

Registration test decision

Application name	Jabiru Township
Name of applicant	Yvonne Margarula and Nida Mangambarr
State/territory/region	Northern Territory
NNTT file no.	DC97/7
Federal Court of Australia file no.	NTD6027/98
Date application made	1 September 1997
Date application last amended	20 October 2009
Name of delegate	Cobey Taggart

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

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cth).

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: 20 August 2010

Cobey Taggart

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an **instrument of delegation dated 2 August 2010** 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 Native Title Registrar's (Registrar) delegate, for the decision to not accept the Jabiru Township claimant application (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* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

This application was initially lodged with the Registrar on 1 September 1997. The application was also entered onto the Register of Native Title Claims (Register) on this day. On 6 May 1998 the application was amended to clarify the description of the land and waters which were claimed by the application. The application remained on the Register subsequent to this amendment.

Following commencement of the *Native Title Amendment Act 1998* which introduced the test for registration in s. 190A, the application was amended on 4 October 1999 and subsequently accepted for registration on 14 December 1999. As it was already on the Register at this time, the application was not removed from the Register.

On 20 October 2009 the application was again amended, in accordance with leave from the Federal Court granted on 6 October 2009. The Federal Court (the Court) gave a copy of the application to the Registrar on 20 October 2009, pursuant to s. 64(4) of the Act. This has again triggered the Registrar's duty to consider the claim made in the amended application under s. 190A of the Act, commonly referred to as the 'registration test'.

A number of amendments were made to the application, including:

- to the native title claim group description;
- to the particular native title rights and interests claimed by the application, including new rights and interests being claimed; and
- the removal of an assertion, at Schedule Q of the application, that the claimants assert the Crown does not wholly own minerals, petroleum or gas in the area subject to the application.

Additionally, in accordance with leave from the Court granted on 6 October 2009, the amended application also reflected a change to the constitution of the applicant, from Raymond Gamarrawu, Yvonne Margarula and Irene Nayinggul to Yvonne Margarula and Irene Nayinggul.

However, the amended application was accompanied by two affidavits addressing the requirements of s. 62(1)(a), by Yvonne Margarula and Nida Mangambarr. The amended application was not accompanied by an affidavit by Irene Nayinggul, despite this latter individual being named in the amended application, with Yvonne Margarula, as one of the two persons comprising the applicant. The deponent of the second affidavit, Nida Mangambarr, was not named in the amended application as an applicant.

This created some uncertainty as to the identity of the applicant. However, it is my view that any uncertainty has been cured by an order of the Federal Court dated 2 November 2009 in the following terms:

- (1). To the extent necessary, Yvonne Margarula, Irene Nayinggul and Raymond Gamarrawu be removed as Applicants and replaced by Yvonne Margarula and Nida Mangambarr.
- (2). The title to the proceeding be amended by omitting "Yvonne Margarula, Irene Nayinggul and Raymond Gamarrawu on behalf of the Mirrar people" as Applicants and substituting "Yvonne Margarula and Nida Mangambarr" as Applicants.

As noted earlier, Mr Gamarrawu had apparently been removed as a person jointly comprising the applicant by the amendments made to the application on 20 October 2009, leaving Yvonne Margarula and Irene Nayinggul as the applicant. This may explain the use of the phrase 'To the extent necessary' in the first order.

Whatever the case, it is my view these orders should be treated as being made under s. 66B(2) of the Act for the following reasons.

The terms of the order reflect the wording of s. 66B(1) and provide for the removal of the applicant named in the application and their replacement by Yvonne Margarula and Nida Mangambarr.

Further, it is my view that where the effect of the order is to introduce a new person as part of the applicant (in this case Nida Mangambarr) the only way for this to occur is by order of the Court under s. 66B(2) of the Act. For this proposition, I refer to comments by Siopis J in *Sambo v State of Western Australia* (2008) 172 FCR 271; [2008] FCA 1575 (*Sambo*) — at [30]. I note that there is a recent decision by Mansfield J in *Lennon v State of South Australia* [2010] FCA 743 (*Lennon*) indicating that there may be an exception in circumstances where the applicant being removed is made up of a deceased person or persons and the replacement applicant are the surviving authorised persons who formed part of the original applicant. Mansfield J found that both s. 62A of the Act and O. 6 r. 9 of the Federal Court Rules 1979 (Cth) allowed an applicant to seek an amendment to an application to remove the deceased persons from the 'applicant', without having to resort to s. 66B — *Lennon* at [20] to [33].

However, I note also that the matter before me is different to that before Mansfield J in *Lennon*. In my view, s. 66B is the only way the applicant could have been removed and replaced in the application before me, because the addition of Nida Mangambarr has involved something more than the removal of an individual from the group of persons who comprised the applicant.

In addition to the matters discussed above, I have had regard to information from the Federal Court which I find persuasive and supportive of this construction. I refer to an email dated 13 July 2010 from the Court's South Australia and Northern Territory District Registrar informing the Registrar that although it was not clear, with the passage of time, whether the 2 November 2009 orders were made in accordance with s. 66B, it was requested that, on the basis that s. 66B may apply, the Registrar is to treat this as notification under s. 66B(3).

I note that the Registrar has amended the Register in accordance with s. 66B(4) to reflect the 2 November 2009 orders. While not directly relevant to the requirements of the registration test, I consider it persuasive and significant that the Registrar has in a related context accepted that the 2 November 2009 orders are, or should be treated as being, made under s. 66B(2).

For these reasons and in the absence of any explicit indication that the 2 November 2009 order is not made pursuant to s. 66B, I consider that it is appropriate to treat that order as an order under s. 66B(2) of the Act. Accordingly, I understand that the applicant is now comprised by Yvonne Margarula and Nida Mangambarr.

The amended application filed on 20 October 2009 was accompanied by affidavits deposed by Ms Margarula and Ms Mangambarr on 2 October 2009, attesting that they comprised the applicant. Having regard to this and the absence of an affidavit from Ms Nayinggul, it appears that it was always intended Ms Margarula and Ms Mangambarr would comprise the applicant and that the reference to Ms Nayinggul in the amended application was an error or slip. In my view, it is reasonable to consider that the intention of the Court in making the 2 November 2009 orders was to enable that misstatement to be cured; such that the identity of the applicant is clarified and confirmed.

While it is unusual, I consider that in this instance it is reasonable and appropriate to read the amended application in accordance with that order. Therefore for the purposes of the registration test, I will consider and read the 20 October 2009 amended application in accordance with the 2 November 2009 order.

Registration test

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) applies and set out my reasons for this below:

- as no order has been made under s. 87A of the Act regarding the application, s. 190A(1A) is not applicable; and
- the types of amendments discussed in s. 190A(6A) relate only to reducing the area covered by the application, removing a right or interest from those claimed in the application, changing the representative body details and altering the applicant's address for service. As noted above in the application overview, the amendments to the application are more extensive than those contemplated by s. 190A(6A). The amendments include changes to the native title claim group described in Schedule A and to the description of the claimed native title rights and interests in Schedule E, such that I am not satisfied that the only effect of the amendment is to do one or more of the things identified in s. 190A(6A)(d)(i) to (v).

