National Native Title Tribunal

Registration test decision

Application name	Mantjintjarra Ngalia Peoples
Name of applicant	Phyllis Thomas, Dolly Walker, Kado Muir, Nancy Gordon, Vanessa Thomas, Jane Beasley, [Name deleted for cultural reasons]
State/territory/region	Goldfields region, Western Australia
NNTT file no.	WC96/20
Federal Court of Australia file no.	WAD6069/1998
Date application made	11 March 1996
Date application last amended	6 February 2008
Name of delegate	Lisa Jowett

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 do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s.190B.

Date of decision: 29 September 2009

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* **(Cwlth) under an instrument of delegation dated 6 March 2009 and made pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to not accept the Mantjintjarra Ngalia Peoples 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 18 September 2009, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Mantjintjarra Ngalia Peoples claim (WAD6069/98) was first lodged with the Tribunal on 11 March 1996 and details of the application were placed on the Register. With the commencement of the *Native Title Amendment Act 1998* (Cwlth), the Registrar was required to consider the claim made in the application under s. 190A (item 11 of Part 2 of Schedule 5). As the application had not been amended to address the requirements of the new registration test, it did not meet the conditions of ss. 190C(2) and 190C(4), and the claim was not accepted for registration on 23 April 1999. As a consquence, the details of the claim were removed from the Register on that date.

The Mantjintjarra Ngalia Peoples claim was included, to the extent (and because) of its overlap with the Wongatha application (WAD6005/98), in the proceedings in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*). When the decision of the Court was made in *Wongatha* on 5 February 2007, it dismissed the Mantjintjarra Ngalia Peoples application to the extent of its overlap with any of the land or waters of the Wongatha application.

Because of the effect of item 90 of Schedule 2 of the transitional provisions to the *Native Title Amendment Act 2007*, the Registrar was again required to apply the registration test to the claim. The application still had not been substantially amended and was essentially in the same form as that lodged in 1996. On 19 October 2007, the delegate decided that the application did not meet the requirements of s. 190C(2), (4) and (5); s. 190B(2), (3), (5), (6), (7) and (8) and the claim was therefore not accepted for registration.

On 5 February 2008, the Federal Court (the Court) made an order for the Mantjintjarra Ngalia Peoples claimant application to be amended. The amended application was filed pursuant to this order on 6 February 2008. The Registrar of the Court gave a copy of the amended application to the Native Title Registrar (the Registrar) on 8 February 2008 pursuant to s. 64(4) of the Act and this has triggered the Registrar's duty to consider the claim made in the application under s. 190A.

As this is an application amended after 31 August 2007 (as a consequence of the *Native Title Amendment (Technical Amendments) Act 2007* (*Technical Amendments Act*) the Registrar is required to be satisfied, firstly, that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim.

The amended Mantjintjarra Ngalia Peoples application does not fall within the provision of s. 190A(1A)(b) as it was not amended as a result of an order made under s. 87A by the Court. Neither does s. 190A(6A)(d) apply as the application is an amended application of the claim which had not previously been accepted for registration. Consequently, the full registration test

must be applied to this amended application by the Registrar or her delegate pursuant s. 190A(1).

A number of amendments have been made to bring the application into compliance with the Court's Form 1, and includes a significant reduction in the application area to now cover only the lands and waters within the external boundaries of the Melrose Pastoral Lease 3114/872.

A preliminary assessment of the application against certain conditions of the registration test was provided to the applicant's representative, the Goldfields Land and Sea Council (GLSC), on 25 September 2008 outlining certain deficiencies that may affect the application being accepted for registration. At that time, the date proposed by which the registration test was to be applied was 1 December 2008. However, in order to remedy these deficiencies, the GLSC requested and was granted two extensions of time for the application of the test:

18 November 2008	Extension of time on the application of the test granted to 30 April 2009 at the request of the GLSC
29 April 2009	Further extension of time of the application of the test granted to 31 August 2009 at the request of the GLSC

The GLSC's requests to delay the registration test were based (in summary) on the time and resources required to make the substantial amendments to remedy the deficiencies identified in the preliminary assessment and its intention to prepare for and conduct a meeting of the native title claim group to authorise a new applicant and some further amendments to the application.

