National Native Title Tribunal

Registration test decision

Application name:	Kulyakartu
Name of applicant:	Muuki Taylor, Waka Taylor, Donald Moko, Janice Bullen
State/territory/region:	Pilbara, Western Australia
NNTT file no.:	WC05/7
Federal Court of Australia file no.:	WAD293/2005
Date application made:	11 October 2005
Date application last amended:	13 December 2005
Name of delegate:	Liam Harding

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 accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 3 April 2008

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Liam Harding

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)[1]

[1] Instrument of delegation pursuant to s. 99 of the Act dated 27 September 2007

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) (the Act) requires the Native Title Registrar to apply a 'test for registration' to the claims made in all claimant applications given to him or her under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), with the exception of certain amended applications specified under subsection 190A(1A).

However, I note that the test in this particular instance is triggered by the transitional provisions of the *Native Title Amendment Act 2007* (Cwlth) which commenced operation on 15 April 2007 (see item 89).

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.

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 application was filed in the Federal Court on 11 October 2005. On 28 October 2005 the Registrar provided assistance to the applicant in the form of a written preliminary assessment of both the application and the material accompanying it.

The test in s. 190A was applied on 4 April 2006 and the application was not accepted for registration. The applicant was provided with a copy of the delegate's statement of reasons for the decision.

Although I have read the delegate's statement of reasons I have made my own decision independently. I have done so as it is my view that is not appropriate for an administrative decision-maker to simply rely upon and adopt the findings of another. The principles of administrative decision-making require me to make an independent, unbiased decision based upon all relevant material before me. I refer also to *Gudjala People v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [11] where the Court said that the Registrar's delegate has a statutory duty to

consider, and decide, whether the application meets the requirements of the Act, and a delegate is not bound to follow their earlier decisions.

The Registrar wrote to the applicant on 23 April 2007 and 15 May 2007 to inform the applicant that the transitional provisions of the *Native Title Amendment Act 2007* had triggered the re-testing of the application and invited the applicant to provide further information or to do other things to the application. On 15 October 2007, the Registrar wrote to inform the applicant of the process for requesting an extension of time (should one be required) and confirming that unless an extension was sought and obtained the test would be applied on 19 December 2007.

On 7 December 2007 the applicant's representative, Central Desert Native Title Services (CDNTS), provided affidavits from three members of the claim group together with an accompanying DVD. I have not viewed the DVD but I am reliably informed by the case manager Gerry Putland, that it records the deponents having their affidavits read back to them and subsequently the swearing of each of the affidavits.

On 13 February 2008, CDNTS provided additional material in the form of written submissions in relation to the application of the registration test.

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.

However, given that the registration test has in this instance been triggered by item 89 of the transitional provisions of the *Native Title Amendment Act 2007*, I must also abide by item 89(4)(c). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person *after* the application *was made*. As noted above, the applicant was invited to provide further information and the Registrar has received the following additional material:

- **[Name deleted]** affidavit dated 3 December 2007
- **[Name deleted]** affidavit dated 3 December 2007
- **[Name deleted]** affidavit dated 3 December 2007
- Written submissions from **[Name deleted]** dated 13 February 2008.

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

I have *not* 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* 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 both a delegate of the Registrar and a Commonwealth officer, when I make my decision about whether or not to accept this application for registration, I am bound by and have followed the principles of administrative law, including the rules of procedural fairness.

The steps that the Registrar has undertaken to ensure procedural fairness is observed in this matter are as follows:

- On 11 December 2007, the Registrar provided the Western Australian Government with copies of the affidavit material and DVD received from CDNTS on 7 December 2007;
- On 10 March 2008, the Registrar provided the Western Australian Government with a copy of the written submissions in relation to the application of the registration test received from CDNTS on 13 February 2008.

The Western Australian Government has chosen not to make submissions in response to any of the material which has been submitted for the purposes of the registration test.

Procedural and other conditions: s. 190C

Section 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.

I note that I am considering this claim against the requirements of s. 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the act on 1 September 2007 onwards, and the claim before me is not such a claim.

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).

I have considered whether the application sets out the native title claim group in the terms required by s. 61(1). I note that if the description of the group in the application indicated that not all persons in the native title claim group were included, or that it was in fact a subgroup of the

native title claim group, then the requirements of s. 61(1) would not be met and the claim could not be accepted for registration: *Doepel* at [36].

The group is described in the following way:

> The Kulyakartu application is made on behalf of those Nyangajarra/Yulparija persons who according to Nyangajarra/Yulparija traditional law and custom have rights and interests as Nyangajarra/Yulparija people. These Nyangajarra/Yulparija people are descended from the following ancestors:
> Nyangajarra/Yulparija ancestors
> Junirrinja; Japurtu; Walypartiyi; Turtu-turtu; Kupa-kupa; Mukuly-mukuly; Yatija; Yapa; Wanyija; Wiyilurru; Kipirrkurra; Martuyu; Karalya; Ngingina; Kupi; Puyuru.

Having regard to this description and the other information in the application, there is nothing on the face of the application which causes me to conclude that the requirements of this section are not met, bearing in mind that my consideration of it is limited by the task set in s. 190C(2).

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).

The name and address for service of the persons who are the applicant have been provided in Part B of the application.

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).

This section requires the applicant to either name all the persons in the claim group or to describe them in a way so that it can be ascertained whether a person belongs to the group or not. This application doesn't name the persons in the native title claim group but it does contain a description of the persons (see attachment A) and therefore I am satisfied that this requirement has been met.

