National Native Title Tribunal

Registration test decision

Application name	Ngurrara (Part B)
Name of applicant	Tommy May, George Jabadah, Ricky Thomas and Maria Hand
State/territory/region	Western Australia
NNTT file no.	WC08/03
Federal Court of Australia file no.	WAD281/08
Date application made	3 December 2008
Date application last amended	6 May 2009

Date of decision: 30 June 2009

Reasons for decision

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Introduction

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Ngurrara Part B amended claimant application (WAD281/08, the current application) to the Native Title Registrar (the Registrar) on 11 May 2009 pursuant to s. 64(4) of the Act. This means that that the Registrar must consider, in accordance with s. 190A, the claim made in the application and decide whether or not to accept it for registration. This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

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

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 the claim in an application for registration: see ss. 190A(6) and (6B).

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.

The claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Application overview

The Ngurrara application was filed in the Federal Court on 3 December 2008. The application is made by the Ngurrara native title claim group over areas that were formerly covered by the Ngurrara application WAD6077/98 (the first application). During 2007, a decision was made by the Ngurrara native title claimant group to split their claim into Part A and Part B for technical reasons, namely to secure the benefit of s. 47B over the area identified as Part B. On 9 November 2007, a determination of native title was made by consent over Part A pursuant to s. 87 of the Act: see *Kogolo v Western Australia* [2007] FCA 1703 (the Ngurrara consent determination). The Federal Court made orders recognising the Ngurrara native title claim group's native title rights and interests, which included the right to exclusive possession of the determination area, subject to specific limitations. The native title holdiers for the determination area are the same group of people who constitute the native title claim group for the current application.

The current application covers the remaining Part B area which was not included in the Ngurrara Part A consent determination. On 7 April 2009 the applicants filed an amendment application which contained only minor changes. The court granted leave for the application to be amended on 6 May 2009. The court's Registrar provided the Native Title Registrar (the Registrar) with a

copy of the amended application on 11 May 2009. It is the amended application which is before me for registration testing.

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 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 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 made in a fair, just and unbiased way. 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.

The State of Western Australian was provided with a copy of the proposed amended application and did not oppose the orders granting leave to amend being made by the court. No adverse material has been received by the Registrar at this time.

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.

I address each of the requirements of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document in the reasons that follow.

I note that I do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the prescribed form, filing in the court and payment of court fees, in my view, are matters for the court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2). As I already test these things under s. 190C(2) where what is required, is addressed by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (*Doepel*) at [16] is authority, in my view, that my consideration of ss. 61 and 62 is governed by s. 190C(2). Subsection 190C(2) simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62, and does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2) and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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.

The application **contains** all details and other information required by 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) under s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

Schedule A of the claim contains a comprehensive description of the native title claim group which includes the current applicants.

Having regard to this description and the other information in the application, there is nothing on the face of it that 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 by 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.

The application **contains** all details and other information required by s. 61(3).

The names of the persons who jointly comprise the applicant and their address for service are provided in 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.

The application **contains** all details and other information required by s. 61(4).

The application does not name all of the persons in the native title claim group but it does contain a description of the persons in that group (see Schedule A). I have not undertaken a qualitative assessment of that description for the purposes of this section – that is the task required by the merit condition in s. 190B(3). However, for the purposes of s. 61(4)(b) the description of the native title claim group is sufficient.

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.

The application **is accompanied by the affidavits** required by s. 62(1)(a).

There are four persons who jointly comprise the applicant and they have each made an affidavit where they depose to the matters set out in ss. 62(1)(a)(i) to (iv). With respect to s. 62(1)(a)(v), each deponent states that the process of decision-making required under the claim group's system of

traditional laws and customs has been complied with and they also provide details of that process in paragraph five of their affidavits. This, in my view, sufficiently sets out details of the process of decision-making for the purposes of s. 62(1)(a)(v).

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

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

The application **contains** all details and other information required by s. 62(1)(b). It contains the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

I note again my view that *Doepel* at [36], [37] and [39] is authority that the consideration of s. 190C(2) does not involve going beyond the application, and in particular does not require some form of merit assessment of the material in determining whether the requirements of s. 190C(2) are met.

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.

The application **contains** all details and other information required by s. 62(2)(a).

