

NATIONAL NATIVE TITLE TRIBUNAL

RECONSIDERATION OF CLAIM

Section 190E *Native Title Act 1993* (Cth)

Application Name: Jabiru Township
NNTT file no: DC97/7
Federal Court of Australia file no: NTD6027/98
Tribunal: Deputy President John Sosso
Place: Brisbane
Date: 11 November 2010

Legislation *Native Title Act 1993* (Cth) ss. 13, 24MD, 29, 31, 47, 47A, 47B, 61, 62, 63, 64, 86F, 123, 186, 190, 190A, 190B, 190C, 190D, 190E, 190F, 223, 225, 251B

Cases *Akiba v Queensland (No 2)* [2010] FCA 643
Attorney-General (NT) v Ward (2003) 134 FCR 16
Daniel v Western Australia [2003] FCA 666
Gudjala People #2 v Native Title Registrar [2007] FCA 1167
Gudjala People No 2 v Native Title Registrar (2008) 171 FCR 317
Gudjala People #2 v Native Title Registrar [2009] FCA 1572
Harrington-Smith v Native Title Registrar [2007] FCA 414
Hazelbane v Doepel (2008) 167 FCR 325
King v Northern Territory (2007) 162 FCR 89
Landers v South Australia (2003) 128 FCR 495
Martin v Native Title Registrar [2001] FCA 16
Moses v Western Australia (2007) 160 FCR 148

Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (2005) 145 FCR 442

Northern Territory v Doepel (2003) 133 FCR 112

Powder Family v Registrar, Native Title Tribunal [1999] FCA 913

Queensland v Hutchinson (2001) 108 FCR 575

Quall v Native Title Registrar (2003) 126 FCR 512

Risk v National Native Title Tribunal [2000] FCA 1589

Sampi v Western Australia [2010] FCFAC 26

Strickland v Native Title Registrar (1999) 168 ALR 242

Wakaman People No 2 v Native Title Registrar (2006) 155 FCR 107

Ward v Registrar, National Native Title Tribunal [1999] FCA 1732

Watson v Native Title Registrar (2008) 168 FCR 187

Western Australia v Native Title Registrar (1999) 95 FCR 93

Western Australia v Sebastian (2008) 173 FCR 1

Western Australia v Strickland (2000) 99 FCR 33

Wulgurukaba People #1 v Queensland [2002] FCA 1555

Yorta Yorta Community v Victoria (2002) 214 CLR 422

Introduction

[1] On 20 August 2010 Ms. Cobey Taggart, Delegate of the Native Title Registrar, gave notice, pursuant to s. 190D(1) of the *Native Title Act 1993* (Cth) ('the Act') of her decision not to accept the claim made in the Jabiru Township native title determination application for registration pursuant to s. 190A of the Act. The Delegate reached this conclusion because the application did not, in her opinion, meet the following statutory conditions:

- (a) s. 190C(2) - information required by ss. 61 and 62, in particular the requirements of s. 62(1)(b) and s. 62(2)(b);
- (b) s. 190B(2) – identification of area subject to native title;
- (c) s. 190B(3) – identification of the native title claim group;
- (d) s. 190B(5) - factual basis for claimed native title; and
- (e) s. 190B(6) – prima facie case.

[2] By letter dated 20 August 2010, Mr. Hamish MacLeod, Case Manager in the Central Australia Registry, wrote to Mr. R Levy, Principal Legal Officer of the Northern Land Council, the legal representative of the Applicant, notifying him of the Delegate's decision.

[3] On 1 October 2010 the Northern Land Council, on behalf of the Applicant, applied, pursuant to s. 190E(1) of the Act, for reconsideration of the claim. Such application must, pursuant to s. 190E(2):

- (a) be in writing; and
- (b) be made within 42 days after the notice under s. 190D(1) is given; and
- (c) state the basis on which the reconsideration is sought.

It will be noted that the 42 day time period commences *after* the notice is given. Therefore, when calculating the 42 days, the first day is the day after the notice is given and not the day of such notice. In this case the 42 day period commenced on 21 August 2010, and, as such, the application was received within the statutory time period.

[4] The application set out the following grounds for seeking reconsideration:

"2. The bases on which reconsideration of the claim made in the Amended Application is sought are as follows:

- (1) the claim satisfies all the conditions in ss 190B and 190C of the Native Title Act, including those referred to in [3];*
- (2) the grounds upon which the Delegate of the Registrar decided that the claim did not satisfy the conditions referred to in [3] differ to those set out in a letter dated 23 February 2010 that conveyed what was said to be the preliminary view that had been formed by the Delegate;*
- (3) the Delegate did not, subsequent to the letter of 23 February 2010, and before deciding not to accept the claim on the grounds referred to in [3], notify the Applicant of the difference in grounds, and that the Application may be amended under the Federal Court Rules."*

[5] The Applicant also requested (at [4]) that the Delegate identify the documents, mentioned at page seven of the Delegate's Registration Test Decision, which she considered when making her decision. Mr. Harding, the Acting NSW/ACT State Manager of the Tribunal, subsequently provided a list of those documents, and on 19 October 2010 Ms. Tamara Cole of the Northern Land Council requested copies of four identified documents. These documents were copied and provided by Mr. Harding to Ms. Cole on the same day.