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).

The application is in the form prescribed by Regulation 5(1)(a) of the Native Title (Federal Court) Regulations 1998 as required by s. 61(5)(a). It was filed in the Federal Court on 13 December 2005 as required pursuant to s. 61(5)(b).

I have read s. 61(5)(c) as requiring that an application contain the information prescribed in the Act, including the information prescribed at ss. 61 and 62. I am of the view that the application does contain the prescribed information in s. 61 and therefore I am satisfied that this subsection is met. Please refer to my comments above regarding s. 61 and then below regarding s. 62.

Section 61(5)(d) requires the application to be accompanied by any prescribed documents (which I have read as being the applicant affidavits prescribed by s. 62(1)(a)) and any prescribed fee.

In relation to the prescribed documents I am satisfied that the requirements of s. 61(5)(d) have been met.

I note that s. 190C(2) only requires me to consider details, other information and documents required by ss. 61 and 62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.

For the reasons outlined above, it is my view that the requirements of s. 61(5) have been 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 entry in the National Native Title Register, 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) stating the basis on which the applicant is authorised as mentioned in (iv).

Result

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

The application is accompanied by affidavits from each of the four persons who jointly comprise the applicant. Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently address the matters required by s. 62(1)(a)(i)–(v).

Accordingly, I am of the view that the application meets the requirements of s. 62(1)(a)(i)–(v).

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

Subsection 62(2) contains 8 paragraphs (from (a) to (h)), and I address each of these subrequirements in turn, as follows immediately here. My decision regarding this requirement is the combined result I come to having considered each of the subrequirements. My combined result for s. 62(2) is found at page 12 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).

Information that enables the boundaries of the area covered by the application to be identified is found in the written description in attachment B and in the map in attachment C of the application.

Information that enables the boundaries of any areas within the external boundaries not covered by the application to be identified is found in schedule B of the application.

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).

A map showing the external boundaries of the area covered by the application is found in attachment C.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out 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).

At schedule D the applicant states:

> The Applicant does not have details of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the Application area.

In these circumstances I am satisfied that the application satisfies the requirements of s. 62(2)(c).

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).

A description of the claimed native title rights and interests is found in schedule E of the application. It 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. Therefore I am satisfied that this procedural requirement is met.

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).

When read in conjunction with each other, the information contained at Schedule F and the affidavit material accompanying the application addresses the requirements of s. 62(2)(e).

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).

Schedule G provides details of activities that are said to be carried out by members of the native title claim group in relation to the area claimed and consequently I am satisfied that the requirement under s. 62(2)(f) has been met.

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).

The applicant has provided advice to the effect that no other applications have been made in relation to the area claimed. The Tribunal's Geospatial Services Unit made an assessment on 29 October 2007 (the geospatial assessment) that this application is not overlapped by any other native title determination or compensation application. Therefore I am satisfied that this procedural requirement is met.

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).

The applicant is only required to provide details of s. 29 notices of which they are aware at the time of filing the application. Schedule I duly provides details of one s. 29 notice issued on 6 February 2002.

I have no cause to believe that the applicant was aware of other s. 29 (or equivalent) notices and accordingly I am satisfied that this procedural requirement is met.

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.

Section 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).

A search of the Register indicates that there are no applications that overlap this application on the Register of Native Title Claims. I am satisfied that this is the case and as such, I do not need to consider this condition further.

Section 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(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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 because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

The applicant states, at Schedule R, that the application has been certified under s. 203BE of the Act by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC).

I note that the geospatial assessment indicates that the YMBBMAC is the only representative Aboriginal/Torres Strait Islander Body that covers this area and I am satisfied that this is the case.

On 16 November 2005, the Registrar received a certificate made under s. 203BE from the YMBBMAC. As required by s. 203BE(4)(a) the certificate contains statements to the effect that YMBBMAC is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicants to make the application and to deal with all matters arising in relation to it under the NTA; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all other persons in the native title claim group.

As required by s. 203BE(4)(b) the certificate also sets out briefly the reasons for the YMBBMAC being of that opinion — see paragraphs [1] to [6]. Having considered this information I am satisfied that this requirement under the Act is satisfied.

Therefore I am satisfied that this certification complies with the requirements for a valid certification under s. 203BE(4) of the Act.

Merit conditions: s. 190B

Section 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).

Subsection 190B(2) requires that the information in the application, describing the areas covered by the application, is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss. 62(2)(a) and (b) as set out above.

Schedule B of the application refers to attachment B, which describes the boundaries of the application area by means of geographic coordinates in decimal degrees referenced to the Geocentric Datum of Australia 1994.

At schedule B, the applicant has provided information identifying areas within the external boundaries of the area covered by the application that are not covered by the application. This is done by way of a number of general exclusions.

Attachment C contains a copy of a map produced by the Tribunal's Geospatial Services Unit dated 8 August 2005 and includes the following information:

- the application area depicted by a bold outline and fill pattern
- the boundaries of labelled adjoining native title determination and determination applications
- scale bar, north point, coordinate grid, legend and locality diagram, and
- notes relating to the source, currency and datum or data used to prepare the map.

The Tribunal's Geospatial Services Unit assessed the map and written description and concluded in its assessment dated 30 January 2006 that, 'the description and map are consistent and identify the application area with reasonable certainty'.

Considering the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of this external boundary on the map in attachment C, I am satisfied that the external boundaries of the application area have been described comprehensively, so that the location of it on the earth's surface can be identified with reasonable certainty.