Because neither ss. 190A(1A) nor (6A) apply, I must consider the claim in the amended application pursuant to ss. 190A(6) and (6B) which together provide that I can only accept the claim for registration if it satisfies all of the conditions in s. 190B and s. 190C of the Act.

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 in s. 190C(2) that the application must contain certain specified information and be accompanied by certain prescribed 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 s. 190A(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 A.

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 have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4): see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) – at [16]. In making this decision I have had regard to the amended application and accompanying documents filed by the applicant with the application. I have also had regard to documents contained in the Tribunal’s case management/delegates file DC97/7 (also known as 2009/02518). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons.

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. 94D of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L of the Act).

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 Tribunal, Applicant and Northern Territory Government have engaged in correspondence relating to this application and the requirements of the registration test. I provide an outline of that correspondence below as it relates to affording procedural fairness to the applicant and the Northern Territory Government (Territory):

- letter, dated 20 November 2009, from the Tribunal to the applicant confirming the Registrar had received a copy of the 20 October 2009 amended application, and accompanying documents, from the Court and that the application will be registration tested;
- letter, dated 24 November 2009, from the Tribunal to the Territory, informing the Territory that the Registrar had received a copy of the 20 October 2009 amended application and accompanying documents, and that the application was to be registration tested. The letter provided an opportunity for the Territory to make any comment or provide any material for

the delegate's consideration of the application and stated that it was anticipated the registration test would be applied by 15 January 2010;

- by email dated 2 December 2009, Mr. Ron Levy, Principal Legal Officer for Northern Land Council (NLC), as the solicitor on the record for the applicant, wrote to the Tribunal and requested a deferral of the date by which the registration test would be applied;
- letter, dated 22 December 2009, from the Tribunal to the applicant informing the applicant that its request for a deferral of the date by which the registration test would be applied had been declined and that the delegate would proceed to apply the registration test by 29 March 2010;
- letter, dated 23 February 2010, from the Tribunal to the applicant informing the applicant that the delegate had formed a preliminary view that the application would likely not meet certain conditions of the registration test. In particular the conditions at ss. 190B(3), (5), (6) and (7) were identified in this correspondence. The applicant was provided with an opportunity to amend the application and/or provide further information to the case manager for my consideration by 15 March 2010;
- by email dated 8 March 2010, Mr Levy wrote to the case manager requesting a deferral of the date by which the registration test was to be applied to the application, inter alia, so that the applicant could respond to the issues raised in the case manager's letter of 23 February 2010;
- letter, dated 12 March 2010, from the Tribunal to the applicant requesting clarification and further information regarding the extension of time which the applicant sought before the registration test would be applied to the application;
- by letter dated 23 March 2010, Mr. Levy wrote to the Tribunal and confirmed that the extension of the time sought by the applicant was 31 May 2010;
- letter, dated 6 April 2010, from the Tribunal to the applicant informing the applicant that the request for an extension of time had been accepted and that the delegate anticipated applying the registration test by 30 June 2010. The applicant was requested to provide any additional information and/or amend the application by 11 June 2010.

To date the applicant has not provided any additional information or otherwise amended the application. Neither the Tribunal nor Registrar has received any further requests from the applicant for a further extension of time or any other correspondence from the applicant (including its legal representative) relating to the application.

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. 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 largely procedural and 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): *Doepel* – at [16] and also at [35] to –[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 under s. 190C(2), 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.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

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

Result

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

Reasons

As I have noted above, s. 190C(2) largely directs my consideration to procedural or administrative matters. For the purposes of s. 61(1) my task is limited to considering only whether the information is contained within the application. I am not required, except in limited circumstances, to consider the merits of the information. Broadly, these circumstances are concerned with the exclusion of a person/s from the native title claim group description, who, on the face of the application, are otherwise part of the 'native title claim group': *Doepel* — at [36] and [37].

Part A[2] of the application states '[t]he applicants are entitled to make this application as the persons authorised by the native title claim group to make the native title determination application'.

A description of the native title claim group is found at Schedule A of the application and provides:

The native title claim group are the persons who hold the rights comprising the native title claimed, being Aboriginal people:

(a) who are members of the following groups:

- (i) Mirarr¹ Gundjeihmi;
- (ii) Mirarr Urningangk;
- (iii) Mirarr Mengerddji

by virtue of descent through his or her father or father's father or by virtue of adoption into one of the groups;

(b) whose mother or mother's mother is or was a member of the groups referred to in paragraph (a);

(c) who are spouses of the persons referred to in paragraph (a);

(d) who have connections to the claim area by virtue of:

- (i) being a member of a group (other than the groups referred to in paragraph (a)(ii) and (iii), which group has an estate neighbouring the traditional estate of the Mirarr Gundjeihmi;
- (ii) being spouses of the persons referred to in paragraph (d)(i);
- (iv) related spiritual affiliations or ritual authority in relation to the claim area.

I am satisfied that the application contains the information required by s. 61(1). That is, who the native title claim group is and that the members of that group have authorised the making of the application. I am also satisfied that there is nothing on the face of the application which indicates

¹ The application variously uses 'Mirarr' and 'Mirrar'. For consistency I shall use Mirarr, other than when directly referring to information provided by the applicant. In those instances I shall retain the information as provided in the application.

the exclusion of members of the native title claim group from the native title claim group description.

For these reasons I am **satisfied** that this condition is met.

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

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

Result

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

Reasons

The application, at page 1, states that Irene Nayinggul and Yvonne Margarula are the persons who jointly comprise the applicant. The applicant's address for service is provided at p. 14 of the application.

However, as I have outlined above, the applicant as named in the 20 October 2009 application was replaced by order of the Court (Mansfield J) on 2 November 2009. I am aware that *Doepel* provides clear authority that 'for the purposes of the requirements of s. 190C(2), the Registrar may not go beyond the information in the application itself' — at [39].

I have previously explained my view that it is appropriate to read the application in accordance with the 2 November 2009 orders. I rely on those reasons here also. Accordingly, I am satisfied that I am able to have regard to the 2 November 2009 order, or its consequences for the application, when considering the requirements of s. 190C(2), without departing from the limitations identified by Mansfield J in *Doepel*.

For these reasons I am satisfied that the application, when read as amended by the 2 November 2009 order, names the persons who together comprise the applicant and provides their address for service.

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

The application must:

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

Result

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

Reasons

A description of the persons in the native title claim group can be found at Schedule A of the application (see above at s. 61(1) for an extract of this description).

Whether or not I am satisfied that the description is sufficiently clear, so that it can be ascertained whether any particular person is a person in the native title claim group, is the task when considering the relevant merit condition of the registration test in subsection 190B(3): see *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala #2*) — at [31] and [32].

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

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
- (v) stating the basis on which the applicant is authorised as mentioned in (iv).

Result

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

Reasons

I refer to my reasons above that the application is now made by Yvonne Margarula and Nida Mangambarr as the persons jointly comprising the applicant, following the Federal Court orders dated 2 November 2009.

The application was accompanied by affidavits deposed by each of these individuals. Both affidavits were deposed on 2 October 2009, are signed and competently witnessed.