A written description of the three portions of land covered by the application is found in Attachment B which is entitled 'External Boundary Description Ngurrara Part B'. No general exclusions in relation to the internal boundary are listed.

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).

The application **contains** all details and other information required by s. 62(2)(b).

A map showing the boundaries of the application area is included at attachment C.

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.

The application **contains** all details and other information required by s. 62(2)(c).

I have no information before me to suggest that searches have been carried out by the applicant which have not disclosed in the application.

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.

The application **contains** all details and other information required by. 62(2)(d).

Schedule E contains a description of the claimed native title rights and interests.

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.

The application **contains** all details and other information required by s. 62(2)(e).

Schedule F contains information about the factual basis provided to support the assertion that the native title rights and interests claimed exist and for the assertions found in s. 62(2)(e)(i)-(iii).

Although the information in Schedule F only minimally addresses the factual basis condition, the general description provided does do more than merely recite the particular assertions found in s. 62(2)(e) and, in my view, therefore meets the requirements of a general description of the factual basis on which it is asserted that the claimed rights and interests exist. See *Queensland v Hutchison* (2001) 108 FCR 575 and *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317 (*Gudjala FC*) at [92], where the Full Court discussed the nature and quality of the information required by s. 62(2)(e) and said that:

> 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.

In my view, and noting that I undertake no qualitative or merit assessment of the details provided, attachment F of the application addresses the requirement in s. 190C(2) that the application contain certain details and other information, namely a general description of the factual basis on which it is asserted that the claimed rights and interests exist. In my opinion, the discussion at [92] of *Gudjala FC* does not overturn the authority in *Doepel* that the Registrar is not to undertake a qualitative or merit assessment of the details required by ss. 61 or 62 when checking for compliance with s. 190C(2). That task is undertaken when considering the associated merit condition which, for the details required by s. 62(2)(e), is the condition found in 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.

The application **contains** all details and other information required by s. 62(2)(f).

These details are found in schedule G.

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.

The application **contains** all details and other information required by s. 62(2)(g).

In schedule H of the application the applicant states that the claim group are not aware of any other applications which have been made in relation to the whole or a part of the area covered by the application.

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.

The application **contains** all details and other information required by s. 62(2)(ga).

The applicant states in Schedule HA that they are not aware of any notifications under s. 24MD(6B)(c).

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.

The application **contains** all details and other information required by s. 62(2)(h).

The applicant states in Schedule I that they are not aware of any section 29 notices.

Combined result for s. 62(2)

The application **contains** all the details and other information required by paragraphs 62(2)(a) to (h).

Combined result for s. 190C(2)

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

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

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

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

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) only arises if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Subsection 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration and any registered overlapping 'previous application'.

It is stated at schedule O that none of the claimants is a member of any other native title claim group (regarding the area or part thereof) in respect of any previous application entered on the Register of Native Title Claims.

The Tribunal's geospatial overlap analysis and report dated 7 January 2009 (GeoTrack: 2008/2198—the geospatial report) also confirms that there are no overlapping applications and no previously registered claims over the claim area. Although the geospatial assessment pre-dates the recent amendments, I note that the area description was not amended so the assessment remains current.

Therefore, I need not consider the issue of common membership under this section and I find that the requirements are met.

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(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.

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 the only representative Aboriginal/Torres Strait Islander body that could certify the application.
The application contains a certification of the application by the Kimberly Land Council (the KLC), which has been signed by the chief executive officer and is dated 26 November 2008.

The geospatial report shows that the application area is entirely within the area for which the KLC is the recognised representative body and that there are no other recognised bodies (s. 203AD) or funded bodies (s. 203FE) for the application area. Accordingly, the KLC is the one representative body that is empowered to certify the application and I must therefore consider whether the certification complies with s. 203BE of the *Native Title Act 1993*.

For the certification to satisfy the requirements of s. 190C(4)(a), it must comply with the provisions of ss. 203BE(4)(a) to (c) and, for the reasons that follow, I am satisfied that it does.

Pursuant to s. 203BE(4)(a), the certification contains statements that satisfy s. 203BE(2), that is, KLC is of the opinion that the requirements of s. 203BE(2) have been met—it certifies that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it; and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

Pursuant to s. 203BE(4)(b), the certification includes brief reasons as to why the KLC holds these opinions. I note that s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the representative body's certification. This reasoning is drawn from *Doepel* at [80]—[81], which was confirmed in *Wakaman People 2 v Native Title Registrar* (2006) 155 FCR 107; [2006] FCA 1198 at [31]—[32].