A further update was provided to the Registrar by the GLSC on 11 September 2009 outlining further developments since April 2009 that have occurred in relation to the management of this claim. These included foreshadowing the discontinuance of the Mantjintjarra Ngalia Peoples application on the one hand, and the commissioning of a consultant anthropologist to assist with amending the application and to provide additional material for the purposes of the registration. The GLSC is concerned that the Mantjintjarra Ngalia Peoples application be retained until such time as it can be discontinued and a proposed new claim filed.

It is not my intention to delay any further the application of the registration test by awaiting the outcomes of the GLSC's proposed course of action. This is because firstly, a considerable amount of time has elapsed since the Registrar's duty arose to test the Mantjintjarra Ngalia Peoples application (in February 2008). Secondly, despite being afforded a reasonable opportunity to address the deficiencies of the application, the representative for the applicant is not able to provide a specific timeframe in which the application will be in the form the GLSC has continued to propose.

The amended application currently before me is the one I now consider for registration pursuant to s. 190A.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among 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.

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment C.

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.

Also, I 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 steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

I note that as it is a party to the proceedings the State of Western Australia has a copy of the application as originally lodged with the Tribunal on 11 March 1996, including the amended application filed in the Court on 6 February 2008. The applicant has not provided any information additional to the application to which it wishes me to have regard for the purposes of the registration test.

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 am **not satisfied** that the application contains all details and other information, and is accompanied by any document required by ss. 61 and 62 because the application does not contain all the details and other information required by s. 62(2)(e). This is explained in the reasons below.

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 reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and 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. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts 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 (as specified in s. 190C(2)). I therefore 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 Court's prescribed form, filing in the Court and payment of 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, as I already test these things under s. 190C(2) where required 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.

I now turn to each of the particular parts of 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.

The application contains all details and other information required by s. 61(1).

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and I should not accept the claim for registration—*Doepel* at [36].

In forming a view on this, I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is in reality the correct native title claim group—*Doepel* at [37].

The description of the persons in the native title claim group is set out in Schedule A of the application (set out in full below under s. 190B(3)). It is stated that this application is made on behalf of certain named people and their families.

For the reasons set out below for the condition at s. 190B(3), I am not satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in that group. However, there is nothing on the face of the description provided that leads me to conclude that the description indicates that not all persons have been included in the native title claim group, or that it is in fact a subgroup of the native title claim group.

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 name and address for service of the applicant's representative is found on page 10 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.

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

The application at Schedule A does not name the persons in the native title claim group but provides a description of the persons in the group.

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).

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

The application is accompanied by affidavits from each of the seven persons who comprise the applicant. The affidavits are signed by each deponent, appear to be competently witnessed and make the statements required by this section.

Though not a requirement of applications made before the *Technical Amendments Act*, each of the affidavits comply with subsection 62(1)(a)(v) of that *Technical Amendments Act* which requires that details of the decision–making process complied with in authorising the applicant be set out. Paragraphs 5 to 7 of each affidavit contain details of the traditional decision-making process of the Mantjintjarra Ngalia people that must be used by members of the claim group to authorise the applicant.

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 **does not** contain all details and other information required by s. 62(1)(b).

The application **does not** contain all the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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).

Schedule B of the application refers to Attachment B.

Attachment B describes the external boundaries of the application area at paragraphs 1.1 and 1.2 by reference to the external boundaries of the Melrose Pastoral Lease 3114/872. Information about the areas within the external boundary which are not covered by the application area is provided at paragraphs 2.1 through to 2.5.

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).

Schedule C of the application refers to an Attachment C which is a map that shows the external boundaries of the application area.

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.

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

Schedule D refers to Attachment D which states that a search to determine any non-native title rights and interests has been conducted by the National Native Title Tribunal on behalf of the applicant. The results set out non-freehold land tenure as at October 2006 prepared by the Tribunal's Geospatial Services on 4 May 2007 and includes the pastoral lease, a general lease, a number of reserves and a portion of unallocated Crown land that all fall within the external boundary of the application area.

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 s. 62(2)(d).