Both of the affidavits are in the same terms and each deposes to the matters required by s. 62(1)(a)(i) to (v). Relevantly the affidavits provide:

1. I believe that 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 amended native title determination application accompanying this affidavit.
2. I believe that none of the area covered by the application is also covered by an entry in the National Native Title Register.
3. I believe that all of the statements made in the application are true.
4. I am 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.
5. I am authorised, in accordance with decision making processes under traditional laws acknowledged and customs observed, to make this application.

As this is all the information that is required by an affidavit, and the affidavits are otherwise deposed, witnessed and filed I am satisfied that s. 62(1)(a) is satisfied.

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 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.

Result

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

Reasons

Schedule B contains a written description of the areas included within the application and areas within the application's boundaries which are not covered by the application.

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

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

Result

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

Reasons

Schedule C of the application states that there are three maps depicting the application area provided at Attachment B of the application. However the application as provided by the Court to the Registrar did not contain Attachment B. The Court has confirmed that no maps were included with, or otherwise filed with, the 20 October 2009 application.

While the current application does not contain a map depicting the boundaries of the area covered by the application, the application prior to 20 October 2009 did contain three maps.

It would seem that the absence of a map/s within the application is an oversight and the maps referred to at Schedule C are the same maps which were within the application immediately prior to 20 October 2009. This is supported by the fact that Schedule C in both the 4 October 1999 and 20 October 2009 amended applications are identical. Schedule C in each instance describes with some detail the maps included at Attachment B. Attachment B however was not included in the 20 October 2009 amended application.

While the absence of these maps may be a slip or error, it creates a defect within the application.

The requirements of s. 190C(2) are procedural and, in this instance, require me to consider whether the application contains certain information. While this may be a technical requirement of the Act, the application does not contain the information required by s. 62(1)(b) and therefore does not satisfy this particular requirement of s. 190C(2).

For these reasons I am **not** satisfied that this condition has been met.

Searches: s. 62(2)(c)

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

Result

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

Reasons

Schedule D lists the searches which have been 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 results of these searches are also included at this schedule.

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

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

Result

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

Reasons

Schedule E provides a description of native title rights and interests claimed, which is not merely a statement that the claimed native title rights and interests are all native title rights and interests that may exist, or 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.

Result

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

Reasons

As the wording of this section suggests, an applicant is required by this section to provide a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist, with particular emphasis on the specific requirements set out within s. 62(2)(e).

In *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala #2 FC*) the Full Court considered the requirement that an applicant provide a general description of the factual basis on which it is asserted that the claimed native title rights and interests exist. In that instance the Court found:

‘...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...the applicant is not required to provide evidence that proves directly or by

inference the facts necessary to establish the claim... [o]f 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].

Where an application merely provides formulaic statements which are broadly a replication of s. 62(2)(e), it is unlikely that such statements would provide sufficient detail: *State of Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) —at [17] and [18].

Attachment F to the application provides a description of the factual basis on which it is asserted that the claimed native title rights and interests exist.

This description addresses the specific requirements of s. 62(2)(e)(i) to (iii). I am satisfied that this description is not merely a recitation, or formulaic statement, of these requirements. I note that whether the provided factual basis is sufficient to support the assertion will be considered in accordance with s. 190B(5).

Activities: s. 62(2)(f)

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

Result

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

Reasons

A list of activities carried out by the native title claim group in relation to the areas claimed can be found at Schedule G, Schedule M and Attachment F to the application.

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

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

Result

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

Reasons

Schedule H of the application states that the claimants are not aware that any other applications seeking a determination of native title or a determination of compensation have been made in relation to the whole or part of the area covered by the application.

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

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

Result

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

Reasons

Schedule I of the application states that the claimants are not aware of any notices under s. 29 of the Act (or under a corresponding provision of a law of a State or Territory), that have been given and that relate to the whole or part of the area covered by the application.

Subsection 190C(3)

No common claimants in previous overlapping applications

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

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

Result

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

Reasons

Schedule H of the application states that the applicant is not aware of any native title determination application which covers the whole, or part, of the area covered by the application.

I have also had regard to the geospatial assessment and overlap analysis, dated 7 December 2009, as prepared by the Tribunal's Geospatial Services.

This geospatial assessment and overlap analysis is somewhat limited in its use. This is because it considers, and provides opinions on, maps which were included within the application prior to its amendment. As the application does not contain a map/s depicting the application area there is some question as to how much reliance or consideration I should give to these opinions.

In my view it is still appropriate to consider the geospatial assessment and overlap analysis for the purposes of s. 190C(3). I have considered the written description of the application area contained within the application filed on 4 October 1999 (the form that the application was in immediately prior to 20 October 2009).

I am satisfied that the written description of the application area in the 20 October 2009 application is consistent with, and virtually identical to, the written description which was within the application filed on 4 October 1999.

While the current application does not contain a map depicting this area, the application *prior* to 20 October 2009 did contain such a map. I have outlined above, within my reasons regarding s. 62(2)(c), relevant information regarding this.

It is these maps which the geospatial assessment and overlap analysis has considered, as well as the written description of the application area in the current amended application.

The geospatial assessment and overlap analysis does not identify any lack of clarity within the current written description. It also identifies that no native title applications, registered or otherwise, cover any area claimed by the current application.

Whilst this conclusion was in part formed by having regard to maps not within the application, it is my view that I can accept and rely on this information for the purposes of s. 190C(3). This is primarily because in all the circumstances it is reasonable to conclude that the information considered within the assessment and overlap analysis remains the same, albeit that some of that information is not found within the application.

Based on this information I am satisfied that the requirements of s. 190C(3) are satisfied.

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.

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.

Result

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body (representative body) that could certify the application.

Reasons

Pursuant to s. 190C(4)(a), the application at Schedule R contains a written certificate from the Northern Land Council (NLC). This certificate is said to be made under s. 202(4)(d) of the Act and is dated 20 October 2009.

I note that s. 190C(4)(a) currently provides for certification to be made under Part 11 of the Act. In particular, s. 203BE of the Act is the relevant provision which deals with certification matters by a representative body.

However, the note accompanying s. 190C(4) allows for certifications to have *been made* under the former s. 202(4)(a). In my view where a certificate is provided by a representative body it must be made under s.203BE if that section was operable at the time of certification, irrespective of when the relevant application was made.

As NLC has provided a new certificate for the purposes of s. 190C(4)(a), that certificate was required to have been made in accordance with s. 203BE rather than s. 202(4)(d). I am mindful however that it is not appropriate for me to approach matters of certification with an 'unduly technical' mind: *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) — at [33].

Having regard to this, and considering that s. 203BE substantially replicates the former s. 202(4), I have formed a view that this is not a reason to consider that s. 190C(4)(a) has not been satisfied. Notwithstanding this, I understand that I must be satisfied that the certificate contains all information and details required by s. 203BE of the Act.

Is the certification made by all representative bodies that could have certified the application?

Under s. 190C(4)(a) an application must be certified by all representative Aboriginal/Torres Strait Islander bodies (representative body) which cover all or part of the application area. Schedule K of the application states that NLC is the representative body for the area covered by the application.

I have also had regard to the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services, dated 7 December 2009 (reference number GeoTrack 2009/2285). The geospatial assessment and overlap analysis identifies NLC as the only representative body whose area covers the application area.