[6] Member MacPherson considered the application in light of the requirements of s. 190E(2), (3) and (4), and advised the President on 13 October 2010 that he was satisfied that the statutory requirements were met.

[7] The reconsideration must be conducted by a single member of the Tribunal – s. 190E(5). On 14 October 2010 the President appointed me, pursuant to s. 123(1)(cb), to be the person to constitute the Tribunal for the purposes of reconsidering the decision of the Delegate of the Registrar not to accept the claim.

[8] An Applicant may not seek reconsideration either if an application has already been made to the Federal Court under s. 190F(1) for review or if there has been a previous reconsideration request (s. 190E(3) and (4)). Neither of these circumstances is present, and as such, the Tribunal is empowered to reconsider the claim.

[9] There would appear to be no future act notices of the type enumerated in s. 190E(8)(a) – (d) impacting on the claim, and, consequently the need to use best endeavours to meet the timeframes outlined in s. 190E(8) (e) – (h) are not applicable. The only timeframe of relevance is the requirement, mandated by s. 190E(9), that the Tribunal finish reconsidering the claim as soon as is practicable. Subject to the requirements of procedural fairness, I have attempted to satisfy the requirements of s. 190E(9).

[10] On 14 October 2010 Mr. Liam Harding, the Acting NSW/ACT State Manager of the Tribunal wrote to the Applicant care of Mr. Ron Levy, the Principal Legal Officer of the Northern Land Council. Mr. Harding pointed out that on reconsideration a Member could consider not only the information before the Delegate but any other information that the Member considers relevant. Mr. Levy was invited to provide any further information by 21 October 2010 that the Applicant wished that I consider.

[11] Mr. Harding also informed Mr. Levy that if the Member is of the view that, on its face, an application is likely to be accepted for registration, the Territory Minister would be informed and afforded an opportunity to comment on any additional material provided. Mr. Harding also provided information on other matters germane to the reconsideration.

[12] On 14 October 2010 Mr. Harding also wrote to the Northern Territory care of Ms. Anita Kneebone, alerting the Territory to the fact that a request for reconsideration had been received in respect of Jabiru Township and that if, on the face of any additional information provided, the Member was of the view that the claim would be likely to be accepted for registration, a copy of the additional material would be provided to the Northern Territory to allow an opportunity for comment.

[13] On 18 October 2010 Ms. Cole emailed Mr. Harding as follows:

"I confirm that the Applicant intends to file a further submission in support of its contentions dated 1 October 2010 and information which the Tribunal may have regard to under section 190E(7) of the Native Title Act (Cth) 1993.

I advise that owing to other commitments, counsel for the Applicant will not be in a position to file the additional materials by 21 October 2010 as requested by the Tribunal.

Accordingly, counsel respectfully requests that the Tribunal extend time to file until 1 November 2010."

[14] Ms. Cole subsequently wrote to the Tribunal on 20 October 2010 formally requesting an extension of time to provide further submissions and concluded in the following terms:

"I also confirm that the Applicant accepts that if it is afforded an extension of time, it is likely the Tribunal will require a longer period of time to deliver a decision owing to the commitments of the delegate assigned to this matter."

The reference to the "delegate assigned to this matter" is, presumably, a reference to me as the Member reconsidering the claim pursuant to s. 190E. The commitments refer to the fact that I would be overseas between 12 – 26 November 2010, and the delay in providing further submissions could result in the reconsideration not finalizing until early December 2010. As the Applicant accepted that such a delay was possible if the further submissions were not provided until 1 November 2010, I determined to grant the extension of time sought.

[15] The Tribunal was provided with the Applicant's submission on registration on 29 October 2010. The submission was prepared by Mr. Sturt Glacken of Counsel and attached to it were various documents filed with the Federal Court in relation to the Jabiru Township native title determination application (which are listed in Appendix C to the submission). A copy of the submission and attached documents was forwarded by Mr. Harding to Ms. Kneebone on 2 November 2010. Ms. Kneebone was informed that I was of the view that on the face of it the application may be accepted for registration and the Territory was given until 8 November 2010 to provide any comments on the Applicant's submission. The Northern Territory did not avail itself of the opportunity to comment.

[16] At the outset (at para 1), Mr. Glacken contended that the function of the Tribunal under s. 190E involved a review de novo. Mr. Glacken then stated:

"The Tribunal is not concerned with whether the Registrar's decision is affected by error. Nevertheless, it is as well to pay attention to the respects in which the Registrar did not accept the claim for registration, as no question arises about the claim satisfying other conditions in ss 190B – 190C."

I accept that this is a correct statement of the task and focus of a Member on reconsideration.