I am of the view that the stated exclusions in schedule B enable areas not covered by the application to be identified with reasonable certainty. In some cases, research of tenure data held by the State of Western Australia may be required; nevertheless, it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

To conclude and for these reasons, I am satisfied that the application complies with s. 190B(2) as the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters.

Section 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).

Subsection 190B(3) sets out two ways in which a claim group may be described for the purposes of registration. They are set out above.

As the application does not name all of the native title claim group members individually s. 190B(3)(a) is not applicable.

My consideration must then turn to whether the description in the application meets the requirement in s. 190B(3)(b). This provision requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The claim group is described in attachment A to the application as follows:

> The Kulyakartu application is made on behalf of those Nyangajarra/Yulparija persons who according to Nyangajarra/Yulparija traditional law and custom have rights and interests as Nyangajarra/Yulparija people. These Nyangajarra/Yulparija people are descended from the following ancestors:
> Nyangajarra/Yulparija ancestors
> Junirrinja; Japurtu; Walypartiyi; Turtu-turtu; Kupa-kupa; Mukuly-mukuly; Yatija; Yapa; Wanyija; Wiyilurru; Kipirrkurra; Martuyu; Karalya; Ngingina; Kupi; Puyuru.

Reading the description to mean that Nyangajarra/Yulparija people are all the descendants of the sixteen listed ancestors I am satisfied that it is sufficiently clear to meet the requirements of s. 190B(3)(b).

Section 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).

Section 190B(4) requires me to be satisfied that the description of the native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified. The description referred to in s. 190B(4) must be:

> …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: s. 62(2)(d).

For a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Any assessment of whether the rights can be prima facie established as native title rights and interests will be discussed in relation to the requirement under s. 190B(6) of the Act. For my consideration of the claim against s. 190B(4), I am focussing only on whether the rights and interests as claimed are 'readily identifiable'.

I take the view that s. 190B(4) is only intended to identify those rights and interests, if any, that are not 'readily identifiable' in the sense of being unintelligible or not able to be understood.

Schedule E sets out a list of thirty-four rights, all of which are sufficiently clear to be understood and meet the requirements of s. 190B(4).

Section 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.

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 below.

The task required at s. 190B(5)

The nature of the task I have to undertake at s. 190B(5) was discussed by Mansfield J in *Doepel*:

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

And:

> 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). All it requires is that the Registrar be satisfied that there be a proper factual basis on which it was asserted that the claimed native title rights and interests exist— at [127] to [128].

In an application for judicial review of a registration test decision, the Federal Court in *Gudjala* applied the conditions of s. 190B(5) and the decision provides an outline of some key principles that I must apply when considering whether an application satisfies this section. This was the first time that the court had considered in detail what is required to provide a sufficient factual basis for the purposes of s. 190B(5), as well as to consider the interdependence of or relationship between the composition of the claim group and the 'normative' society which is discussed in the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) both at the time of sovereignty or first contact and the present.

The court in *Gudjala* also considered more widely how the key principles in *Yorta Yorta* (at [32]–[89]) inform the delegate's assessment of the nature and quality of the material required to establish a sufficient factual base for the assertions at s. 190B(5), and to the relationship between the traditional laws and customs and the claim to rights.

I am also mindful also that the registration test is of an administrative nature and that it is therefore not appropriate to apply standards of proof that would be required at a trial or hearing of the application.

What I can consider

In performing the task under s. 190B(5), I am not limited to consideration of information contained in the application but may have regard to other information provided by the applicant. I may also have regard to information from other sources relevant to my consideration, as indicated by the concluding words of s. 190A(3) that the Registrar 'may have regard to such other information as he or she considers appropriate', subject to providing procedural fairness: *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107 at [4], per Kiefel J.

I note however that the provision of material demonstrating a sufficient factual basis to support the assertion that the claimed native title rights and interests exist is ultimately the responsibility of the applicant and there is no requirement that I undertake an independent search for this material: see *Martin v Native Ttle Registrar* [2001] FCA 16 at [23].

Information considered

I have considered the information in the application together with the affidavit material from members of the claim group and the written submission from CDNTS dated 13 February 2008.

Section 190B(5)(a)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the native title claim group have and the predecessors of those persons had an association with the application area.

The word 'association', as it is used in s. 190B(5)(a), is not defined in the Act. In my view, the association required must be referrable to the native title rights and interests claimed in respect to the particular land and water the subject of the application.

I note that the court found in *Gudjala* that it may be that some members of the claim group are, and their predecessors have been, associated with the claim area, but that does not necessarily mean that 'the claim group as a whole, and their predecessors, were similarly associated'—at [51]. This does not mean that all members must have association at all times, but that there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence that there was an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

There is a considerable amount of factual information contained in affidavits taken from members of the claim group which supports the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

In her affidavit dated 3 December 2007 **[Name deleted]** speaks of having been born in the application area and says that both her parents were born in the area as well. The deponent speaks extensively of her knowledge of the application area; knowledge which has been acquired through a lifetime of living on and travelling throughout the area and through her association with other Yulparija people. I note that **[Name deleted]** also makes references to older and younger generations of her family and other Yulparija people having acquired knowledge of the application area through the rituals of being shown the country and inter-generational teaching of laws and customs relating to the Yulparija people and the application area. For instance, at paragraph 8 she says:

> **[Culturally sensitive material deleted]**

And at paragraph 16:

> I know my country. I know all the stories; I give him all the stories [to younger generation]. Well I gotta take em alright. I gotta teach my grandson. We gotta teach the young people. We teach the young people about our country to keep our country strong.