Schedule E refers to Attachment E which provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application area. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

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 **does not** contain all details and other information required by s. 62(2)(e).

Schedule F refers to Attachment F which provides a description of the factual basis on which it is asserted that the native title rights and interests claimed exist. The decision of the Full Court in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) held that the details specified by s. 62(2)(e) constitute a general description of the factual basis and are an important indicator of the nature and quality of the information required by s 62:

> 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—at [92].

No further description of the facutal basis is provided at any of the other schedules or in the affidavits of the persons comprising the applicant. The statements in Schedule F largely recite the the three particular assertions of the condition. Statements such as 'the native title claim group continues to acknowledge and observe those traditional laws and customs' and 'the native title claim group, by those laws and customs, has a connection with the land in respect of which the claim is made' do not in my view add anything further to the recitation of the assertions.

Whilst 'it is only necessary for an applicant to give a general description of the factual basis of the claim I do not consider that the general description in Schedule F contains 'sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections' (*Gudjala* at [92]). I am of the view that the statements provided at Attachment F are not something more than assertions at a high level of generality.

By not containing a sufficient level of detail, the description does not satisfy the requirements of s. 62(2)(e) and will not enable a genuine assessment of the application at s.190B(5).

Activities: s. 62(2)(f)

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

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

Schedule G contains details of activities carried out by the native title claim group in the application area.

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).

Schedule H contains the details obtained from the Tribunal's Geospatial Services of applications as at 10 December 2007 that seek a determination of native title over any or all of the area covered by the application. (I note that since that date these applications have been dismisssed by the Federal Court.)

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).

Schedule I provides geospatial data held by the Tribunal and lists notices given under s. 29 between 1995 and 2007 which fall within the external boundary of the application as at 10 December 2007.

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 (the Register) 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) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' on the Register.

A search of the Mantjintjarra Ngalia Peoples application area against the Register reveals there are currently no applications on the Register covering all or part of the application. Therefore, the requirement that I be satisfied that there are no common members between this application and any other overlapping application/s is not triggered.

Subsection 190C(4)
Authorisation/certification

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

(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.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . .

authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

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

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 not satisfied** that the requirements set out in either ss. 190C(4)(a) or (b) are met.

As the application is not certified pursuant to s. 190C(4)(a), it is necessary to consider if the application meets the condition in s. 190C(4)(b). That is, the applicant is a member of the native title claim group and authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways. The alternative processes are defined in the sub paragraphs 251B(a) and (b):

- in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists; or
- where there is no such process, in accordance with a decision-making process agreed to and adopted by native title claim group.

Attachment R and the affidavits of each of the persons who comprise the applicant attest to the use of a traditional decision-making process by the native title claim group to authorise the applicant to make and deal with the Mantjintjarra Ngalia application.

The importance of proper authorisation of an application has been considered by the Courts on many occasions. For instance, in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 (*Bolton*), Justice French observed the following:

> As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title…—at [43].

As the application is not certified it must, pursuant to s. 190C(5), include a statement to the effect that the requirement in s. 190C(4)(b) has been met and briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met. If it is the case that the formal requirements of s. 190C(5) have been met by the information in the application, it will still be necessary for me to consider the substantive condition in s. 190C(4)(b).

Information considered

The information regarding the authorisation of the Mantjintjarra Ngalia Peoples application is found at Attachment R.

> Applicants are members of the Native Title claim group
>
> The applicants are members of the native title claim group and are authorised to make the application and deal with matters arising in relation to it, by all the other persons in the native title group.
>
> Authorisation
>
> Written notice was given to all members of the Mantjintjarra Ngalia claim group for the authorisation meeting that was held at Leonora on 29 August 2006 ("the meeting"). Each person at the meeting identified themselves by reference to their family name and by reference to their place as descendants of apical ancestors that together comprised the basis of the claim group description. Those present at the meeting stated that they were able to make decisions on behalf of their family. The group, which included elders, confirmed that they and their family members all belong to the Mantjintjarra Ngalia group and that in their traditional way those present at the meeting could speak for their family and could speak for any other family members who were unable to be at the meeting.
>
> Those present at the meeting then decided that the applicants were authorised to make this application, and deal with matters arising in relation to it. This was accepted by the meeting as a decision by all the persons in the native title claim group under a decision making process in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.