[17] It will be noted that s. 190E(1) provides that the applicant may apply to the Tribunal “to reconsider the claim”. The Member undertaking the reconsideration is not evaluating the decision of the Delegate, but is required to independently assess the claim against the relevant statutory conditions. Nonetheless when seeking a reconsideration the Applicant must, pursuant to s. 190E(2)(c), state the basis on which the reconsideration is sought. It necessarily follows that a Member undertaking a reconsideration should have regard to the Applicant’s stated basis for seeking a reconsideration. In doing so a Member will, where appropriate, have regard to the decision of the Delegate. This will be the case, for example, where there are elements of that decision which are not contested by the Applicant and with which the Member is in agreement. Furthermore in paying due attention to the basis of the reconsideration, where this involves suggested errors in the reasoning or findings of a Delegate, then it is appropriate that the Member address those issues when making his or her own decision. However, it is not the purpose of a reconsideration to review a Delegate’s decision. It would be potentially counter-productive for an Applicant to focus all their attention on the reasoning of the Delegate and fail to address the broader issues that are before a Member on reconsideration. In doing so, an Applicant runs the risk of inadvertently channeling the reconsideration down narrow and potentially unproductive paths.

[18] It is on this basis that I have had regard to the decision of the Delegate. I have not approached this exercise on the basis that I am reconsidering her Decision, but have referred to her reasons extensively in order to ensure that the Applicant’s stated bases for seeking reconsideration are fully addressed.

[19] Before dealing with the background to the Jabiru Township application, a procedural issue requires mention. Mr. Glacken, on behalf of the Applicant, made the following submission (at para 61):

“In the circumstances, if, for any reason, the Tribunal is not satisfied that the claim in the Amended Application should be accepted for registration, then the Applicant would seek a further opportunity to be heard and to deal with any point considered adverse to the case for registration.”

[20] This submission proceeds on the assumption that even after providing the Applicant with an opportunity to put forward its case for reconsideration, there is a duty imposed on the Member, having considered that material, to inform the Applicant if the Tribunal is not satisfied, the basis for that dissatisfaction and to provide the opportunity to put forward further material.

[21] Mansfield J in *Hazelbane v Doepel* (2008) 167 FCR 325 pointed out (at 332/[25]) that the “way in which procedural fairness should be provided in any particular circumstance depends upon the nature of the decision of the statutory framework in which it is made.” Having regard to the particular

statutory framework pertaining to reconsiderations, I am of the view that there is no basis for the Applicant having a legitimate expectation, and a concomitant obligation imposed on the Member, to notify the Applicant of the opinion formed on reading the material before the Tribunal and an opportunity, or opportunities, to attempt to make further submissions.

[22] It is relevant to consider that the Registrar or her Delegate when considering a claim for registration may, before deciding whether or not to accept a claim, notify the Applicant that the claim may be amended – s. 190A(5A). In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala No 1*) Dowsett J, when referring to this subsection, said (at [15]):

“The decision to accept or reject an application is a purely administrative function, the decision depending upon whether or not such application satisfies the prescribed criteria. The Act does not suggest that the NT Registrar is to receive submissions as to any proposed decision. If anything, subs 190A(5A) suggests to the contrary. To impose such a requirement would, in my view, imply a similar requirement in many other statutory registration schemes. This would be a considerable extension of the law.”

[23] There is no equivalent to s. 190A(5A) in s. 190E, which governs reconsiderations. Clearly, a reconsideration is a decision de novo, and when making such a decision the Member is required to accord the Applicant an opportunity to present their case. In this instance such an opportunity has been provided. There is no obligation to provide further opportunities to make submissions purely on the basis that the Member has formed the opinion pursuant to s. 190E(11) that the Registrar should not accept the claim. A Member on reconsideration is entitled to proceed on the assumption that the Applicant has put forward their best case and to make a decision on the material before the Tribunal. To suggest that a Member cannot make a decision on the material before the Tribunal, but instead must indicate in advance if an adverse view is formed and provide the Applicant with potentially endless opportunities to respond, undermines the clear statutory obligation imposed by s. 190E(9) to make a decision as soon as is practicable. Further, the remedy for a dissatisfied Applicant lies, either in s. 190F, namely a review by the Federal Court, or an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The submission of Mr. Glacken, then, not only has no basis in the law governing procedural fairness, but is contrary to the clear statutory scheme for reviewing or setting aside registration test decisions.

Background to the Jabiru Township native title determination application

[24] The Jabiru Township application was originally lodged with the Tribunal on 1 September 1997 and the claim entered on the Register of Native Title Claims on the same day. The application was amended in 1998 and 1999, and accepted for registration on 14 December 1999. In short, this claim has been on the Register of Native Title Claims continuously since 1 September 1997.

[25] Following leave of the Federal Court granted on 6 October 2009, the application was further amended on 20 October 2009. This, in turn, activated, pursuant to s.190A, the obligation of the Registrar to registration test the claim made in the application. The amendments which triggered the application of the registration test included changes to:

- (a) the claim group description;
- (b) the rights and interests claimed;
- (c) the removal of the assertion in Schedule Q that the Crown did not wholly own minerals, petroleum or gas in the claim area; and
- (d) the composition of the Applicant, by the removal of [Names of persons who formerly comprised the Applicant have been deleted] and the addition of Nida Mangambarr.

