MET
	s. 190B(3)(a)	MET
	s. 190B(3)(b)	MET
s. 190B(4)		MET
s. 190B(5)		Aggregate 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)(a) or (b)		MET
s. 190B(8)		Aggregate result: MET
	re s. 61A(1)	MET
	re ss. 61A(2) and (4)	MET

Test condition	Sub-condition/requirement	Result
	re ss. 61A(3) and (4)	**MET**
s. 190B(9)		**Aggregate result:** **MET**
	re s. 190B(9)(a)	**MET**
	re s. 190B(9)(b)	**MET**
	re s. 190B(9)(c)	**MET**

Attachment C
Documents and information considered

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

I have considered all the material in the registration file number SC08/2 Dieri No 2 SAD136/08 Volume 1 (also referred to as 2008/002376 Vol 01) which was prepared for me by the Case Manager, in accordance with the Tribunal's procedures.

That file included an expert report by Dr Rod Lucas dated March 2008. I became aware during my consideration that there had been at least two prior Dieri reports prepared: see the report at 1.1, paragraph 7. I do not know whether they have been provided to the Tribunal in connection with the matters for which they were prepared, nor, if they were, on what basis (that is, whether in circumstances of mediation, in which case they would not be available to me, or on an open circumstance). Even if it were the latter, I have not sought to access those reports on the grounds that they may be within the imputed knowledge of the Registrar, as I found the report provided sufficient for my task.

[End of document}