For these reasons, I am satisfied that NLC is the only representative body whose area covers, wholly or partially, the application area.

As this application has been certified by all representative bodies that could certify this application, my task is confined to considering whether the requirements for certification at part 11 of the Act have been met and not matters relating to the basis on which the certification was provided. All I am required to be satisfied of is the fact that the application is certified and not the fact of authorisation: *Doepel* — at [81]; *Wakaman* — at [32].

Does the certificate contain the information required by s. 203BE?

I am satisfied that the certificate contains the necessary information and opinions as required by s.203BE(4), which provides:

- (4) A certification of an application for a determination of native title by a representative body must:
 - (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
 - (b) briefly set out the body's reasons for being of that opinion; and
 - (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The requirements of paragraphs (2)(a) and (b) are:

- (2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
- (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
 - (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(a)

Schedule R of the application provides at [24]:

- (1) The Northern Land Council is of the opinion that the requirements of s.202(5)(a) and (b) have been met namely that:
- (a) the applicants have authority to make the application and deal with matters arising in relation to it on behalf of all the other persons in the native title claim group; and
 - (b) reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

I note that [24](1)(b) does not state that *all* reasonable efforts were made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group. In my view this is not problematic. When read as a whole, [24](1) does state that NLC is of the opinion that the requirements of s. 202(5) (now s. 203BE(2)) have been met.

Even though there is some minor dissimilarity between the wording used in s. 202(5) and s. 203BE(2), each requires a representative body to form and hold opinions of the same nature. In this sense I accept that the statement at [24](1) is to the effect that NLC holds the opinions set out at s. 203BE(2).

Accordingly, I am satisfied that the requirements of s. 203BE(4)(a) have been met.

Section 203BE(4)(b)

The certificate provides that NLC has provided representation to the Mirarr People and other groups in the Kakadu region regarding a range of matters since 1975. Within this representation, comprehensive anthropological research has been undertaken.

The anthropological research has included detailed consideration of the system of traditional laws and customs which operate in relation to the Mirarr People, including the composition of the traditional owning groups, and the identification of the traditional decision-making process.

The certificate then explains that NLC conducted a series of meetings with the Mirarr people in 1999 regarding the application. At this time it was confirmed that the applicant had been authorised to make the application and deal with matters in relation to it.

A further meeting was held in September 2009 with the native title claim group which confirmed that the applicants have been authorised to make the application and deal with matters arising in relation to it.

As a result of the research referred to above, NLC is satisfied that the native title claim group description fully describes or otherwise identifies all persons in the native title claim group.

Based on the information I have summarised above I am satisfied that NLC has briefly set out the representative body's reasons why it is of the opinion that the requirements of s. 203BE(2) has been met. Therefore I am satisfied that the requirements of s. 203BE(4)(b) have been met.

Section 203BE(4)(c)

The certificate states at [24](7):

The [NLC] is not aware of any other application or proposed application that partly or wholly covers the application area.

Based on this information I am satisfied that the certificate provides the information required by s. 203BE(4)(c).

As I am satisfied that the certificate is made by the appropriate representative body and contains all the information it is required to, I am satisfied that the requirements of s. 190C(4)(a) have been met.

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.

Result

The application **does not satisfy** the condition of s. 190B(2).

Reasons

As I have outlined above, the application does not contain a map of the application area.

The words of s. 190B(2) are clear. They require me to form a view as to whether the information *and map contained in the application* 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.

For the reasons I have outlined above regarding s. 62(2)(b), and the requirement of s. 190B(2) that there be a map within the application, I am not satisfied that this requirement has been met.

I note that I have, in my reasons regarding s. 62(2)(b), indicated my view that the applicant likely relies on the maps which were contained in the application immediately prior to its amendment. However, I am unable to have regard to those maps within my consideration of s. 190B(2). It is a necessary condition for s. 190B(2) that the map is within the application:

The focus [at s. 190B(2)] is upon the information and map *contained in the application*, as required by s 62(2)(a) and (b). It is whether *that material* enables, with reasonable certainty, the assessment of whether the native title rights and interests are claimed in relation to particular land or waters (emphasis added): *Doepel* —at [122].

As there is no map within the application, I am **not** satisfied the requirements of s. 190B(2) are met.

Subsection 190B(3)

Identification of the native title claim group

The Registrar must be satisfied that:

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

Result

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

Reasons

The application contains a description of the native title claim group, which I have extracted above in my reasons regarding s. 61(1). As the application does not name all members of the native title claim group I must consider whether s. 190B(3)(b) is satisfied. In considering this requirement I rely on information within the application only: *Doepel* — at [16].

Nature of the task at s. 190B(3)(b)

The requirement of s. 190B(3)(b) is quite specific. I must be satisfied that the native title claim group description is sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

It is **not** to consider whether the claim group description is correct or whether ‘there is a cogent explanation of the basis upon which [the members] qualify for such identification’: *Gudjala #2* — at [33]; *Doepel* — at [47].

In considering whether a claim group description is sufficiently clear for the purposes of s. 190B(3)(b) I understand that it is not necessary that the description alone, without any factual inquiry, be capable of allowing for it to be ascertained whether any particular person is in that group: see *Western Australia v Native Title Registrar and Ors* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*) — at [67].

In that regard the focus of s. 190B(3) is not upon the accuracy or correctness of the native title claim group description. It is upon whether the application of identified rules or principles describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group: *WA v NTR* — at [67].

Consideration of the description contained in the application

Members of a Mirarr group

The persons described at [4](a) are persons who are members of Mirarr Gundjeihmi, Mirarr Urningangk or Mirarr Mengerrdji ‘by virtue of descent through his or her father or father’s father or by virtue of adoption into one of the groups’.

Although it is not explicitly stated, I understand the description to mean that an individual’s identity as a Mirarr person arises where their father or paternal grand-father was or is a Mirarr member. The same principle would seemingly also mediate the father’s or paternal grand-father’s recruitment into a Mirarr group, unless those persons were adopted into a Mirarr group.

This principle of patrilineal descent explains how members, as a general class of persons, are recruited into a Mirarr group. However, there is not sufficient information to enable it to be ascertained whether any particular person is a member of a Mirarr group.

While it is regulated on a patrilineal basis this is essentially a description which provides that persons descended from earlier Mirarr members are themselves Mirarr. In this regard, while its operation is specific, this principle is, in essence, a description which provides that descent from earlier members of a Mirarr group regulates contemporary membership. However, there is no information which identifies those earlier members.

In order to apply this particular principle it is necessary to first know with some specificity those persons who are identified as being Mirarr. Without this ‘point of reference’ it is difficult to

consider how the application of this particular principle could enable it to be ascertained whether any particular person is a member of a Mirarr group by virtue of patrilineal descent.

I note that a similar issue was the subject of some consideration in *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732. In that instance the Court accepted that something more than a rule or principle of descent was necessary before it could be ascertained where any particular person was a member of the native title claim group — at [13] to [27]. Of course each claim group description must be considered on its own facts and construction.

For the reasons I have outlined above it is my view that the description and provided information is not sufficiently clear. It requires some further information, and it is only then that the application of the principle of patrilineal descent would answer whether any particular person is a member of a Mirarr group.