[26] There was initially some confusion about the composition of the Applicant, and the circumstances surrounding this issue are comprehensively set out in the Delegate's Decision (at pages 4 - 6). The Delegate formed the view that the Orders of the Federal Court made on 2 November 2009 should be treated as being made under s. 66B(2), and outlined the bases for reaching that conclusion. I have reached the same view and adopt the reasons of the Delegate.

[27] Mr. Glacken comprehensively outlined the background to the Jabiru Township application in his submission (at paras 5 – 9). In summary, the Town of Jabiru is within and forms part of Kakadu National Park. It is surrounded by land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, which is leased to the Commonwealth Director of National Parks as a national park. The establishment of the national park and township flowed from the findings of the Ranger Commission of Inquiry, which in turn had its genesis in the then proposal for uranium mining in this area. Mr. Glacken (at para 6) referred to findings of the Commission with respect to claimed land in the Alligator Rivers region by a number of Aboriginal clans who the Commission found were the traditional owners of each of the clan areas. The clan estates reported upon by the Commission included that of the Mirarr Gundjehmi (spelt in the report as Gundjebmi) which fell within the proposed town centre.

[28] Mr. Glacken also provided information about the prosecution and proposed settlement of the Jabiru Township application (at paras 10 – 16). He contended that steps were taken in 2009 to ready the application for trial, including the filing of a statement of agreed facts. That statement was executed by the Northern Land Council, the Australian Government Solicitor, the Solicitor for the Northern Territory and Energy Resources of Australia Limited (the third respondent to the proceedings). The statement dealt with the matters outlined in s. 225(a) and (b), namely the persons holding native title and the nature and extent of native title rights and

interests in the determination area. This statement, together with other material, was forwarded to the Tribunal under the cover of a letter of 8 March 2010. Paragraph 2 of the statement is as follows:

“The persons who hold the rights comprising the native title are Aboriginal people:

(a) who are the members of the following groups:

- (i) Mirarr Gundjeihmi;*
- (ii) Mirarr Umingangk;*
- (iii) 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.

(b) whose mother or mother’s mother is or was a member of the groups referred to in (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 person referred to in paragraph (d)(i);*
- (iii) related spiritual affiliations or ritual authority in relation to the claim area.”*

[29] Schedule A of the amended native title determination application contains the same description of the claim group as that which was set out in paragraph 2 of the statement of agreed facts.

[30] Mr. Glacken points out (at para 13) that if this matter proceeds to trial and the Court finds that native title subsists, the parties would seek a determination that the native title holders are those body of persons as described in paragraph 2 of the statement of agreed facts.

Information considered when undertaking the reconsideration

[31] In reconsidering a claim, a Member must have regard to any information the Delegate was required to have regard pursuant to s.190A(3) – (5) when considering the claim – s.190E(7)(a). However, in addition, a Member can also have regard to any other information which is considered appropriate for the purposes of the reconsideration – s.190E(7)(b).

[32] For the purposes of s.190E(7)(a), I have had regard to the documents mentioned by the Delegate at page 7 of her reasons, as well as those documents identified elsewhere in those reasons. Each of those documents is helpfully set out in Appendix A of Mr. Glacken’s submission.

[33] I have also had regard, pursuant to s.190E(7)(b), to the additional information supplied by the Applicant, and which is set out in Appendix C of Mr. Glacken’s submission.

[34] I have not had regard to some of the material which the Registrar had regard when testing this application in 1999 and which is set out in Appendix B of Mr. Glacken's submission. In particular, I have not been provided, nor have I sought, a full copy of the *Ranger Uranium Environmental Inquiry Second Report 1977*. I did locate on the Delegate's file an extract from the Second Report which I perused. That extract was a photocopy of pages 222, 223, 238, 239, 262, 270 271, 281 and a map of Clan Territories.

[35] I have perused the *Alligator Rivers Stage II Land Claim Report* of Justice Toohey. I have had regard to this Report particularly in the context of my consideration of s. 190B(3) and (6).

[36] It has not been particularly helpful that Mr. Glacken suggests that on reconsideration I should have regard to all the documents that were before a Delegate more than a decade ago, and then assume that I should divine from hundreds, if not thousands, of pages of documentation the relevant information that supports the Applicant's case for registration of the claim. It is not my role, or that of a Delegate, to fact find for the Applicant. If the Applicant seeks to rely on secondary material, that material should be identified, the relevant parts referred to, and the case made out for relying upon that material. Simply referring to documents and assuming that I should then do the work of the Applicant is not correct, and is an exercise which I have not engaged in. Nonetheless, where Mr. Glacken has specifically referred to secondary reports and material, I have, where possible, located that material and considered it.