Each of the affidavits sworn by the persons comprising the applicant (pursuant to the requirements of s. 62(1)(a)) provide the same information at paragraphs 4 through to 8:

> The Applicants are authorised by all of the persons in the native title claim group to make the Application and to deal with matters arising in relation to it.
>
> Authorisation of the Application to make this Application was carried out at a Mantjintjarra Ngalia claim group meeting held in the Ambulance Hall, Leonora on 29 August 2006.
>
> At that claim group meeting the traditional decision making process that must be used by Mantjintjarra Ngalia people under our traditional laws and customs for things of this kind was used by members of the claim group for authorising the Applicants.
>
> The decision making process involves all Mantjintjarra Ngalia people discussing the matter and then the Mantjintjarra Ngalia native title claim group making a decision by consensus.
>
> At that claim group meeting, the Mantjintjarra Ngalia native title claim group resolved to withdraw the Mantjintjarra Ngalia claim (WAD 6069/98) and to exclude any overlap with the Birriliburu claim (WAD6284/98 and to exclude any overlap with the Ngaanyatjarra Lands claim (WAD6004/04) but to continue to include an area over Darlot (Melrose pastoral

> lease) until such time as other native title claims over this area are withdrawn and until such time as appropriate Mantjintjarra Ngalia families are indentified for a new united claim over that area.

The requirements of s. 190C(5)

Attachment R contains the relevant statements required by s. 190C(5). It is stated in the first paragraph that the applicants are members of the native title claim group and are authorised to make and deal with the application. The second paragraph briefly sets outs the grounds on which the Registrar should consider that the requirements of s. 190C(4)(b) have been met.

A brief summary is provided, as quoted above, and includes the date of the authorisation meeting, a description of the group attending and a statement that a decision-making process was followed in accordance with the traditional laws and customs of the Mantjintjarra Ngalia people.

The affidavits accompanying the application by each of the persons comprising the applicant also attest to the same information, the relevant paragraphs of which are quoted above.

The interaction of s. 190C(4)(b) and s 190C(5) is considered in *Doepel* in that it:

> may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

It is my view that the application contains the information required by s. 190C(5), however it is still necessary for me to consider whether I am satisfied that the applicant is authorised pursuant to s. 190C(4)(b), noting that I am not limited to what is in the application on the issue.

Consideration

As I understand the information provided in the affidavits, there exists a traditional decision-making process that must be used by the native title claim group for things of this kind and it involves the group as a whole discussing the matter and reaching a decision by consensus. It is not clear what steps the group took to inform all known members of the native title claim group of the meeting, other than that 'written notice was given to all members of the Mantjintjarra Ngalia claim group'. This seems relevant noting that the asserted decision making process contemplates 'all Mantjintjarra Ngalia people discussing the matter and reaching a decision by consensus'.

The decision in *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) makes it clear that it is not necessary to have literally all the members of the claim group involved in the decision-making process so long as 'the members of the claim group are given every reasonable opportunity to participate in the decision-making process'—at [25]. In my view, the application lacks sufficient information about how the meeting was notified and how wide the net was cast such that all members of the native title claim group were given every reasonable opportunity to participate in the decision making process undertaken at the meeting.

However, there is a further reason why I am not satisfied that the members of the native title claim group were provided a reasonable opportunity to participate in the authorisation process. As I explain in my reasons below at s. 190B(3), it is my view that the description in schedule A is

not sufficiently clear so that it cannot be ascertained whether any particular person is in the native title claim group. Without reliable identification of the persons in the native title claim group, I am of the view that I cannot be satisfied about the applicant's authority from the rest of the native title claim group to make and deal with the application.

Those persons attending the meeting 'identified themselves by reference to their family name and by reference to their place as descendants of apical ancestors that together comprised the basis of the claim group description' (Attachment R, paragraph 2). Reliance on, what is in my view, a flawed description of the group to identify those who participated at the authorisation meeting compounds the uncertainty about authorisation of the applicant by the native title claim group. I cannot be certain who attended the meeting or how representative of the whole group the attendees were, as the application does not provide sufficient information about the steps taken to notify the meeting to the group as a whole and because there is uncertainty around the membership of the claim group.