Persons related to a Mirarr member

The persons described at [4](b) and (c) are respectively:

- those persons whose mother or mother's mother was or is a member of a Mirarr group; or
- persons who are spouses of a member of a Mirarr group

While they are members of the native title claim group, it is my understanding that these persons are not members of a Mirarr group. Nonetheless the membership of these persons to the native title claim group is regulated through their relationship with a Mirarr person.

As the native title claim group description is not sufficiently clear to enable it to be ascertained whether a person is/was a member of a Mirarr group it logically follows that it could not be ascertained whether any particular person had a relationship with a Mirarr person.

Persons who are members of a group which neighbours the Mirarr Gundjeihmi traditional estate

The persons described at [4](d)(i) are described as people who are members of the native title claim group by virtue of being a member of a group, other than the Mirarr Urningangk or Mirarr Mengerrdji groups, which has an estate that neighbours the traditional estate of the Mirarr Gundjeihmi (a neighbouring group).

While I understand this to mean that any person who is a member of a neighbouring group is also a member of the native title claim group, there is not sufficient information to enable it to be ascertained whether any particular person is a member of a neighbouring group. There is no identification of these particular groups or the various rules and principles by which members are recruited into them. Without elaboration as to how members are recruited into an identified neighbouring group it could not be ascertained whether any particular person was such a member.

Spouses of members of neighbouring groups

The native title claim group includes a person who is the spouse of a member of a neighbouring group. Accordingly the membership of these persons to the native title claim group is regulated through this specific relationship.

As the native title claim group description is not sufficiently clear to enable it to be ascertained whether a person is/was a member of a neighbouring group it logically follows that it could not be ascertained whether any particular person is the spouse of a member of a neighbouring group.

Persons who have spiritual affiliation or ritual authority

A person who has a connection to the claim area by virtue of related spiritual affiliations or ritual authority in relation to the claim area is a member of the native title claim group.

I do not understand what is meant by this description and in particular the term 'related spiritual affiliations or ritual authority'. I accept that it is a term which has meaning for the native title claim group, however that meaning is not clear or otherwise explained. It does not have an ordinary and obvious meaning which is otherwise capable of being understood.

This description is entirely unclear such that it could not be ascertained whether any particular person was a member of the native title claim group. Without elaboration, this criterion as described is incapable of conveying sufficiently clear meaning: *Colbung v Western Australia* [2003] FCA 774 — at [41].

Conclusion

For the reasons I have provided above, I am not satisfied that the native title claim group description is sufficiently clear to enable it to be ascertained whether any particular person is in that group.

Subsection 190B(4)

Native title rights and interests identifiable

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

Result

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

Reasons

In considering whether the description of the claimed native title rights and interests is sufficient to allow the native title rights and interests to be readily identified I must be satisfied that they are understandable and have meaning: see *Doepel* — at [99].

I understand that my task at s. 190B(4) is not to consider whether the claimed native title rights and interests are established within a particular application. That is, broadly, the task which is required by s. 190B(6). Rather, the nature of my consideration of s. 190B(4) is limited to considering whether the claimed rights and interests are understandable and otherwise have meaning.

Schedule E of the application contains the description of the native title rights and interests claimed, and provides:

- (5) By the traditional laws and customs that govern the exercise of the native title:
 - (a) the claim area is within the traditional estate of the Mirarr Gundjeihmi;
 - (b) members of the Mirarr Gundjeihmi have:
 - (i) rights of access to and use of the claim area;

- (ii) rights to control access to and use of the claim area by others;
 - (c) the members of the Mirarr Mengerrdji and Mirarr Urrningangk, and the persons referred to in paragraphs 4(b), (c) and (d) above, have rights of access to and use of the claim area, subject to the right specified in paragraph (b)(ii).
- (6) Where the native title has not been wholly or partially extinguished, or where prior extinguishment is required by ss 47A or 47B of the Act to be disregarded, the native title comprises, subject to the traditional laws and customs that govern its exercise, rights to possess, occupy, use and enjoy the claim area to the exclusion of all others.
- (7) Where the native title has not been wholly extinguished, but has been partially extinguished, and prior extinguishment is not required by ss 47A or 47B of the Act to be disregarded, the native title comprises, subject to the traditional laws and customs that govern its exercise:
- (a) the right to travel over, to move about and to have access to the claim area;
 - (b) the right to hunt and to fish on the land and waters of the claim area for personal, domestic or non-commercial exchange or communal consumption for the purposes allowed by and under the traditional laws and customs of the native title holders;
 - (c) the right to gather and to use the natural resources of the claim area such as food, medicinal plants, wild tobacco, timber, stone and resin for personal, domestic or non-commercial exchange or communal consumption for the purposes allowed by and under the traditional laws and customs of the native title holders;
 - (d) the right to take and to use the natural water on the claim area;
 - (e) the right to live, to camp and for that purpose to erect shelters and other structures on the claim area;
 - (f) the right to light fires on the claim area for domestic purposes, but not for the clearance of vegetation
 - (g) the right to conduct and to participate in the following activities on the claim area:
 - (i) cultural activities;
 - (ii) cultural practices relating to birth and death, including burial rites;
 - (iii) ceremonies;
 - (iv) meetings;
 - (v) teaching the physical and spiritual attributes of sites and places on the claim area that are of significance under the traditional laws and customs of the native title holders;
 - (h) the right to maintain and to protect sites and places on the claim area that are of significance under the traditional laws and customs of the native title holders;
 - (i) the right to share or exchange subsistence and other traditional resources obtained on or from the claim area for personal, domestic or non-commercial exchange or communal consumption for the purposes allowed by and under the traditional laws and customs of the native title holders;

- (j) the right to be accompanied on to the claim area by persons who, although not native title holders, are:
 - (i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the claim area;
 - (ii) people who have rights in relation to the claim area according to the traditional laws and customs acknowledged by the native title holders;
 - (iii) people required by the native title holders to assist in, observe or record traditional activities on the claim area.

The rights referred to at (a) to (j) do not confer on the native title holders possession, occupation, use and enjoyment to the exclusion of others.

- (8) The native title rights and interests are subject to and exercisable in accordance with the valid laws of the Northern Territory of Australia and the Commonwealth of Australia.

I am satisfied that each of the claimed native title rights and interests are readily identifiable for the purposes of s. 190B(4). That is, they are understandable as native title rights and interests and otherwise have meaning.

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.

The task required by s. 190B(5) was considered by Mansfield J in *Doepel*, where his Honour found:

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: *Doepel* — at [17]; affirmed in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala #2 FC*) — at [83].

As the wording of s. 190B(5) suggests, the factual basis must be sufficient to support the particular assertions required by subsections (a) to (c) as it applies to the native title claim group. In this regard, Dowsett J found in *Gudjala #2*:

There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land —at [40].

That is, the factual basis must support the assertion that ‘the identified claim group (and not some other group) hold the rights and interests claimed (and not some other rights and interests)’: *Gudjala #2* —at [39].