Procedural Fairness

[37] Both the Delegate when making a decision whether to accept or not accept an application for registration, and a Member when undertaking a reconsideration pursuant to s. 190E, are bound by the general requirement to undertake their task in a fair, just and unbiased manner. In particular, a Member undertaking a reconsideration, should ensure that an Applicant has been properly notified of the Delegate's decision not to register a claim and has been afforded a reasonable opportunity to place before the Member such further material that is considered relevant. As Mansfield J said in *Hazelbane v Doepel* (2008) 167 FCR 325 (at 332/[25]): "*When a statute confers a power on a public officer, the exercise of which may affect a third person's rights or interests, that person is entitled to procedural fairness until that entitlement is excluded by express terms or by any necessary implication.*" The same principle applies, with even greater force, when considering the duty of a decision maker, not to a third party, but to the person or entity being directly impacted by the decision in question.

[38] In this matter, Mr. Glacken outlined (at paras 17 – 25) a number of procedural fairness issues in relation to the process leading to the Delegate's decision.

[39] The Delegate provided the Applicant, in a letter dated 23 February 2010, her preliminary view regarding the adequacy of the claim with respect to ss. 190B(3)(b), 190B(5)(a) – (c), 190B(6) and 190B(7). The parties subsequently requested the Delegate not to complete testing the claim in order to assist the parties' efforts to implement a compromise. It should be noted, though, that the letter from the Australian Government Solicitor dated 23 March qualified this support by stating: *"In saying this, the Commonwealth should not be taken to agree with all of the factual statements in the NLC letter."*

[40] The Delegate agreed to a deferral until 30 June 2010. Mr. Glacken then submits (at para 19):

"Without further reference to the Applicant (or the other parties), the Delegate proceeded to test the claim and on 20 August 2010 decided not to accept the claim for registration. The grounds upon which the Delegate decided that the claim did not satisfy certain conditions in ss 190B and 190C differed to those set out in the letter of 23 February 2010. The Delegate did not give the Applicant a chance to deal with the different grounds."

[41] As a reconsideration is a review de novo, the merits or otherwise of this submission are not relevant to the task before me. However, as quite some time was taken by Mr. Glacken and the Northern Land Council in bringing these matters before me, I will deal with them, although, as I note, they are not germane to the reconsideration.

[42] The first request for a deferral of the application of the registration test was contained in an email of 2 December 2009 from Mr. Ron Levy to Mr. Gordon Chalmers of the Tribunal's Darwin Registry. The request was that the application of the registration test be deferred until at least August 2010. This request was refused, and the basis for the refusal outlined in correspondence dated 22 December 2009 from Mr. Chalmers to the Applicant care of Mr. Levy. It was subsequent to that correspondence that Mr. Levy was provided with the Delegate's preliminary assessment in a letter dated 23 February 2010.

[43] On 8 March 2010 Mr. Levy wrote to Mr. Tony Shelley, the Tribunal's Northern Territory State Manager. Mr. Levy stated (at para 3): *"In light of our telephone discussion with Mr Chalmers on 2 December 2009, our e-mail did not at that time include a detailed submission in support of the suggested deferral. He went on to say (at para 5): "We have sought advice from counsel, and seek to provide a detailed submission for consideration by the delegate as to the basis whereby, in the unique circumstances of this matter, the suggested deferral is appropriate and ought to be implemented."* Mr. Levy then requested that the Delegate defer consideration of the claim until a date after 14 May 2010, that being the day on which the Federal Court was to convene a case management conference to assess implementation of settlement of the proceedings. Later in his letter Mr. Levy nominated 31 May 2010 as the end time for the registration testing to remain in abeyance.

The reasons advanced by Mr. Levy included the suggested impracticality of the Delegate finalising consideration of the claim before the Court's assessment of the implementation of the settlement agreement, the diversion of parties and attention from the settlement of the proceeding, putting at risk the settlement and the possible perception, based on the Delegate's preliminary assessment, of questioning the correctness of Court orders.

[44] Mr. Shelley responded to Mr. Levy on 12 March 2010 pointing out that the capacity of a Delegate to defer the application of the registration test was limited, drawing attention to s. 190A(2A) which requires consideration of a claim as soon as practicable, and the further obligation on the Registrar to maintain the Register of Native Title Claims so that it "*accurately reflect the up to date position regarding claims*" – *Harrington-Smith v Native Title Registrar* [2007] FCA 414 at [16]. Mr Levy was informed that the Delegate had formed the view that there may not be enough information in the letter of 8 March 2010 to form a basis by which the Delegate could accept the request. The basis for that opinion was then set out in length in the letter.

[45] Mr. Levy responded to Mr. Shelley on 23 March 2010 and in that letter, inter alia, said:

"The Applicant has not requested that the Registrar not finish considering the claim in the amended (sic) pending implementation of the settlement agreement.

The request made by the Applicant in our letter of 8 March 2010 was that the matter be held in abeyance until 31 May 2010, so as to allow time for the Court to monitor and assess the matter at the case management conference scheduled for 14 May 2010. The reasons for the request are detailed in our letter of 8 March 2010.

We trust this clarifies the matter."