Finally, the affidavits sworn by each of the persons comprising the applicant all refer, at paragraph 8, to certain resolutions being reached at the meeting about the extent of the area to be claimed. The native title claim group is said to have resolved to 'withdraw the Mantjintjarra Ngalia claim (WAD6069/98)', to exclude overlaps with two other claims but 'to continue to include an area over Darlot (Melrose pastoral lease) until such time as other native title claims over this area are withdrawn and *until such time as appropriate Mantjintjarra Ngalia families are identified for a new united claim over that area*' (emphasis added). The emphasised text raises this question in my mind: are there additional members of the native title claim group who have not been involved in the process of authorising the applicant to make and deal with this particular application? In my view, this adds to the uncertainty about the identity of the native title claim group said to have authorised this application. It also adds uncertainty about whether every reasonable opportunity has been afforded to the native title claim group as a whole to participate in the authorisation process.

I am therefore unable to be satisfied that the applicant is authorised by all the persons in the native title claim group to make this application and to deal with matters arising in relation to it.

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

Schedule B refers to Attachment B which describes the area covered by the application as all the 'lands and waters within the external boundaries of Pastoral Lease 3114/872 (Melrose)'. Paragraph 1.2 states that the data is compiled by the Tribunal (April 2007) based on data sourced from Landgate, WA (October 2006).

A written description of the areas within the external boundary that are not covered by the application is also included. This is a description listing a number of qualifications to which the application is subject. That is, the application area excludes areas of land and waters affected by any previous exclusive possession acts as defined by the Act and category A intermediate period acts or category A past acts. The description states that the application area excludes any land or waters where native title has been otherwise wholly extinguished.

The above exclusions are subject to any land or waters falling within certain provisions of s. 23B or ss. 47, 47A or 47B and would, therefore, be included in the area covered by the application.

Schedule C refers to Attachment C which is a monochrome copy of a map prepared by the Tribunal's Geospatial Services entitled WAD6069/98 (WC96/20) Mantjintjarra Ngalia Peoples, Proposed Amendment, dated 27/04/2007 and includes:

- The amended application area depicted by a bold line with a hachured border;
- Cadastral parcels and IDs with major topographic features;
- Scalebar, north point and coordinate grid; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Section 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. For the Registrar to be satisfied that this can be said, the written description and the map are required to be sufficiently consistent with each other.

Having regard to the comprehensive identification of the external boundary in Attachment B1 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 such that the location of it on the earth's surface can be identified with reasonable certainty.

The Tribunal's Geospatial Services has also provided an assessment of the map and written description (the geospatial report). The assessment is that the description and map are

consistent and identify the application area with reasonable certainty. I agree with that assessment.

Whilst the written description at Attachment B2 contains only general exclusions and not a list of tenures, they are sufficient to offer an objective mechanism to identify which areas fall within the categories described.

In conclusion, I am satisfied that the information and the maps required by paragraphs 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 areas of the land or waters.

The application satisfies the condition of s. 190B(2) as a whole.

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 **does not satisfy** the condition of s. 190B(3).

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name each of the persons in the native title claim group but contains a description of the group:

> The application is made on behalf of the Mantjintjarra and Ngalia Peoples including, [Name deleted] and family, [Name deleted] family, [Name deleted] and family, [Name deleted] (dec) and family, [Name deleted] family, [Name deleted] and family, [Name deleted] and family, [Name deleted] family, [Name deleted], [Name deleted] and [Name deleted] and [Name deleted] and [Name deleted] and family, [Name deleted] family, [Name deleted] and family, [Name deleted] and family, [Name deleted], [Name deleted], [Name deleted] family, [Name deleted] (dec) and family, [Name deleted] family.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b)—at [51].

Mansfield J also said that the focus of s. 190B(3) is:

> ...not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained—at [37].

Additionally, Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591 found, in the way native title claim groups were described, that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently—at [67].

The description of the Mantjintjarra Ngalia Peoples native title claim group does necessitate some engagement in a factual inquiry. But the difficulty for reliable identification is presented in the description's use of two words—'including' and 'family'.