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

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

Result

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Reasons

Nature of the task at s. 190B(5)(a)

The task at s. 190B(5)(a) requires me to consider whether the provided factual basis is sufficient to support the assertion that the *whole* native title claim group have an association with the land and waters subject to the application and that the predecessors of that group had that association with those land and waters since European settlement: *Gudjala #2* —at [52].

The nature or meaning of ‘association’ is to be informed and understood having regard to the information provided within an application and what it asserts the nature of the association to be. That is, association does not necessarily require physical presence of persons on those land and waters, nor does it mandate a spiritual connection to those areas: *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) —at [26].

However, whatever the nature of a claim group’s association with those land and waters, the factual basis must be sufficient to support an assertion that the claim group’s association is with the entire area subject to the application: *Martin* —at [26].

Factual basis provided to support the assertion that the claim group have, and their predecessors had, an association with the claim area

Annexure F of the application provides information which is said to support the assertion that the native title claim group have, and its predecessors had, an association with the land and waters claimed by the application. By way of summary this information provides:

Historical association

- archaeological deposits on Mirarr country suggest habitation on the Mirarr estate extending back at least 60,000 years —at [8];

- rock art on Mirarr country indicates contact with Macassans, either directly or via Aboriginal people on the coast who traded with Macassans for centuries — at [6];
- the first contact with non-Aboriginal people may have been the 1866 McKinley expedition which passed through, or very close to, the application area and is recorded as camping near an identified Mirarr sacred site — at [4];
- since time immemorial and in accordance with traditional laws and customs, the application area has been regarded as Mirarr country by other Aboriginal people in the region — at [9];
- Mirarr *na-yuhyunggi* possessed, occupied, used and enjoyed the application area and who then passed along traditional laws and customs which enabled the Mirarr and those who they succeeded to possess, occupy use and enjoy the application area at the time of the acquisition of sovereignty and at the time of contact with non-Aboriginal people — at [2];

Contemporary association

- the continuity of spiritual and ancestral connections is based on a foundation, communally acknowledged, that *na-yuhyunggi* created the land and waters and ongoing human relationships with it — at [13];
- the continuity of acquisition of customary rights and interests in land and waters is usually mediated by reference to those having Mirarr *gunmogurrurr* established by a patrilineal connection with the application area — at [28]. The term *gunmogurrurr* is not explained in the application. In the application in its form as filed on 4 October 1999, this term was explained as relating to the Mirarr groups and ‘denot[ing] an entity which consists of members of one or more patrilineages who hold communal rights to an area of land including and generally defined by a set of dreaming sites’. I consider that this explanation continues to remain applicable to this term as it is used in the current form of the application;
- within the application area, there exist many Mirarr place names and associated areas of significance. The claimants possess stories which relate to the application area. Detailed information about these places, stories and sites is not provided in the application, due to their sensitive nature, however some general information is provided about them. This general information provides the Mirarr names of specific places within the application area as well as the Mirarr names of natural resources, such as paperbark trees and pandanus scrub, which the claim group know the locations for in the application area. It is stated that the claim group continues to access and use these areas, as their ancestors did before them — at [22] to [25];
- the claim group engage in hunting activity over the claim area — at [25];
- the ‘Mirarr have been accepted in two *Land Rights Act* claim processes in relation to the application area and the surrounding estate as being a “local descent group who have common spiritual affiliations to sites on the land that place the group under a primary spiritual responsibility for the sites and land. There was no dispute that members of the group are entitled by Aboriginal tradition to forage as of right over that land” (Alligator Rivers Stage II Land Claim, *Report by the Aboriginal Land Commissioner*, July 1981, p.23)’ — at [3];

- Schedules G and M of the application provide information regarding current activities of the claimants on, and associated with, the lands and waters' subject to the application. Some examples of these activities include residing on the land and caring for sites on the land and waters in accordance with spiritual obligations.

I am not satisfied that the provided factual basis summarised above, is sufficient to support the assertion that the predecessors of the whole native title claim group had an association with the application area.

While it is not altogether clear, I do have some general understanding of the native title claim group. I understand that it is a composition of persons from a number of groups, which includes Mirarr groups and also includes:

- persons related in specific ways to at least one Mirarr person;
- persons who are members of groups which are not Mirarr, but neighbours of the Mirarr Gundjehmi estate; and
- persons who have a connection to the claim area which is not mediated by Mirarr membership, a relationship with a Mirarr member or membership to a group that neighbours the Mirarr Gundjehmi estate.

The conclusion or understanding I have formed from this is that the Mirarr groups comprise part of, but not the whole, native title claim group.

The information provided in support of the assertion that the predecessors of the native title claim group had an association with the application area is limited to the association of the predecessors of the Mirarr groups. Even in this regard that information is somewhat limited. However, it is sufficient to support the assertion that those predecessors had an association with the application area.

In forming this view I refer to the information provided that Mirarr members and their predecessors have occupied, used and enjoyed the application area since time immemorial, when Mirarr *na-yuhyunggi* created that land and ongoing human relationships with it. Further, the Aboriginal Land Commissioner's report regarding the Alligator Rivers Stage II Land Claim is said to refer to areas including the application area. That information identifies the Mirarr people as having a traditional right to forage over that area.

This information provides particular and specific information which is unique to Mirarr people and further explains that the association of those people with the application area is of both a physical and spiritual nature.

As *Martin* makes clear, there is no objective definition or understanding of 'association'. Such an understanding is derived from the information in the application or other material provided to support the relevant assertion: *Martin* — at [26]. Accordingly I am satisfied that there is a factual basis which is sufficient to support the assertion that the predecessors of the Mirarr groups had an association with the application area.

There is however no information to support the assertion that the predecessors of persons other than Mirrar people had an association, spiritual or otherwise, with the application area.

The general requirement of s. 190B(5) requires a factual basis which is sufficient to support the assertion that 'the identified claim group (and not some other group) hold the rights and interests claimed (and not some other rights and interests)': *Gudjala #2* — at [39].

In this instance, the information does not support an assertion that the predecessors of the identified claim group had an association with the application area. Rather it supports an assertion that the Mirarr group and its predecessors had such an association. For the reasons I've already given, it is my understanding that while the Mirarr groups are part of the claim group they are not, of themselves, the identified claim group.

For these reasons I am not satisfied that the requirements of s. 190B(5)(a) have been met.

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

Result

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Reasons

Section 190B(5)(b) requires me to consider whether there is a factual basis which is sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group. As with s. 190B(5)(a), paragraph (b) requires me to be satisfied that the information sufficiently supports the assertion in relation to the *identified* claim group, and not a part of that group.

The term 'traditional' was considered in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

Yorta Yorta provides that for a law or custom to be traditional it must satisfy four broad criteria:

- the law or custom must have been passed from generation to generation of a society, usually by word of mouth or common practice — at [46];
- the acknowledgment and observance of the law or custom must have continued substantially uninterrupted since sovereignty — at [87];
- the origins of the content of the law or custom concerned is to be found in the normative rules of the relevant society which existed before the assertion of sovereignty by the Crown — at [46];
- the normative system which existed before the assertion of sovereignty must have had a continuous existence and vitality since sovereignty — at [47].