[46] On 6 April 2010 Mr Shelley responded to Mr. Levy informing him that the Delegate had decided to grant the request for an extension of time. The Delegate took into account the relative short and finite period of time requested, the limited resources being directed to the implementation of an agreement to settle the claim and the support of other interested parties. The Delegate further agreed to a deferral until 11 June 2011 "*in which to provide any additional materials or take any further step you consider necessary or appropriate.*" Mr. Shelley then pointed out that unless new or compelling reasons were adduced, it was unlikely that further extensions of time would be granted. Importantly he then said: "*Please also be advised that the delegate will proceed to complete testing of your application for registration by 30 June 2010.*"

[47] In fact the Delegate did not make her decision until 20 August 2010. I can find no relevant correspondence from the Applicant regarding either extensions of time or the preliminary assessment other than those set out above.

[48] The suggestion by Mr. Glacken that the Delegate without further reference to the Applicant proceeded to test the claim must be viewed in light of the sequence of events set out above. The Applicant was put on notice on 6 April 2010 that the Delegate would be proceeding to make her decision by 30 June 2010. Yet at no time between 6 April 2010 and 20 August 2010 was there any attempt made to deal with either the preliminary assessment or seek a further extension of time. The Applicant, then, was on notice of the need for the Delegate to make a decision promptly having regard to the statutory requirement in s. 190A(2A) that the Registrar must finish considering the claim as soon as is practicable.

[49] I shall now turn to the preliminary assessment and the implication that the Delegate was somehow at fault or wrong when she brought down a decision on somewhat different grounds and did not give the Applicant a chance to deal with those different grounds.

[50] The first point is the Applicant failed to even deal with the grounds outlined in the preliminary assessment. It is surprising that Mr. Glacken would suggest that the Applicant be given a chance to respond to the final conclusions reached by the Delegate, when the Applicant failed to avail themselves of the opportunity to deal with the preliminary grounds, despite a specific invitation to do so.

[51] Second, the provision of a preliminary assessment by the Registrar or her Delegate is a professional courtesy to and not a vested legal right of the Applicant. As Dowsett J found in *Gudjala No 1* (at [21]), the provision of a preliminary assessment is *“a desirable, but not necessary, course.”*

[52] Third, in the letter of 23 February 2010 outlining the preliminary assessment the following disclaimer was outlined in the second paragraph:

“Please note that the matters below represent the preliminary view of the delegate and do not comprise legal advice. Further, this letter should not give rise to an expectation that if particular actions are taken in response to it, the application will necessarily pass the registration test or that the application will satisfy any of the other conditions of the test that are not addressed below.”

[53] Fourth, the suggestion that the grounds outlined in the preliminary assessment were different to those in the decision is not totally correct. The Delegate formed a preliminary view on four stated bases. The first of these related to the claim group description, particularly the description that persons *“have connections with the claim area by virtue of ...related spiritual affiliations or ritual authority”*. The Delegate formed the view that this may not allow it to be said whether any particular person is within that discrete section of the claim group. In fact the Delegate did reach that conclusion at page 24 of the Registration Test Decision. While it was

only one of a number of bases for her not being satisfied that the claim group description was clear, it was certainly one of them.

[54] Likewise the Delegate formed a preliminary assessment about the connection of the persons identified in the claim group description with Mirrar society, or its laws and customs. Further concerns were raised about establishing that such laws and customs were traditional, in that they had their origin in a society existing at sovereignty and have been continuously observed by a society. Again these issues were dealt with by the Delegate in her discussion of s. 190B(5).

[55] Fifth, even if the Delegate's final decision concerned matters not addressed in the preliminary assessment, as Dowsett J said in *Gudjala No 1* (at [21]) the Delegate was not bound by the grounds outlined in the preliminary assessment.

[56] In conclusion, then, the type of concerns raised in the preliminary assessment appeared in the Registration Test Decision, together with other issues. It cannot be said that the Applicant was not given ample time and opportunity to present further material to the Delegate. The Delegate granted extensions of time, and provided a useful preliminary assessment. The suggested deficiencies in the material before the Delegate was not commented on nor was there any attempt to counter the negative preliminary views formed.

[57] Even though it is not necessary for the purposes of this reconsideration, I think it appropriate that I specifically note in my reconsideration that I see no fault whatsoever in the way in which the Delegate approached her task. She provided procedural fairness to the Applicant, and any suggestion that the Applicant was in any way disadvantaged by the Delegate is, on the material before me, unfounded.

Registration Test General Principles

[58] The Registrar is required, pursuant to s. 190A(1), to consider any claimant application made pursuant to ss. 63 or 64(4), subject to the proviso outlined in s. 190A(1A). If such an application complies with the conditions prescribed by ss. 190B and 190C the Registrar *must* register the claim on the Register of Native Title Claims – s. 190A(6). In other words, *all* of the conditions prescribed by these sections must be complied with as there is no discretion vested in the Registrar to accept a claim if only a majority of the requirements of these provisions are met – per Mansfield J *Quall v Native Title Registrar* (2003) 126 FCR 512 at 518/[17].