Another member of the group, **[Name deleted]**, has provided an affidavit dated 3 December 2007 which describes his own association, and that of his predecessors, with the application area. He explains that his family group is part of a larger group called Nyangajarra [who are also known as

Yulparija] and that he was born **[date and location deleted]**, which is situated on Nyangajarra country. He deposes to the fact that his father and paternal grandfather were both Nyangajarra men and that his father was born on country.

It is apparent from **[Name deleted]** affidavit that until the age of about 15 or 16 he lived a lifestyle seemingly unaffected by European settlement. He describes how as a boy he travelled around the claim area with his father and mother, hunting and collecting bush food and at the age of 14 or 15 he went through law to be initiated. This presumably occurred on Nyangajarra country, given that he has explained that occurred before he and his family walked out of the desert to Balfour Downs station.

In an affidavit dated 11 November 2004, **[Name deleted]** gives an account of his own association with the application area and that of other Nyangajarra/Yulparija people. **[Name deleted]** has also provided an affidavit dated 3 December 2007 which similarly provides an account of how his forebears have been and how he continues to be associated with the application area.

The court in *Gudjala* considered the condition of s. 190B(5)(a) and found that while it may be that some members of the claim group are, and their predecessors have been, associated with the claim area, that this is not quite enough:

> Mr Santo and Ms McLean may demonstrate that they and their families presently have an association with the claim area. They may also show that their predecessors have had such association since European settlement. However they have not demonstrated that the claim group as a whole presently has such association. I do not mean that all members must have such association at all times. However there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty. Ms McLean and Mr Santo's evidence does not go so far. Mr Hagan's evidence provides opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim—at [52].

The information provided in respect of this application however goes further than merely describing an association of some members of the claim group with the area the subject of the application. I note that **[Name deleted]** refers to and names other members of the claim group of his generation that 'went through Law' with him on country and he speaks in a collective sense of the 'ownership' of and association to country of the Yulparija people. There are also numerous references in the affidavit material to the fact that the succeeding generation have spent time within the application area learning about and practising Yulparija law and custom which has been passed down from one generation to another. For example, **[Name deleted]** deposes:

> **[Culturally sensitive material deleted]**

I note that affidavit and other material also endeavours to demonstrate the link between those persons named in attachment A as being ancestors of the group and the application area itself. Japurtu, Junirrinja, Mukuly-mukuly, Wiyilurru and Wanyjija are persons so named and their association with the Kulyakartu application area, together with the lines of descent through these persons to current members of the claim group has been particularised in the affidavits of **[Names deleted]** and in the written submissions received from CDNTS.

The written submissions prepared by the applicant's legal representative, Mr Malcolm O'Dell greatly assist the applicant in the task of demonstrating the factual basis for the assertion that the

native title claim group have, and the predecessors of those persons had, an association with this area. The submissions provide a chronological history of recorded European entry into the application area and argue that when this is considered, in conjunction with the other sources of information provided by the applicant, inferences can be drawn to support the conclusion that there has been an association with the area by the Yulparija people that existed before sovereignty and which continues today. I have excerpted the following historical data which I consider to be relevant:

- The first recorded European entry into the claim area was 1896 when members of the Calvert Scientific Expedition most likely passed through the area in 1896.
- In 1897 William Rudall, a government surveyor, led an exploration party in search of the missing members of the Calvert Expedition. While traversing what is now the current Kulyakartu claim area Rudall had contact with several 'natives' whose assistance he sought in guiding him to water.
- The next recorded information about European entry into the claim area was in 1963 when W.A. Petroleum ('WAPET'), an oil and gas exploration company, constructed a track (called either the WAPET Road or the Kidson Track) to facilitate its exploration activities. The track ran eastward from the Great Northern Hwy just south of Sandfire Roadhouse and joins the Canning Stock Route south of the claim area at Well 33 (Kunawarritji).
- In 2002 Dr Nick Smith conducted field research in relation to the Kulyakartu application and recorded the following rock hole sites with **[Name deleted]**: **[Sites information deleted]**.

I am informed by the applicant's legal representative that during the 1897 expedition Mr Rudall made references in his diary to:

- 'natives'' knowledge of rock holes, including the names of the rock holes [see above];
- the fact that '[the] natives can show us the waters from some distance';
- the fact that 'natives seem to leave these rock holes full of earth to keep the water from evaporating'; and
- knowledge of food sources held by 'natives' – in this case 'native walnut tree'.

The applicant's representatives submit that the surveyor's frequent reference to 'natives' in the vicinity of the claim area is sufficient for an inference to be drawn that Aboriginal people were in the Kulyakartu application area at the earliest point of contact with Europeans. I accept that this is a reasonable inference to draw from the facts, as they have been presented to me.

The applicant further submits that when Rudall's exploration notes and the material provided by members of the claim group is considered the following inferences can also be drawn:

- Aboriginal people in the area had some knowledge and undertook certain activities in furtherance of their subsistence in the area, and that this knowledge had some social element to it as it had been passed on.
- Given Rudall's statement that the expedition 'found several natives and their families were some relations of our native woman guide' it is sufficient to infer some sort of family grouping.
- Given the coincidence in the names of rock holes Rudall mentions with those in the affidavit of **[Name deleted]** and in information given to **[Name deleted]**, it is possible to infer prima facie

that the people in the vicinity of the claim area at the earliest point of contact with Europeans were the forebears of at least some of the current members of the Kulyakartu claim group.