In my view, where the word 'including' precedes a list (of people or things) it is used to indicate that those items listed are selected examples forming part of a particular group or part of a whole. In this case, I read the description as a list of some of the people and their families who make up the native title claim group. That is, those persons and their families named in the list are only a selection of all of the Mantjintjarra Ngalia Peoples native title claim group.

This issue is then compounded by the use of the term 'family'. The difficulties posed by a claim group description that uses the term 'family' to describe its membership is discussed in *Colbung v Western Australia* [2003] FCA 774 (*Colbung*):

> The description of the persons on whose behalf the application is made is clearly inadequate. The description "the Isaacs family" is itself difficult enough in the absence of explanation. The word "family" as applied to people can be used in a variety of senses. The Oxford English Dictionary (2nd ed), for example, includes the following amongst possible meanings of "family":
>
> > *"3.a. The group of persons consisting of the parents and their children, whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity.*
> > *4.a. Those descended or claiming descent from a common ancestor: a house, kindred, lineage."*
>
> Alternatively the term as used in the application may have its own dictionary or conventional meaning...—at [38] to [39].

It is not clear to me from the description if a 'family' includes all people descended from a common ancestor, or also includes persons by adoption or marriage or other kinds of incorporation—that is, the scope of how the Mantjintjarra Ngalia Peoples define 'family' is not provided for in this description.

I understand the authorities of *Doepel* and *Western Australia v Native Title Registrar* to mean that the description at Schedule A needs to contain some objective means of identifying or ascertaining the members of the group. Describing the claim group in such indefinte terms does not in my view provide a sufficiently reliable means by which to ascertain a person's membership of the group. Essentially I cannot be certain who are the people that make up the whole of the Mantjintjarra Ngalia Peoples native title claim group.

Therefore, I am not satisfied that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

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

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

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

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in Ward. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

I am of the view that 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.

Native title rights and interests are defined in the Act at s. 223(1), which states:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

With this definition in mind it may be argued that rights and interests that have been found by the courts to fall outside the scope of s. 223 cannot be 'readily identified' for the purposes of s. 190B(4).

On another view, s. 190B(4) is only intended to cover those rights and interests that are not readily identified in the sense of being unintelligible or not understandable. On this view, any rights that fall outside the scope of s. 223 should be considered under s. 190B(6) as not able to be prima facie established. I have adopted this latter view and do not consider those rights that fall outside the scope of s. 223 under this condition at s. 190B(4).

The description of the native title rights and interests claimed in relation to particular land or waters is found at Schedule E:

> 1. Over areas where a claim to exclusive possession can be recognized (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply), the native title claim group claims the right to possess, occupy, use and enjoy the

lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

2. Over areas where a claim to exclusive possession cannot be recognised, the native title claim group claims the following rights and interests:

(a) the right to access the application area
(b) the right to camp on the application area
(c) the right to erect shelters on the application area
(d) the right to remain and erect habitats on the application area
(e) the right to hunt on the application area
(f) the right to have access to, manage and use the natural water resources of the application area
(g) the right to gather and use the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs
(h) the right to conduct ceremonies on the application area
(i) the right to participate in cultural activities on the application area
(j) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area
(k) the right to conduct burials on the application area
(l) the right to speak for and make decisions about the application area
(m) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs
(n) the right to control access to and use of the application area by other Aboriginal People who seek access to or use of the lands in accordance with traditional laws and customs
(o) the right to determine and regulate membership of the native title claim group
(p) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites

subject always to:

(i) the valid laws of the State of Western Australia and Commonwealth of Australia; and
(ii) The rights (past or present) conferred upon persons pursuant to the valid laws of the State of Western Australia and Commonwealth of Australia.

I am satisfied that the description of all of the native title rights and interests claimed is sufficient to allow for them to be readily identified in the sense that they are described in a clear and easily understood manner.

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.

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particular assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel*, Mansfield J stated 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].