Finally, the certification states that the provisions of s. 203BE(4)(c) do not apply. I note that the geospatial report shows that there are no overlapping applications and, on that basis, I accept that this sub-condition does not apply.

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.

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

The application contains a written description of the external and internal boundaries in attachment B. A map showing the external boundary is found in attachment C of the application.

The external boundary is described by reference to Lot numbers (Reserves), cadastral boundaries and geographic decimal coordinates which allows for the boundary of the application to be located on the earth's surface.

Schedule L contains details of Reserves and an area of UCL formally known as reserve 22401 in the application over which extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded.

The map in attachment C clearly depicts the external boundary. The map contains a scale bar, north point, coordinate grid, locality map and source and datum notes.

An assessment provided by the Tribunal's Geospatial Services dated 7 January 2009 (Reference: 2008/2198) indicated that the written description and map were consistent and identified the application area with reasonable certainty. Since that time, the description and map have not been amended. Therefore, I accept that the assessment remains current relevant.

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

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

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

The focus of s. 190B(3)(b) is whether the application enables the identification of persons in the native title claim group. Subsection 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application (subsection 3(a)) or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group (subsection (3)(b)). Although subsection (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subsection (3)(a), it is intended to do so: *Doepel* at [51].

Schedule A contains a claim group description which is divided into two parts. Part A lists the apical ancestors from whom descendants, and therefore the claim group, can be identified. Part B states that the claim group also comprises 'those Aboriginal People who are acknowledged by the Native Title claimants listed in (A) as having rights and interests in the claim area through a direct relationship by birth/finding and growing up in places ('Ngurrara') within the the application area'.

The fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group is insufficiently described for the purposes of s. 190B(3)(b): *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or her delegate to determine whether or not the description is sufficiently clear: *Ward v Native Title Registrar* [1999] FCA 1732. In my view, s. 190B(3)(b) requires that the description contain an objective method of determining who is in the claim group.

A description (as in Part A) which relies for identification of the claim group's members on a formula which says that they are the descendants of named persons is sufficiently certain to identify the members of the claim group. A similar formula was approved by the court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93.

The basis for the identification of the claim group in accordance with Part B is supported by the anthropological report prepared by Mr Daniel Vachon which is contained in the application at Schedule M 1. Mr Vachon's report addresses the criteria for membership and identity of the members of the claim group in great detail and highlights the overriding imperative that only Aboriginal People who are acknowledged by the Native Title claimants listed in (A) as having rights and interests in the claim area are in the claim group. At [para 43] of the report it is stated:

> [A]n individuals [sic] expression of connection to the *Jila* country is not made in isolation from the rest of the community. Proof that a person satisfies the criteria of claim group membership is found in the acceptance of that person by the claim group. As this suggests individuals are able to identify the 'country' of other people identified as 'jila people'. The 'country' of others in this situation is usually identified with a general reference to a named jila or jila-kalpurtu site. The claimants are able to identify the country of many of their predecessors … . Older men and women are most knowledgeable about where their forebears and their peers lived in the desert, who had knowledge of which places, where children were born and grew up. In accordance with the claimants' laws and customs, it is these older claimants who should be asked about such matters, and thus about who satisfies the criteria for membership of the claim group.

It is clear from the above explanation that there is an objective method for determining the membership of Part B claimants. I am therefore satisfied that the claim group description is sufficient to meet the requirements of s. 190B(3).

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.

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

Doepel is authority for the proposition that what the delegate is required to consider is whether '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 [99].

Native title rights and interests are defined in s. 223(1) of the Act as:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples 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.

The description of the claimed native title rights and interests is found in schedule E of the application. I am satisfied that this description is sufficient to allow the native title rights and interests claimed to be readily identified as required by s. 190B(4).

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) below.

What is required under s. 190B(5)?

In reaching this decision, I understand that it is not my function to adjudicate on whether native title exists in relation to the application area when considering the condition in s. 190B(5); that is for the court when making a determination of native title under s. 225. In particular, I note the

direction in *Gudjala FC* at [92] in relation to what an applicant must do to meet the requirements of this condition:

> [T]he 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 note also the statement by Mansfield J in *Doepel* that:

> 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].