- As the genealogies [which accompany the CDNTS written submissions] record, and as referred to in **[Name deleted]** affidavit at paragraph 4, **[Name deleted]** father's father **[Named deleted]** was most likely born at least circa 1887. Therefore at the time of Calvert's and Rudall's incursion into Yulparija / Nyangajarra country **[Name deleted]** would have been 9 or10 years old. It is possible to infer that prima facie **[Name deleted]** father's father, **[Named deleted]**, was in the Kulyakartu claim area at the earliest point of contact with Europeans.
- Given that at the next known contact with European entry in the claim area, that is in 1963, **[Name deleted]** and his father **[Name deleted]** were located in the area, it is possible to infer that prima facie continuity of connection within the area is established through **[name deleted]** father's father to at least 1897, then through **[Name deleted]** father to 1963, then through **[Name deleted]** himself from circa 1950.

The question of whether or not a sufficient factual basis has been provided to support the assertions laid out in s. 190B(5) has always involved a wider consideration than simply an acceptance of generalised statements or mere assertions—*State of Queensland v Hutchison* [2001] FCA 416—at [25]. This is even more clearly the case since the decision in *Gudjala*, which outlines the requirements of what is sufficient information. It is clear that statements made in support of the factual basis need to contain more than mere opinions and conclusions; an alleged factual basis should be provided for any opinions and conclusions—at [46], [68] and [81].

I consider that the conclusions regarding the association of members of the Yulparija people with the claim area can reasonably be inferred from the application and the material provided in support of it. I note that it is not my task to consider whether the facts, on which these inferences are premised, can or would be proven at trial. I am therefore satisfied on the basis of the material before me that there is a sufficient factual basis to support the assertion that the whole group have an association with the application area and that there was an association between the predecessors of the whole group and the area over the period since sovereignty.

Section 190B(5)(b)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

For the laws and customs to be traditional, they must have their source in a pre-sovereignty society and must have been acknowledged and observed since that time by a continuing and vital society. I refer particularly to the following passages from *Yorta Yorta*:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs—at [46].

> Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist—at [47].

Schedule F makes the following general assertion at paragraph (iii):

The native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors.

There are frequent references to Yulparija law in the affidavit material before me. The source of that law is said to derive from the Jukurr or Jukurrpa [the dreaming]; a term that I note conveys a sense of agelessness and which certainly predates European occupation of Australia.

At paragraph 8 of his affidavit **[Name deleted]** states:

[Culturally sensitive material deleted]

And at paragraph 9:

[Culturally sensitive material deleted].

[Name deleted] goes on to describe laws and customs that govern such things as:

Skin groups and the interrelations between members of the native title claim group

[Culturally sensitive material deleted]

[Culturally sensitive material deleted]

[Culturally sensitive material deleted]

Responsibility for Yulparija country and sites of significance

[Culturally sensitive material deleted]

Access to Yulparija country

[Culturally sensitive material deleted]

Food preparation and cooking

[Culturally sensitive material deleted]

In the affidavits of other members of the claim group I find further support for the assertion that there exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

In **[Name deleted]** affidavit, she describes how she was born on country and walked the application area with her parents [6] – [7]. **[Culturally sensitive material deleted]**

> [Culturally sensitive material deleted]
>
> [Culturally sensitive material deleted]

As I have noted above, the task required by s. 190B(5) as espoused in *Doepel* is to assess the quality of the factual basis upon which it is asserted that native title rights and interests are claimed so that the question that must be answered is: if the statements are true could they support the claim? I am of the view that the asserted facts are sufficient to support the assertion at s.190B(5)(b), that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

Section 190B(5)(c)

This subsection requires me to be satisfied that the factual material provided is sufficient to support the assertion that the claim group continues to hold native title in accordance with their traditional laws and customs.

In keeping with the law guiding my decision under s. 190B(5)(b), I must again have in mind the meaning of 'traditional' but also be satisfied that a sufficient factual basis is provided for the assertion that native title has continued to be held in accordance with these traditional laws and customs. In *Yorta Yorta* it was said at [87] that 'acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty'.

It is asserted in paragraph (iv) of schedule F that:

> that native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of:
>
> Descent from ancestors connected with the area;
>
> Conception in the area;
>
> Birth in the area;
>
> Traditional religious knowledge of the area;
>
> Traditional knowledge of the creation and geography of the area;
>
> Traditional knowledge of the resources of the area; and
>
> Knowledge of and participation in traditional ceremonies and rituals associated with the area.

I consider this to be merely a statement without the necessary factual basis required by s. 190B(5) to support the assertion that the claim group continues to hold native title in accordance with their traditional laws and customs.

However, I consider that the affidavit material provided by members of the claim group contains a sufficient description of how the native title claim group draws on traditional laws and customs to support their claim that they continue to hold native title. There is information in the application

which speaks to the way the group has continued to uphold traditional methods of hunting, to preserve the language and practise bush medicine on the area. The affidavits describe a rich and enduring, complex system of land-based law and custom which govern the lives of members of the group. In this regard I refer to the affidavit evidence I have already summarised above.

For these reasons I am satisfied that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Section 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.