[59] When considering a claim, the Registrar *must* have regard to information contained in the application and, where permitted, in any other documents provided by the Applicant, any information obtained by the Registrar when searching registers of interests maintained by a

government and any information provided by a government that is relevant to the matters outlined in ss. 190B or 190C – s. 190A(3). Importantly, the Registrar, *may*, in addition, “*have regard to such other information as he or she considers appropriate.*”

[60] The Registrar, or her Delegate, has a relatively broad discretion to consider additional material where the relevant statutory condition allows it. Starting with the decision of O’Loughlin J in *Risk v National Native Title Tribunal* [2000] FCA 1589 at [24] - [25], the Federal Court has emphasised not only the correctness of considering a broader range of material than that specifically prescribed in s. 190A(3) but also the risk that the Registrar (or her Delegate) could be in breach of her statutory obligations if she ignored such material.

[61] The decision whether to accept or not accept an application for registration is a purely administrative function, the decision depending on whether the application satisfies the statutory criteria prescribed by ss. 190B and 190C – see *Powder Family v Registrar, Native Title Tribunal* [1999] FCA 913 at [26] – [27] per Kiefel J.

[62] In addition, to quote Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]):

“... the Tribunal’s task is defined by those provisions (i.e. ss. 190A – 190C). Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.”

[63] In addition to the material considered by the Delegate, I also have the Application for reconsideration together with attached documents.

Non-contested findings of the Delegate

[64] Reconsideration by a Member is, as previously stated, a review de novo. Nonetheless it is open to a Member to adopt, where appropriate, the reasons and conclusions reached by a Delegate.

[65] As with the Delegate, I am required to assess the material before me to determine if the Jabiru Township application meets the conditions prescribed by ss. 190B and 190C. Despite their chronological sequence, the initial focus of attention is s. 190C which prescribes conditions about procedural and other matters. Much of the information prescribed by s. 190C forms the basis for the application while s. 190B prescribes conditions about the merit of a claim. The absence of information prescribed by s. 190C (and by reference to ss. 61 and 62) in turn may prevent a Delegate from determining if any or all of the merit conditions in s. 190B have been

satisfied – see s. 190E(11)(b) where there is a reference to it not being possible for a Member, when reconsidering a claim, to determine whether the claim satisfies all the conditions of s. 190B because of a failure to satisfy s. 190C.

[66] In this matter the Delegate was satisfied that the application met a number of the requirements mandated by both ss. 190B and 190C. While I have independently considered each of these conditions and formed my own opinion, I note that neither the Applicant or the Northern Territory have contested these conclusions reached by the Delegate.

Subsection 190C(2)

[67] A Delegate is required, pursuant to s.190C(2) to be satisfied that the native title determination application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62.

[68] The Delegate determined that the following requirements mandated by ss. 61 and 62 were met:

<i>Provision</i>	<i>Requirement</i>
61(1)	Persons who may make application
61(3)	Applicant's name and address
61(4)	Application authorised by persons
62(1)(a)	Application accompanied by a sworn affidavit
62(1)(b) and (2)(a)	Identification of boundaries
62(1)(b) and (2)(c)	Searches of non-native title rights and interests
62(1)(b) and (2)(d)	Description of claimed native title rights and interests
62(1)(b) and (2)(e)	General description of the factual basis of the claim
62(1)(b) and (2)(f)	Current claim group activities
62(1)(b) and 2(g)	Other applications
62(1)(b) and (2)(h)	Details of s. 29 notices.

[69] None of these findings is challenged by the Applicant and, having considered the material before me, I accept and adopt the reasons and findings of the Delegate at pages 9 - 15 of her Registration Test Decision in relation to each of the above matters.

Subsection 190C(3)

[70] Subsection 190C(3) requires the Registrar to be satisfied that no person included in the native title claim group was a member of any previous application if:

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

[71] The focus of the inquiry mandated by s. 190C(3) is to identify if there are any common claim group members between the current application and any previous, but still registered, application that overlaps the same land and waters.

[72] The Delegate formed the view (at pages 16 – 17) that there were no native title determination applications, registered or otherwise, that overlapped the area claimed in the Jabiru Township application.

[73] Based on the material before me I have come to the same conclusion.

Subsection 190C(4)

[74] The Registrar or her Delegate is required by s. 190C(4) to be satisfied that either:

- (a) the application has been certified by the relevant Aboriginal representative body; 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.

[75] The Delegate was satisfied pursuant to s. 190C(4)(a) because Schedule R contains a written certificate from the Northern Land Council which is dated 20 October 2009. The Delegate outlined (at pages 17 – 20) various issues in relation to the certification, but ultimately came to the conclusion that s. 190C(4)(a) had been satisfied. In that regard she focused her inquiry on the substantive issue of whether the requirements of s. 203BE had been met, notwithstanding that reference was made in the documentation to the old s. 202(4) and (5). In doing so the Delegate correctly, in my opinion, adopted the approach to the question of certification enunciated by Kiefel J in *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107 (at 118/[33]) namely not to be “*unduly technical*” which is “*not appropriate to the procedures under the*

NTA." I have reached the same conclusion and adopt her reasons for the purposes of this subsection.