The use of the word 'traditional' in s. 190B(5)(b) requires me to consider whether there is a factual basis which is sufficient to support the assertion that there are traditional laws and customs acknowledged and observed by a native title claim group, having regard to the meaning of traditional as explained by the High Court in *Yorta Yorta*: *Gudjala #2* — at [63] and [65].

Factual basis provided to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group

Pre-sovereignty society

In my reasons regarding s. 190B(5)(a) above, I have provided a summary of the factual basis provided in relation to the historical association of the claim group with the application area.

Some of that information is relevant here also. However for clarity, I set out below the information provided in support of the assertion that there was a society which existed before the assertion of sovereignty by the Crown, some of which has been set out above.

- since time immemorial and in accordance with traditional laws and customs, the application area has been regarded as Mirarr country by other Aboriginal people in the region — at [9];
- Mirarr *na-yuhyunggi* possessed, occupied, used and enjoyed the application area, in accordance with their traditional laws and customs. Those ancestors passed along traditional laws and customs which enabled the Mirarr and those who they succeeded to possess, occupy, use and enjoy the application area:
 - (a) at the times when British sovereignty was asserted; and
 - (b) at the time of contact with non-Aboriginal people — at [2];
- according to the claimants' traditional laws and customs, the physical and cultural landscape, along with the legal, social, kinship and religious systems and the conditions for their continuity were established by *na-yuhyunggi* who travelled on, above or below the land in a creative era long ago. The evidence of these travels remains evident today throughout the landscape. The Mirarr described in their oral tradition of song-poetry, legend and ritual the ancestral past or Dreamtime. It is from this period and these ancestors that Mirarr derive their rights to land — at [38].
- the continuity of spiritual and ancestral connections is based on a foundation, communally acknowledged, that *na-yuhyunggi* created the land and waters and ongoing human relationships with it — at [13];
- the continuity of acquisition of customary rights and interests in land and waters is usually mediated by reference to those having Mirarr *gunmogurrurr* established by a patrilineal connection with the application area — at [28];
- the claimants' laws and customs are passed from generation to generation through modes of oral transmission. The claimant's knowledge of descent connections is transmitted orally. It is well documented throughout Aboriginal Australia that Aboriginal genealogical memory is shallow and that individuals beyond the grandparental level are rarely remembered. Beyond this level, ancestors are ultimately believed to be spiritually descended from the *na-yuhyunggi* — at [30].

Consideration of the information provided

Based on the above information I understand the assertion to be that at, and prior to, the acquisition of sovereignty there was a society within the application area which was the Mirarr society.

In *Yorta Yorta* the High Court found:

To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a

particular society that exists as a group which acknowledges and observes those laws and customs – at [50].

I of course do not suggest that I am required to consider or determine whether there are, as a matter of fact, traditional laws and customs derived from a society in existence since the acquisition of sovereignty to the present day. However, the above extract does demonstrate that there is a fundamental relationship between an identified society and traditional laws and customs of a native title claim group.

In considering this relationship within the context of the registration test, Dowsett J considered in *Gudjala #2* what was required of a factual basis, generally, to satisfy s. 190B(5)(b). In this regard his Honour found that it is not necessary for a factual basis to assert, or otherwise support an assertion, that the predecessors of a native title claim group were themselves members of an identified society which existed prior to the acquisition of sovereignty.

However ‘there must be some connection between a native title claim group and the relevant pre-sovereignty society from which the claim group asserts that it has derived its native title rights and interests’: *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala #2* [2009]) – at [40].

Insofar as the native title claim group description refers to Mirarr people, the connection between the pre-sovereignty society and those members is clear. I also understand that there is some connection between that society and persons who are related to a member of the Mirarr groups, but who are not themselves Mirarr.

In particular, this relates to the persons who are members of the native title claim group because:

- their mother or mother’s mother was/is a member of one of the Mirarr groups; or
- they are the spouse of a Mirarr member

It would seem reasonable to conclude that those members’ native title rights and interests in the area arise from the Mirarr society and its laws and customs. Prior to its amendment on 20 October 2009, so much was said in the application in its form as filed on 4 October 1999. I consider it appropriate to have regard to that information in this instance and accordingly have done so.

However, neither that information nor the current application explains the connection of the remaining members of the native title claim group with the Mirarr society. When the native title claim group description is read as a whole it seems that those remaining members are effectively described as persons who are members of groups which are not Mirarr. That is, the application does not describe these particular members of the claim group as members of the Mirarr society. There is no information which otherwise explains the connection of those members with the Mirarr society.

I note that Annexure F of the application does provide information about the recruitment of members into the native title claim group by various processes of succession, incorporation or fusion. Broadly this information explains that under the claimants’ system of traditional law and custom there are processes of succession and incorporation into the native title claim group.

This information does not assist in clarifying or understanding the connection of the non-Mirarr members with the Mirarr society. Rather it asserts that there are traditional laws and customs of

the claim group by which persons can *become* a member of the native title claim group through these processes of succession and/or incorporation.

Conclusion

In the absence of any information which explains the connection of the identified native title claim group with the Mirarr society, the factual basis is not sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group. This is because there is not sufficient information to explain the connection between the identified pre-sovereignty society from which the claim group seemingly asserts that it has derived the identified native title rights and interests: *Gudjala #2* at —[39]; *Gudjala #2 [2009]* —at [40].

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

Result

I am **not satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Reasons

As I am not satisfied that there is a sufficient factual basis to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group, I am not satisfied that there is a sufficient factual basis to support the assertion that the native title claim group continues to acknowledge and observe traditional law and customs.

Subsection 190B(6)

Prima facie case

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

Result

The application **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.

Reasons

Requirements of s. 190B(6)

The term 'native title rights and interests' is defined at s. 223(1) of the Act. It is therefore appropriate that I have regard to this definition when considering whether a particular claimed native title right or interest is established prima facie.

This definition provides that a native title right or interest is one which is 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the native title claim group. In this regard there is a relationship between the information considered for the purposes of s. 190B(5) and the considerations required by s. 190B(6): *Gudjala #2* — at [85] to [87]; *Gudjala #2 [2009]* — at [84].

I am not satisfied that the application provides information which is sufficient to support the assertion that there are traditional laws and customs acknowledged and observed by the identified native title claim group. In the absence of this information I am not satisfied that any of the claimed native title rights or interests can be established prima facie.

Subsection 190B(7)

Traditional physical connection

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

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

Result

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

Reasons

The requirements of s. 190B(7) are quite specific. They require me to consider whether there is at least one member of the native title claim group who has, or previously had, a traditional physical connection with any part of the land or waters covered by the application.

The term 'traditional physical connection' is not defined by the Act. In my view, the use of the word traditional requires me to have regard to the High Court's definition and explanation of traditional in *Yorta Yorta*, to which I have referred previously: *Gudjala #2* — at [89].

In *Gudjala #2* [2009] Dowsett J commented:

As to s 190B(7), much may depend upon the meaning of the term "traditional physical connection". I have not been referred to any authority on the point. It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs — at [84].

In *Doepel*, Mansfield J also considered the nature of the Registrar's task required by s. 190B(7). In this regard, his Honour observed:

Section 190B(7) imposes a different task [to s. 190B(5)] upon the Registrar. It does require the Registrar to be satisfied of a particular fact or facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as the Court when it comes to hear and determine the application for determination of native title rights and interest. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration — at [18].