> As a starting point I note that only one of the claimed native title rights or interests needs to be prima facie established for the claim to be registered (subject to all other requirements being met). Those that cannot be prima facie established will not be entered on the Register.
>
> The term 'prima facie' was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 (*North Ganalanja)*. In that case, the majority of the High 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].
>
> I note that the meaning of prima facie was also recently considered in *Doepel* at [134] to [135]. Briefly, the Court concluded that although *North Ganalanja* was decided before the 1998 amendments to the Act, there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate. Therefore, I have adopted the ordinary meaning, referred to by their Honours, in considering this application and in deciding which native title rights and interests claimed can be established prima facie.
>
> I am of the view that my task under s. 190B(6) is to consider whether there is any probative factual material before me evidencing the existence of the particular native title rights and interests claimed, having regard to relevant law about what is a 'native title right and interest' (as that term is defined in s. 223) and whether or not the right has been extinguished.
>
> In my view, having regard to the above authorities on what is meant by prima facie, it is not my role to resolve whether the facts claimed in the application as supporting a determination of native title will be made out at trial. The task under this section is to consider whether there is any probative factual material available evidencing the existence of the particular native title rights and interests claimed, having regard to settled law about:

- what is a 'native title right and interest' (as that term is defined in s. 223), and
- whether or not the right has been extinguished.

As noted in my reasons under s. 190B(4) above, I have taken the view that it is under this condition that I must consider whether the claimed rights and interests have been found by the courts to be 'native title rights and interests' within s. 223. If a claimed right and interest has been found by the courts to fall outside the scope of s. 223, then it will not be capable of being 'prima facie established' for the purposes of s. 190B(6).

In the circumstances where I have found that a particular claimed right cannot be prima facie established I refer the applicant to the provisions of s. 190(3A) of the Act. These provisions are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

The application categorises three types of areas within the area covered by the application. These areas are referred to in schedule E as Areas A, B and C and are defined in the application as follows:

Area A means lands within the application area that is landward of the high water mark and which comprises:

1) areas of unallocated Crown land (including islands) that have not been previously subject to any grants by the Crown;
2) areas to which section 47 of the Act applies;
3) areas to which section 47A of the Act applies;
4) areas to which section 47B of the Act applies; and
5) other areas to which the non-extinguishment principle, set out in section 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

Area B means land or waters which are a 'nature reserve or 'wildlife sanctuary' (as those terms are defined in the Wildlife Conservation Act 1950(WA) created before 1975.

Area C means land or waters within the application area that are not included in Areas A or B above

All 34 rights and interests referred to in schedule E are claimed over Area A. Rights and interests listed at 13 to 43 of schedule E are claimed over Area B and rights and interests listed at 9 to 34 are claimed over Area C.

The rights described as 'Area A' rights are rights and interests that are expressed in the manner of a right to exclusive possession over areas where a claim to exclusive possession can be recognised, such as areas where there has been no prior extinguishment of native title or where ss. 238, 47, 47A or 47B apply. The incidents of the right to exclusive possession are listed as rights 1 to 41 of schedule E. As held in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward HC*) at [51], exclusive possession includes within it all of the available rights in the bundle of rights, so it should not be necessary to list them. Accordingly, I have considered whether a right to exclusive possession over Area A can be prima facie established (and not the various listed incidents of that right) before considering whether rights and interests numbered 9 to 34 of schedule E can be prima facie established on a non-exclusive basis only.

In my consideration of the rights claimed in the application, I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

I now consider whether each of the native title rights and interests claimed in schedule E can be prima facie established:

> The Applicants claim the following listed native title rights and interests relating to exclusive possession, in relation to Area A only:
>
> 1) The right to possess, occupy, use and enjoy the area as against the world;
>
> 2) A right to occupy the area;
>
> 3) A right to use the area;
>
> 4) A right to enjoy the area;
>
> 5) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
>
> 6) A right to control access of others to the area;
>
> 7) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statue law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and
>
> 8) A right to control the taking, use and enjoyment by others of the resources of the area.

Established

> In *Ward HC*, the majority of the High Court found that a right of possession, occupation, use and enjoyment is the fullest expression of native title there is and where 'native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms'.
>
> And at [89]:
>
> The expression 'possession, occupation, use and enjoyment … to the exclusion of all others' is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of 'possession' of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.
>
> Therefore a claim to possession, occupation, use and enjoyment is only capable of being prima facie established in relation to those areas where a claim to exclusive possession can be recognised. In light of the comments in *Ward HC*, I am of the view that in order to prima facie establish this claimed right, there must be sufficient information available to establish, prima facie, the right of the claim group to control access to and use of those parts of the claim area in relation to which a right to exclusive possession can be recognised.

It would not, in my mind, be sufficient for the applicant to rely upon evidence that simply indicates that they have accessed, lived and practised traditional law and custom on the application area in order to prima facie establish this right. As it was put in *Ward HC,* exclusive possession describes 'a particular measure of control of access to land'—at [89]. I accept however that the applicant has demonstrated prima facie evidence of this right. For example, in his affidavit **[Name deleted]** describes the traditional laws which give rise to this particular right. He states:

[Culturally sensitive information deleted]

and:

[Culturally sensitive information deleted]

There is further evidence of the exercise of this right and the underlying law that governs access to the application area in **[Name deleted]** affidavit, where he deposes:

[Culturally sensitive material deleted]

In these circumstances I am satisfied that there is sufficient information available to prima facie establish this right.

Area A and C rights (i.e. excluding areas which are a 'nature reserve' or 'wildlife sanctuary' (as those terms are defined in the Wildlife Conservation Act 1950(WA) created before 1975.)

9) A right to hunt in the area;

11) A right to take fauna

Established

Schedule G of the application refers to members of the claim group currently carrying out activities such as hunting and using fauna on the application area.