The material I have before me that goes to the factual basis for the assertion that the claimed native title rights and interests exist is limited to a very general description at Attachment F and the brief list of activities at Schedule G. I note, as referred to in the Application Summary earlier, a preliminary assessment of the application was provided to the applicant identifying deficiencies about the factual basis, but further material was not provided.

Consideration of this condition necessitates taking into account the concept and meaning of the word 'traditional'. The decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

> 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.
>
> 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 [46]—[47].

No information is included in the affidavits of the persons comprising the applicant nor has any material been provided to the Registrar separate to the application to identify:

- the Mantjintjarra Ngalia society asserted to exist prior to European settlement,

- the traditional Mantjintjarra Ngalia laws or customs asserted to be derived from a body of norms or normative system that existed before European settlement, and
- that the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation of Mantjintjarra Ngalia Peoples since European settlement.

I have also considered material provided for the purposes of previous registration testing of the Mantjintjarra Ngalia Peoples application, in particular the affidavits of [Name deleted] (13 January 1999) and [Name deleted] (13 January 1999). Some of that material is relevant to the factual basis but does not sufficiently support the assertion that the native title rights and interests claimed exist.

In considering all of the information available to me, I am of the view that I do not have sufficient evidentiary material before me that details:

- the past and present association of the Mantjintjarra Ngalia people with the claim area,
- Mantjintjarra Ngalia society observing identifiable laws and customs at the time of European settlement,
- that the Mantjintjarra Ngalia People have since European settlement continued to acknowledge and observe its traditional laws and customs.

I note that the provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that a delegate undertake a search for such—*Martin v Native Title Registrar* [2001] FCA 16 at [23].

Finally, fundamental to being able to reach conclusions about the factual basis for the claimed rights and interests is being able to reliably identify the native title claim group. As detailed in the reasons provided above for the purposes of s. 190B(3)(b), I am not satisfied that the group has been described sufficiently clearly. Even if the applicant had provided detailed information in support of the three assertions, I may not be able to draw inferences from it that could pertain to the group as a whole as the membership of the native title claim group is not sufficiently clear to me.

For example, where I am required to consider the Mantjintjarra Ngalia claim group's present, and its predecessors' past, association with the claim area, it would need to be clear to me as to who comprises the group. Further, I may not be able to discern whether the laws and customs asserted are those of a particular group of Mantjintjarra Ngalia people or all Mantjintjarra Ngalia people.

To conclude: Firstly I am not satisfied that the persons in the Mantjintjarra Ngalia native title claim group have been described sufficiently clearly so that it can be ascertained who comprises the group. Secondly I am not satisfied that the information in this application is sufficient to support the assertion that the claimed native title rights and interests exist and to support the assertions:

- that the native title claim group have, and the predecessors of those persons had, an association with the area;

- 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; and
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In any case, had evidentiary material been provided about which I could be satisfied, I would not be able to reach conclusions about the factual basis of the claim on the basis of the current description of the native title claim group.

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 **does not satisfy** the condition of s. 190B(6). I consider that none of the claimed native title rights and interests can be prima facie established.

In the absence of a sufficient factual basis being provided by the applicant to support the assertion of traditional laws and custom giving rise to the claimed native title rights and interests, it follows that I cannot be satisfied, prima facie, that there are rights and interests possessed under them. Therefore, under this condition of the test, I do not consider that, prima facie, the native title rights and interests claimed in the application can be established.

That an application which fails the merit condition at s. 190B(5) must then fail the condition at s. 190B(6) is supported by the decision in *Gudjala* at [87].

I would like to note that it may be the case that some of the claimed rights in this application have been found by the courts to fall outside the scope of s. 223(1) and may, on that basis, not be prima facie established for the purposes of s. 190B(6).

Finally, based on the material currently before me, there is in any event little or no information in the application to support that the rights can be prima facie established. What information is provided, including that relating to activities in exercise of the rights and interests claimed (as listed at Schedule E), is neither precise nor sufficient to satisfy me that many of the rights and interests could be prima facie established.

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **does not satisfy** 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.

The word 'traditional' as it is used here must be understood as it was defined in *Yorta Yorta*. That is, it is necessary to show that the traditional connection is in accordance with the laws and customs of a group or society which has its origins in the society that existed at sovereignty.