This approach to the Registrar's task at s. 190B(5) was approved in *Gudjala FC* at [83].

Information before me addressing the factual basis

The application refers me to the contents of schedule F for a general description of the factual basis. Further information in relation to the factual basis is provided in schedule A (description of the native title claim group). Schedule M provides details of traditional physical connection by members of the native title claim group in areas covered by the application. Schedule M1 contains a report by Mr Daniel Vachon titled, 'Ngurrara Native Title Claim WC96/32 Supplementary Consent Determination Report', dated January 2006 and amended October 2007. I note that, at the time Mr Vachon produced his report, the claim area in WC96/32 included the Part B claim area therefore Mr Vachon's report relates directly to this application. Further, each of the persons comprising the applicant states in their s. 62(1)(a) affidavit that they believe all of the statements made in the application are true.

Result and reasons 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).

The material in the application is sufficient to support the assertion the native title claim group have, and the predecessors of those persons had, an association with the claimed area. In his report, Mr Vachon discusses the ways that 'the claimant [sic] group's connection to the claimed area has been maintained in accordance with the continuous acknowledgement and observance of a normative system of law and custom'—at [153]. The report notes at [6] that 'in the claimants' expressed view of *ngurrara*, (a word meaning 'home or country'), there is an emphasis on sites, constellations of sites and sequential 'tracks' of sites', and these 'tracks' can be regarded as song-lines. The report states at [13]-[14]:

> [T]he claimants say that they learned these ways of giving names and understanding the order of the places in the *jila*[1] country, from their forebears and other antecedents. The history of occupation of these antecedents and the claimants themselves is inscribed upon the cultural geography so described. For the claimants, this history reveals itself as a series of camp sites, walking tracks, and ceremonial sites, in the stories people narrate about their occupation of the *jila* country. For those sites connected to *waljirri* and *kalpurtu*[2], the claimants identify their origin as in an epoch long before their time. These sites are said to have been created and named by those Beings. The claimants see their role as following and reproducing what the *waljirri* and *kalpurtu* Beings did.

At [105], Mr Vachon notes that 'the first explorer to traverse the claim area was Colonel Edgerton Warburton in 1873 and it is likely that some of the claimants grand-parents were living there at the time – about a quarter century before the start of sustained European contact'. It is reasonable to infer that the structures of any Indigenous societies present in the claim area at the time of European contact were the same as those in existence at sovereignty. Therefore, I am of the view that the 'position' of the Indigenous society at sovereignty in the area of this application need only be demonstrated by evidence that reflects the position of that society at the time of first European settlement of the area—in this case from 1873 onwards.[3]

At [163], Mr Vachon states:

> I have obtained a number of accounts indicating that, before the mid 1960s, now senior claimants and their forebears had been living over at least two generations (and perhaps more) in the marginal desert area of the stations while going back and forth into the sandhill country of the north-central claim area with their kin.

Mr Vachon also expresses the view that, 'the presence of cultural features in the landscape is indicative of a long and common association by the people to sites within these two zones' (the zones being arid and wet areas of the land) – [164].

Overall there is substantial information in the report which supports a finding that an identifiable community or normative society of indigenous inhabitants occupied, were present upon and used the claim area at the time of first non-Aboriginal contact. The lines of descent are sufficiently demonstrated such that I believe that there is a sufficient factual basis to support the assertion that the predecessors of the claim group had an association with the claim area.

In relation to the claim group currently having an association with the area, I note that on 9 November 2007, Justice Gilmour made a determination of the exclusive possession in favour of the Ngurrara claimants over an adjoining area of land. This is a clear indication of the claim group's current association with the claim area. Furthermore, in his report at [5.3], Mr Vachon discusses the claimants' connection to the *jila* country post1970. In my view, the material comprehensively articulates the claim group's past and present association with the claim area.

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1 A *Jila* is a permanent place on the land known by the claimants see Mr Vachons report – at [7].

2 *Waljirri* are 'Beings of the Dreaming'; *jila-kalpurtu* refers to a snake Being found at waters sites. Each snake having its own distinctive personality and characteristics, including dictating that some waters are undrinkable for cultural reasons—Vachon report – at [7] & [221].

3 See also *Gudjala* at [64], [66] and [82]

Having regard to all of this information I am **satisfied** that the factual basis 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 area.