As Mansfield J acknowledged, the task required by s. 190B(7) is a confined one. It requires the Registrar to be satisfied that at least one member of the native title claim group has a traditional physical connection to some part of, but not necessarily the entire, application area.

As an initial question, I must be satisfied that a particular person is a member of the native title claim group. If this is the case, I must then consider whether that one person (at least) has, or previously had a traditional physical connection with any part of the application area.

In my view it is significant to note that, unlike s. 190B(5) and s. 190B(6), I am not required to be satisfied about whether there is information which supports or satisfies this condition as it relates to the whole of the identified native title group.

Information provided in the application

I have in my reasons regarding subs s. 190B(5)(a) and (b), provided a summary of the applicant's factual basis to support the assertion that the native title rights and interests claimed exist. That summary is relevant here also.

As I have briefly set out earlier in my reasons, I am of the view that there is information in the application sufficient to support the following assertions regarding the Mirarr people:

- there was, at the time of the acquisition of sovereignty, a Mirarr society within the application area which acknowledged and observed a system of laws and customs: Annexure F — at [2] and [3];
- the predecessors of the Mirarr people had, at the time of the acquisition of sovereignty and at the time of first contact with non-Aboriginal people, an association with the application area: Annexure F — at [2], [9], [13], [29] and [30];
- the Mirarr People have an association with the application area: Annexure F — at [3], [7], [9], [11], [22] to [26] and [28];
- the Mirarr society, and its laws and customs, has continued to exist in a substantially uninterrupted way since the time of first contact in approximately 1866: Annexure F — at [3], [7], [9], [13], [28] and [30]; and
- members of the Mirarr society are members of the native title claim group: Schedule A.

I am also satisfied that the factual basis is sufficient to support the assertion that Mirarr people, under their traditional law have a right to access the application area and to also protect sites within that area.

In particular, the application identifies that Mirarr society was created by Mirarr *na-yuhyunggi* who also established the legal and religious systems relevant to Mirarr People. The findings of the Aboriginal Land Claim Commissioner, which I have cited previously, also support this assertion. In particular, that the Mirarr have 'common spiritual affiliations to sites on the land that place the group under a primary spiritual responsibility for the sites and land': Annexure F — at [3] and [38].

Additionally, the application provides information of a deceased Mirarr individual who was a Senior Traditional Owner during two unnamed land claim processes. I understand the suggestion to be that one of these processes was the Alligator Rivers State II land claim: Annexure F — at [7].

This individual was the father of a number of Mirarr people and is acknowledged in historical sources as 'representing one of the few local Aboriginal families remaining in their traditional country following the social disruption brought to the region in the early to mid twentieth century...': Annexure F – at [7].

In my view this information is sufficient to support the assertion that there are traditional laws acknowledged by Mirarr people. In particular that there are traditional laws about the access of Mirarr people to their country, which includes the application area, and the activities which can be carried out on that country.

Traditional physical connection of Yvonne Margarula

The application provides at Schedule M, specific information regarding the traditional physical connection of Yvonne Margarula with parts of the application area. I understand that Ms Margarula is a member of the native title claim group because she is a Mirarr person. Ms Margarula is a named applicant and has been so since the application was first lodged with the Registrar in 1997. Prior to its amendment on 20 October 2009, the application identified Ms Margarula as a Mirarr Gundjeihmi individual.

Schedule M of the application states:

Yvonne Margarula spends part of the week residing part-time at Kinjo Place, Jabiru; works at the Gundjeihmi Aboriginal Corporation at Lakeview Park, Jabiru; travels throughout the claim area on a regular basis; collects bush tucker from the claim area; and attends clan meetings in the application area on a regular basis.

In my view this information identifies that at least one member of the native title claim group does have a traditional physical connection with at least part of the application area.

I am satisfied that this connection is traditional, having regard to the information I have outlined immediately above, as under their traditional law and custom Mirarr people have the right to access the area, to forage over that area and to protect sites therein.

Conclusion

As I am satisfied, having regard to the plain and ordinary meaning of s. 190B(7), that Yvonne Margarula is a member of the native title claim group and that she has a traditional physical connection to the application area arising from Mirarr traditional law and custom, I am satisfied that this requirement has been met.

Subsection 190B(8)

No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

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).

I have had regard to the geospatial assessment and overlap analysis dated 7 December 2009, to which I have referred previously. This assessment identifies that there is no approved determination of native title in any area which is claimed by the current application.

I have set out further information relating to the geospatial assessment and overlap analysis in my reasons regarding s. 190C(3). I rely on that information here also and am therefore satisfied that there is no approved determination of native title within any part of that 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).

Schedule B[8] of the application states that subject to Schedule L, any area to which a previous exclusive possession act under s. 23B of the act has been done, is excluded from this application. Schedule L is of such an effect that the applicant asserts only s. 47B of the Act is relevant.

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).

Schedule E[6] of the application provides that where native title has not been wholly or partially extinguished, or where s. 47A or 47B of the Act are applicable, the applicant claims 'rights to possess, occupy, use and enjoy the claim area to the exclusion of all others'.

Schedule E[7] provides that where there has been partial, but not complete, extinguishment of native title and s. 47A or 47B of the Act are not applicable, the native title comprises a series of claimed rights and interests which do not confer possession, occupation, use and enjoyment to the exclusion of all others.

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).

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

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

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

I have had regard to Schedule P of the application which is entitled 'Schedule P: Claims for exclusive possession of offshore places'. Under this heading the application states 'not applicable'. In my view, while it is perhaps not ideal, this is sufficiently clear to indicate that the applicant does not claim exclusive possession of any offshore place.

I have also had regard to Schedule E[6] which states that the applicant's claim to exclusive possession is limited to areas where 'native title has not been wholly or partially extinguished...'. Schedule E[8] also states that 'the native title rights and interests are subject to and exercisable in accordance with the valid laws of the Northern Territory of Australia and the Commonwealth of Australia'.

Having regard to all of this information, I am satisfied that the applicant does not claim exclusive possession over those areas.

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

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

Schedule E[6] of the application provides that where native title has not been wholly or partially extinguished, or where s. 47A or 47B of the Act are applicable, the applicant claims 'rights to possess, occupy, use and enjoy the claim area to the exclusion of all others'.

Schedule E[7] provides that where there has been partial, but not complete, extinguishment of native title and s. 47A or 47B of the Act are not applicable, the native title comprises a series of claimed rights and interests which do not confer possession, occupation, use and enjoyment to the exclusion of all others.

[End of reasons]

Attachment A

Summary of registration test result

Application name	Jabiru Township
NNTT file no.	DC97/7
Federal Court of Australia file no.	NTD 6027/98
Date of registration test decision	20 August 2010

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)	Not 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)(h)	Met

Test condition	Subcondition/requirement	Result
s. 190C(3)		Met
s. 190C(4)		Overall result: Met
	s. 190C(4)(a)	Met
	s. 190C(4)(b)	N/A

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Not met
s. 190B(3)		Overall result: Not met
	s. 190B(3)(a)	N/A
	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)		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