In his affidavit, **[Name deleted]** makes an indirect reference to hunting which serves to demonstrate the vast history that is attached to the rules by which Yulparija live by. He says at paragraph 10:

[Culturally sensitive information deleted]

In the affidavit material provided in support of the application there are numerous specific references to hunting being a right practised by member of the claim group, for example, at paragraph 17 **[Name deleted]** says:

[Culturally sensitive information deleted]

.

I am satisfied, on this basis, that there is sufficient information available to prima facie establish the claimed rights.

10) A right to fish in the area;

Not established

The application and related material does not disclose evidence supporting a claim under traditional law and customs to this specific claimed right. Accordingly, I am not satisfied that there is sufficient evidence to prima facie establish it.

12) A right to take traditional resources, other than minerals, petroleum and gas from the area

Not established

I read 'traditional resources' to mean those resources, such as gum and bark from trees and other such resources, which are used by members of the claim group in a traditional sense. I read the right to 'take … from the area' to mean remove those resources from the area covered by the application.

While there is a general assertion in Schedule G that members of the claim group take resources from the area and there is information in the affidavits that traditional resources are used on Nyangajarra country, I am unable to find sufficient evidence to prima facie establish the right to remove them from the area covered by the application.

Areas A, B and C rights

13) A right to be present on or within the area;

16) A right of access to the area;

17) A right to live within the area;

19) A right to camp upon or within the area;

20) A right to move about the area;

Established

There is a general assertion in schedule G that the claim group currently exercise the right to move about, live, reside and camp on the application area.

In the affidavit material there is sufficient prima facie evidence of members of the claim group, both of the current and previous generations, having been born and lived on Nyangajarra country and continuing to exercise rights to access and travel throughout the claim area.

[Name deleted[states in his affidavit:

[Culturally sensitive information deleted]

In his affidavit **[Name deleted] states**:

[Culturally sensitive information deleted]

There is further evidence in **[Name deleted]** affidavit where she states:

[Culturally sensitive information deleted]

Accordingly, I am satisfied that there is evidence to prima facie establish these rights.

21) A right to engage in cultural activities within the area;

22) A right to conduct and participate in ceremonies and meetings within the area;

Established

There is a general assertion in schedule G that the claim group currently exercise the right to conduct and engage in 'cultural activities, ceremonies, rituals , meetings and teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the application area'.

Throughout the supporting affidavit material there is prima facie evidence of a rich and enduring cultural life being observed by members of the claim group within the Kulyakartu application area. There are numerous references to a process for initiating young men being practised on country and in his affidavit **[Name deleted]** states:

> [Culturally sensitive information deleted]

and:

> [Culturally sensitive information deleted]

I am satisfied, on this basis, that there is sufficient information available to prima facie establish the claimed rights.

> 23) A right to visit, care for and maintain places of importance and protect them from physical harm;
>
> 34) A right to maintain, conserve and protect significant places and objects located within the area.

Established

> [Name deleted] **speaks in his affidavit of** [Culturally sensitive information deleted]

A very practical example of the manner in which the Yulparija people have prima facie evidenced the exercise of these rights is the way in which they maintain rock holes and soaks situated throughout the claim area. **[Name deleted]**, when speaking of visiting rock holes says, **[Culturally sensitive information deleted]**

I also note that the surveyor William Rudall's diary notes suggest this practice is one which was observed by the ancestors of the current members of the claim group since at least the time of his exploration of the area in 1897.

I am satisfied, prima facie, on the basis of this evidence that these rights can be established.

> 14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

Not established

The application and related material does not specifically disclose evidence supporting a claim under traditional law and customs to this claimed right. Accordingly, I am not satisfied that there is sufficient evidence to prima facie establish it.

> 15) A right to invite and permit others to have access to and participate in or carry out activities in the area;

Established

Paragraphs 12 and 13 of **[Name deleted]** affidavit and paragraph 9 of **[Name deleted]** affidavit [excerpted above] provide evidence of the exercise of this right.

Accordingly, I am satisfied that prima facie this right can be established.

18) A right to erect shelters upon or within the area;

Not established

The application and related material does not specifically disclose evidence supporting a claim under traditional law and customs to this right. Accordingly, I am not satisfied that there is sufficient evidence to prima facie establish it.

24) A right to take flora (including timber);

Established

In her affidavit **[Name deleted]** discloses evidence of her detailed knowledge of local flora from the region and its uses, for example:

[Culturally sensitive information deleted]

Accordingly, I am satisfied that prima facie this right can be established.

25) A right to take soil;

26) A right to take sand;

27) A right to take stone and/or flint;

28) A right to take clay;

29) A right to take gravel;

30) A right to take ochre;

31) A right to take water;

Not established

Schedule G makes general assertions relating to members of the claim group being engaged in activities that involve the taking of resources of the kind referred to in these claimed rights.

These are, however, general assertions which are of themselves insufficient to support the claimed rights. The application and related material does not specifically disclose evidence supporting a claim under traditional law and customs to these rights and consequently I am not satisfied that there is sufficient evidence to prima facie establish it.

I note that the provisions of s. 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include these rights on the Register.

32) A right to manufacture traditional items from the resources of the area;

Not established

> In *Neowarra v WA* [2003] FCA 1402 at [509] the court rejected a submission that this was not a right or activity in relation to land or waters but rather a right in respect of chattels, that is something that has been severed from the land or taken from the waters. The right

however was limited to the manufacture of traditional items such as spears and boomerangs.