Result and reasons 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).

In my view the assertion in s. 190B(5)(b), and that found in s. 190B(5)(c), need to be understood in light of the definition of 'native title' or 'native title rights and interests' which appears in s. 223(1) of the Act, and particularly the elements of that definition in subparagraph (a):

> (1) 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 or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders.

The usage in ss. 190B(5)(b) and (c) of terminology similar to that found in s. 223(1)(a) in turn requires a consideration of the decision by the High Court in *Yorta Yorta* (2002) 214 CLR 422 of what is meant by the term 'traditional' in the context of s. 223(1)(a). The High Court held that 'traditional':

> [D]oes not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court also had this to say about the meaning of the term 'traditional laws and customs' in s. 223(1)(a)]:

> 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.
>
> 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. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title at [46]–[47]. (Emphasis in original.)

Gudjala FC at [96] indicates that, for the purposes of s. 190B(5), the factual basis provided must be 'supportive of an inference that there was ... an indigenous society in the area [at least at first contact], observing identifiable laws and customs'. The court expressed the view at [96] that this was one of the questions 'that s. 190B requires must be addressed'.

In the previous section under s. 190B(5)(a), I have outlined the material which indicates that there was an identifiable society of people in and around the claim area when it was first settled by non-Indigenous people. The material before me supports the assertion that the relevant society was comprised of the Ngurrara people's predecessors in title, who were observing laws and customs which were rooted in the laws and customs of that society as it existed before European settlement of the claim area. In regard to the continuation of that society, and its continued observation of its pre-sovereignty laws and customs, I am satified that the factual basis provided supports an assertion that the Aboriginal society which existed at sovereignty is, in general terms, the same society that exists today. With substantially the same traditional laws and customs being acknowledged and observed at sovereignty as those which are acknowledged and observed by the contemporary claim group as decribed in the applicaiton before me.

Under s. 190B(5)(a), I also outlined the factual basis provided in support of the traditional basis of the claimants' laws and customs as belief in '*jila* law' which is associated with spiritual beings who are tied to the land and the claimants. At [106]-[107] Mr Vachon states that the key concept in regard to the claimant's law and custom is the 'Dreaming' or, as the claimants call it, *Waljirri.* 'The Dreaming constitutes a moral system, and by doing so governs people's behaviour'. Mr Vachon asserts at[106]-[107]:

> A key characteristic of the Dreaming is that it resists change: it sets things in an enduring form…the Dreaming Beings are seen to bestow upon living human beings the "necessary and enabling conditions of social conduct". They introduced various customs and instituted the social order.

The report by Mr Vachon provides details of the existence of a complex semi nomadic hunting/gathering society that dwelt on the lands and waters around an area larger that the current claim area. Mr Vachon asserts that 'the Ngurrara claimants are members of 'local groups', associated with one or more ancestral beings, and 'this fact entitles its members to participate in the system of ritual and myth'—at [71].

It is apparent from the factual basis provided that the Ngurrara People had a society based on a decentralised social structure, which would come together for special events and to fulfil the roles proscribed to them in accordance with their traditional law and custom. At [72], the report details:

> By the claimants accounts of life in the desert, people having their own *ngurrara* in the *jila* country would participate at large gatherings for rituals attached to the *waljirri* Beings. They say that they would gather at *marlulu* ceremonies and at such times men would be initiated and marriages worked out.

The report also discusses the performance of rain making ceremonies as an important feature of the traditional law and custom for the Ngurrara – at [72].

Furthermore, at [244]–[257] the report details the way the claimants behaviour is governed by shared understandings of their connection to land and its Beings, and specifically the protocols the claimants follow concerning 'speaking for' country and obtaining permission for access.

In conclusion, I am **satisfied** that the information I have considered provides a sufficient factual basis 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 interests.

Result and reasons 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).

In my view, the issue at s. 190B(5)(c) is whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests, by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way, this being the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: compare *Yorta Yorta* at [47] and [87].