I was unable to find that the material currently before me is sufficient to support an assertion as to the existence of traditional laws acknowledged and customs observed by the claim group that give rise to the claim to have native title rights and interests. It therefore follows that I am unable to be satisfied that the requirements of this condition to do with traditional physical connection are met—see *Gudjala*:

> As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7)—at [89].

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.

Section 61A provides:
(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.
(2) If :
(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;
a claimant application must not be made that covers any of the area.
(3) If:
(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;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (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.

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1).

The geospatial report dated 7 August 2008 and a search that I made of the Tribunal's geospatial databases on 17 September 2009 reveals that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Attachment B at paragraph 2.1 excludes from the application area any land or waters that are or have been affected by 'a previous exclusive possession act as defined in the *Native Title Act 1993* and regulations and the Western Australian State analogue, *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*'.

Reasons for s. 61A(3)

Section 61A(3) provides that an 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 previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3).

Attachment B at paragraph 2.2 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State of Western Australia.

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.

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

Reasons for s. 190B(9)(a):

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

The application at Schedule Q states that the applicant does not make any claim to minerals, petroleum or gas.

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

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

The application at Schedule P provides the statement 'Not applicable' which in my view is sufficent as the area covered by the application does not include any offshore waters or place.

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

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

Attachment B at 2.5 states that the application 'excludes land and waters where native title rights and interests claimed have otherwise been extinquished'.

[End of reasons]

Attachment A

Summary of registration test result

Application name	**Mantjintjarra Ngalia Peoples**
NNTT file no.	**WC96/20**
Federal Court of Australia file no.	**WAD6069/98**
Date of registration test decision	**29 September 2009**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Not 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:** **Not 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)	**Not met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(h)	**Met**

Test condition	Subcondition/requirement	Result
s. 190C(3)		**Met**
s. 190C(4)		**Overall result:** **Not met**
	s. 190C(4)(a)	**Not met**
	s. 190C(4)(b)	**Not met**

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		**Met**
s. 190B(3)		**Overall result:** **Not met**
	s. 190B(3)(a)	**Not met**
	s. 190B(3)(b)	**Not met**
s. 190B(4)		**Met**
s. 190B(5)		**Aggregate result:** **Not met**
	re s. 190B(5)(a)	**Not met**
	re s. 190B(5)(b)	**Not met**
	re s. 190B(5)(c)	**Not met**
s. 190B(6)		**Not met**
s. 190B(7)(a) or (b)		**Not met**
s. 190B(8)		**Aggregate result:** **Met**
	re s. 61A(1)	**Met**
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**

Test condition	Subcondition/requirement	Result
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.

1. The amended application that was filed in the Federal Court on 6 February 2008 pursuant to an order made on 5 February 2008 to grant leave to amend, including attachments and affidavits.
2. The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis'—GeoTrack 2008/1419, dated 7 August 2008 (the geospatial report), being an expert analysis of the external and internal boundary descriptions and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
3. Reports of searches made of the Register of Native Title Claims, Federal Court Schedule of Applications, National Native Title Register and other databases to determine the existence of interests in the application area, namely, overlapping native title determination applications,
   s. 29 future act notices and the intersection between Mantjintjarra Ngalia Peoples application area and any gazetted representative body regions. These reports are against the Tribunal's databases and documented in the geospatial report.
4. Affidavit of [Name deleted] sworn 13 January 1999
5. Affidavit of [Name deleted] sworn 13 January 1999
6. Registration Test Decision, WC96/20—Mantjintjarra Ngalia Peoples, not accepted for registration on 19 October 2007
7. Preliminary assessment of the claimant application against certain conditions of the registration test, WC96/20—Mantjintjarra Ngalia Peoples, dated 11 September 2008
8. Correspondence from the GLSC to the Tribunal's case manager in respect of requests for extension of time on the application of the registration test, dated:
   8.1. 4 August 2008,
   8.2. 21 October 2008
   8.3. 5 November 2008
   8.4. 9 April 2009
   8.5. 30 June 2009
9. Letter to the Registrar from the GLSC, dated 11 September 2009, providing further update on the management of the Mantjintjarra Ngalia Peoples native title determination application.

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