The right, as expressed in this application limits the manufacture to traditional items. I read the words 'manufacture traditional items' as they are used in this context to mean making artefacts by hand such as cutting tools for the preparation of food or the making of weapons by hand.

While there is a general assertion in schedule G that members of the claim group carry out this type of activity on the area covered by the application I am unable to find sufficient evidence to prima facie establish this right.

I note that the provisions of s. 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include this right on the Register.

33) A right to trade in the resources of the area;

Not established

The Full Court in *Northern Territory v Alyawarr* [2005] FCAFC135 (*Alyawarr*) considered the right to trade and said at [153]:

The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.

The court also considered the case of *Commonwealth v Yarmirr* (2001) 201 CLR 1 (*Yarmirr*) which at first instance referred to evidence related to trade by way of exchange between Indigenous groups, of items including spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells. In *Alyawarr* the Full Court said (at [155]) of the *Yarmirr* decision:

Olney J's observation does not involve the proposition that trade in the resources of the land can never be a 'right' in relation to the land. There the evidence was of an activity. It did not amount to evidence of the exercise of a right … Yarmirr cannot be taken as authority for the proposition that there cannot be a right to trade in the resources of the land as a right in relation to the land.

Having come to this conclusion however, the Full Court in *Alyawarr* was of the opinion that in the matter before them, there had been insufficient evidence before the court at first instance for the right to survive on appeal. The finding by the court was that the word 'trade' should be omitted from the lower court's formulation, leaving as the right:

the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

By taking that view, I believe that the Full Court has implicitly accepted that the right to trade is capable of being established (where satisfactorily evidenced) over land where exclusive possession is not available.

However, I am unable to find evidence to prima facie establish this right in the application and supporting material.

I note that the provisions of s. 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include this right on the Register.

Section 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).

Under s. 190B(7)(a), I must be satisfied that at least one member of the native title claim group currently has or previously had a 'traditional' physical connection with any part of the land or waters covered by the application.

Traditional physical connection is not defined in the Act however, the court in *Gudjala*, when considering the task at 190B(7), said:

> The Delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word 'traditional", that the relevant connection was in accordance with the laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in *Yorta Yorta*.

On the basis of the information contained in their affidavits I am satisfied that **[Name deleted]**, **[Name deleted]**, **[Name deleted]** and **[Name deleted]** are members of the native title claim group who currently have and previously had a traditional physical connection with the area of this application. By way of example I note that in his affidavit **[Name deleted]** deposes to having been born at **[location deleted]** in Nyangajarra country and that he travelled around on foot throughout the Kulyakartu claim area with his parents, hunting and collecting bush tucker along the way.

Accordingly, I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

Section 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).

The geospatial assessment dated 30 January 2006 reveals that there are no approved determinations of native title over the application area as at that date.

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).

Schedule B excludes from the application any area in relation to which a previous exclusive possession act, as defined in s. 23 of the Act, was done.

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).

The application does not seek exclusive possession over areas that are the subject of previous non-exclusive possession acts — see schedule B, paragraph 4.

Accordingly, I am satisfied that the requirement of s. 63A(3) is met.

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.

Section 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 below.

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

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

I refer to schedule Q, which clearly states that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

I refer to description of the area claimed, which is found in schedule B, attachment B and in the map at attachment C and note that no offshore areas are the subject of the application.

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

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

The application and accompanying documents do not disclose, and I am not otherwise aware, that the native title rights and interests claimed 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:	Kulyakartu
NNTT file no.:	WC05/7
Federal Court of Australia file no.:	WAD293/2005
Date of registration test decision:	3 April 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)(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.

1. Native Title Claimant Application, filed in Federal Court 11 October 2005, including all attachments and additional material, namely;
    - Attachment A, claim group description
    - Attachment B, description of application area
    - Attachment C, map of application area
    - Affidavit of **[Name deleted]**, sworn 17 June 2005
    - Affidavit of **[Name deleted],** sworn 17 June 2005
    - Affidavit of **[Name deleted],** sworn 17 June 2005
    - Affidavit of **[Name deleted],** sworn 17 June 2005.
2. Native Title Claimant Application, filed in Federal Court 13 December 2005, including all attachments and additional material, namely;
    - Certificate of Compliance, 13 December 2005
    - Affidavit of Jeremy Ryan, dated 13 December 2005
    - Attachment A, claim group description
    - Attachment B, description of application area.
3. Letter from Federal Court Registrar to NNTT, dated 12 January 2005.
4. Order of Federal Court, leave granted, 12 January 2006.
5. GeoTrack 2005/2437, produced by NNTT, dated 26 October 2005.
6. GeoTrack 2006/0099, produced by NNTT, dated 30 January 2006.
7. GeoTrack 2007/1923, produced by NNTT, dated 29 October 2007.
8. Letter from Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation to NNTT, dated 16 November 2005, including attached documents, namely;
    - Affidavit of **[Name deleted]**, sworn 11 November 2004
    - Affidavit of **[Name deleted]**, undated
    - Certification, dated 30 September 2005.
9. Letter from Central Desert Native Title Services to NNTT, dated 7 December 2007, including the following materials:
    - Affidavit of **[Name deleted]**, dated 3 December 2007

- Affidavit of **[Name deleted]**, dated 3 December 2007
- Affidavit of **[Name deleted]**, dated 3 December 2007.

10. Written submissions from **[Name deleted]** dated 13 February 2008.

[End of document]