The application asserts that the current native title claim group acknowledge the traditional laws and observe the traditional customs of a pre-sovereignty society, as did their apical ancestors, who are identified as having belonged to that society after European settlement of the region. The report by Mr Vachon provides a factual basis that describes in detail the inter-generational transmission of laws and customs relating to their claim groups identity, the *waljirri* and the sites where *Kalpurtu* continue to exist, totemic affiliations, hunting and foraging, knowledge of special sites and the customs to be observed when entering sites on country. Mr Vachon notes that often 'senior claimants teach country while they paint, describing *jila* and other sites in the claim area' – at [150]. It is asserted in the application at schedule G, attachment M and M1 that the claimant group continues to conduct ceremonies in accordance with traditional law and custom to the present day. Attachment G lists 13 activities which the claim group currently undertake including hunting, foraging, traveling across, camping and conducting ceremonies in the claim area in accordance with their traditional laws and customs. Furthermore, the material asserts that the claimants have maintained much of their law and custom through story telling and painting country.

It is apparent from the material provided that the factual basis is sufficient to support the assertion that the claimant group has continued to acknowledge and observe the laws and customs of the pre-sovereignty society in a substantially uninterrupted way to the present day. Numerous and specific examples are provided in Mr Vachon's report of members of the claim group maintaining their Ngurrara identity and observing the laws and customs of their forebears. The totality of the information in my view answers what is required by the section.

I find that I am **satisfied** that the factual basis provided is sufficient to support an assertion that the native title claim group have continued to hold native title in accordance with the traditional laws and customs of a pre-sovereignty society.

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.

The application **satisfies** the condition of s. 190B(6) because of my finding below that, prima facie, all of the claimed native title rights and interests can be established prima facie. Only those rights and interests that prima facie can be established are to be entered on the Register of Native Title Claims—see s. 186(1)(g) and the note to s. 190B(6).

I note the following comments by Justice Mansfield in *Doepel* at [126] to [127] in relation to the Registrar's consideration of the application at s. 190B(6):

> .Section 190B(6) requires some measure of the material available in support of the claim.
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6).

His Honour also said, at [132], that 's 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed'.

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and
- have not been extinguished.

I elaborate on these three points as follows:

Right exists under traditional law and custom in relation to any of the land or waters under claim

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, a particular claimed native title right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group (my emphasis).

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which, prima facie, supports the existence of each claimed right and interest, noting that as long as some can be prima facie established, the requirements of s. 190B(6) will be met. An element of that task requires me to consider whether there is some material which prima facie supports the existence of the claimed rights and interests under the ***traditional*** laws acknowledged and the ***traditional*** customs observed by the native title claim group. See the discussion above in relation to this topic at s. 190B(5).

Right is a native title right and interest in relation to land or waters

It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in the chapeau to s. 223(1) and settled by case law, most notably *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests ' in s. 223(1) prima facie cannot be established.

Right has not been extinguished

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Ward HC*.

With these principles in mind I will consider each individual right and interest described in schedule E. To assist the reader, I identify at the outset the rights and interests being considered and whether or not I consider that, prima facie, they can be established.

1) *The rights to the possession, occupation, use and enjoyment of the area to the exclusion of others, including:*
    a) *the right to travel over, move about and have access to the determination area;*
    b) *the right to hunt, fish and forage on the determination area;*
    c) *the right to take, use and enjoy the natural resources of the determination area such as food, medicinal plants, wild tobacco, timber, stone and resin;*
    d) *the right to trade in resources of the area;*
    e) *the right to have access to and use the natural water of the determination area;*
    f) *the right to live on the land, to camp, to erect shelters and other structures;*
    g) *the right to:*
        i) *engage in cultural activities;*
        ii) *conduct ceremonies;*
        iii) *hold meetings;*
        iv) *teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and*
        v) *participate in cultural practices relating to birth and death, including burial rights.*
    h) *the right to have access to, care for, maintain and protect sites of significance on the determination area;*
    i) *the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purpose); and*
    j) *the right to control access of others to the area.*

Outcome: All prima facie established.

Ward HC states:

> A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others—at [88]. See also at [90]–[93].

In *Sampi v Western Australia* [2005] FCA 777, Justice French stated that:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 72 (*Griffiths*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> {T}he question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.*** It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that,"rise significantly above the level of usufructuary rights"—at [71] [emphasis added].

The court in *Griffiths* indicates at [127] that what is required to prove exclusive rights, such as those claimed in this application, is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The court stressed at [127] that it is also:

> [I]mportant to bear in mind that ***traditional law and custom***, so far as it bore upon relationships with persons outside the relevant community ***at the time of sovereignty***, would have been framed by reference to relations with indigenous people [emphasis added].

In section six of his report, which consist of 26 pages, Mr Vachon carefully examines the 'traditional' basis for the rights and interests being claimed and how they are exercised by the claimants. The section includes details of the traditional protocols, sanctions and prohibitions relating to accessing the land and custodianship. For example, Mr Vachon states that according to the claimants' laws and customs, the right to control access of others to the land 'is based upon *jila* law, specifically the belief that the original occupiers of the *jila* country continue to exist…as a kind of self-willed Being called *Kalpurtu*' – at [248]. It is said that the '*Karlpurtu*:

> [C]an have a concrete effect on human beings. Thus, by the claimants accounts, people fear them, can be made well by them, can be forced from a place by them, can be injured or killed by them. The claimants also say that they can speak to the snake and make it 'quiet'. People who know a particular *Karlpurtu* and are countrymen with it are able to go safely to the area of the *jila* where it lives. Such countrymen can introduce others like *jila* 'visitors' and 'strangers' to the snake and thereby protect them from harm by this being'—at [249].

It is clear that the roles and responsibilties that claimants have in relation to the control, management and protection of sites and country is dictated by their traditonal law and custom. I

find that the information before me does prima facie establish a traditional law and custom which gives rise to a right to possession, occupation, use and enjoyment to the exclusion of all others.

In my view, the rights and interests listed at (a) to (j) have been prima facie established by my finding that prima facie the claimants have rights to exclusive possession, ocupation, use and enjoyment of the claim area.

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.

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

I have taken the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being traditional' as discussed in *Yorta Yorta*. I note also that at [29.19] of the Explanatory Memorandum to the Native Title Amendment Bill 1997, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, there are numerous and specific references to current and previous members of the native title claim group throughout schedules F, G and M and the report at attachment M1, which provide satisfactory evidence of the requisite traditional physical connection by members of the native title claim group. The material refers to members of that group accessing the areas covered by the application pursuant to their traditional laws and customs, including by hunting, foraging, camping and visiting sites, painting country and observing customs when entering sites.

On the basis of this material, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the land or waters covered by the application.

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 below.

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 and reasons

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

The Tribunal's geospatial overlap analysis and report dated 7 January 2009 (GeoTrack: 2008/2198—the geospatial report) confirms that there are no determinations of native title covering the application area.

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

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

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

Result and reasons

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

There is no information before me to suggest that there are any PEPAs in the claim area. I note that the applicants are claiming the benefit of ss. 47, 47A and 47B. Section 61A(2), when read with s. 61A(4), permits a claim in these terms.

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 and reasons

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

I note that the applicants are claiming the benefit of ss. 47, 47A and 47B. Section 61A(2), when read with s. 61A(4), permits a claim in these terms.

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 below.

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

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

Schedule Q states that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

The application does include a claim to any offshore place.

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

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

I do not have any information before me to suggest that the claimed native title rights and interests have otherwise been extinguished. Furthermore, I note that the applicants are claiming the benefit of ss. 47, 47A and 47B. Section 190B(9)(c), when read with s. 61A(4), permits a claim in these terms.

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	**Ngurrara (Part B)**
NNTT file no.	**WC08/03**
Federal Court of Australia file no.	**WAD281/08**
Date of registration test decision	**30 June 2009**

Section 190C conditions

Test condition	**Subcondition/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. 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**
		s. 62(2)(ga)	**met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	met
s. 190C(3)			met
s. 190C(4)			Overall result: met
	s. 190C(4)(a)		met
	s. 190C(4)(b)		NA

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		met
s. 190B(3)		Overall result: met
	s. 190B(3)(a)	NA
	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	Subcondition/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 B
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration.

- Native title determination amendment application WC08/3 filed in the Federal Court of Australia on 7 April 2009, which included a copy of *Kogolo v Western Australia* [2007] FCA 1703 (the Ngurrara Part A consent determination) and a report titled, 'Ngurrara Native Title Claim WC96/32: Supplementary Consent Determination Report', by Mr Daniel Vachon;
- Native title determination application WC08/3 Ngurrara (Part B) filed in the Federal Court of Australia on 3 December 2008;
- The Tribunal's geospatial overlap analysis and report 26 May 2009 (GeoTrack: 2008/2198).

[End of document]