Subsection 190B(4)

[76] 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.

[77] It will be noted that the wording of the subsection draws attention to the description "*in the application*". Further s. 62(1)(b) requires that a "*claimant application*" must contain the details specified in s. 62(2). Accordingly, both ss. 62(2)(d) and 190B(4) focus on the efficacy of the description as found in the application as distinct from any other external material.

[78] This was also the view of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 at 119/[16]. His Honour also provided guidance on the sufficiency of the description. He endorsed (at 139/[99]) "*the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning.*"

[79] In this matter the claimed native title rights and interests are contained in Schedule E. These rights and interests were set out at pages 24 – 26 of the Reasons for Decision of the Delegate. The description, in my opinion, is both understandable and has meaning. In this regard I have had regard to the definition of "native title rights and interests" in s. 223 of the Act. Consequently, I am satisfied that the application meets the condition of s. 190B(4).

Subsection 190B(7)

[80] Subsection 190B(7) requires that the Registrar, or her Delegate, must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters claimed, or previously had and would reasonably be expected to have maintained a physical connection but for things done either by the Crown, a statutory authority of the Crown or a leaseholder or a person acting on behalf of the leaseholder.

[81] It will be noted that the statutory requirement is for a *traditional* physical connection. In *Gudjala No 1* Dowsett J made the following finding (at [89]):

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

[82] The nature of the task imposed on the Registrar by this subsection was explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 as follows (at 120/[18]):

“Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of particular fact or particular 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 that of the court when it comes to hear and determine the application for determination of native title rights and interests. 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.”

[83] The Delegate referred (at page 35) to her findings about the Mirarr people, in particular that there was at sovereignty a Mirarr society within the application area which acknowledged and observed a system of laws and customs, that the Mirarr People continue to have an association with the application area and that Mirarr society and its laws and customs have continued to exist in a substantially uninterrupted way since sovereignty. The Delegate also concluded that there are traditional laws about the access of Mirarr people to their traditional country, including the application area, and activities which can be carried out on country.

[84] The Delegate then referred to Schedule M, which deals with the physical connection of Ms. Yvonne Margarula with parts of the application area. Ms. Margarula is one of the persons comprising the Applicant, and has been so since 1997. Schedule M 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.”

[85] The Delegate concluded that Ms. Margarula was a member of the claim group and that she had a traditional physical connection with the application area arising from Mirarr traditional law and custom.

[86] I have also reached the same conclusion and I am therefore **satisfied** that the requirement of s. 190B(7) has been met. This conclusion has been reached after I was satisfied that the conditions of s. 190B(5) and (6) were met, which are discussed below.

Subsection 190B(8)

[87] The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of section 61A, the application should not have been made.

[88] Section 61A prohibits the filing of a native title determination application where:

- (a) there is an approved determination of native title – s. 61A(1);
- (b) a previous exclusive possession act was done in relation to the area – s. 61A(2);
- (c) a previous non-exclusive possession act was done in relation to the area and the application claims exclusive native title rights and interests – s. 61A(3).

[89] The section is specifically worded to be subject to the operation of ss. 47, 47A and 47B.

[90] The Delegate (at pages 36 - 38) concluded that the application satisfied the condition of s. 190B(8) because:

- (a) a geospatial assessment and overlap analysis dated 7 December 2009 and a search by the Delegate on 27 May 2010 revealed that no part of it was covered by an approved determination of native title;
- (b) Schedule B [8] of the application excludes, subject to Schedule L, areas covered by a previous exclusive possession act; and
- (c) Schedule E [7] states that the application does not claim exclusive possession over areas which are subject to previous non-exclusive possession acts. Exclusive possession is only claimed where native title has not been wholly or partially extinguished, or where ss. 47A or 47B of the Act are applicable – Schedule E [6].

[91] I have independently searched the Native Title Register established pursuant to Part 8 of the Act and have not found any determination of native title over the claimed land and waters. Further, I have perused Schedules B and E and have reached the same conclusion as the Delegate.

Subsection 190B(9)

[92] Section 190B(9) provides as follows:

“The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

- (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas – the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or*
- (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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 subsection 47(2), 47A(2) or 47B(2)).”

[93] The Delegate was of the view (pages 38 - 39) that the application met each of the conditions in s. 190B(9):

- (a) The application does not claim ownership of Crown minerals, petroleum or gas – Schedule Q;
- (b) The application at Schedule P states “not applicable” to the question of whether the application makes claim for exclusive possession of any offshore place. The Delegate noted that while this was not ideal, it was sufficiently clear to indicate that the Applicant does not claim exclusive possession of any offshore place. The Delegate also referred to Schedule E [6]; and
- (c) Schedule E [6] and E [7] of the application addresses the requirement of s. 190B(9)(c).

[94] I have reached the same conclusion, and adopt, for the purposes of this reconsideration, the reasons of the Delegate.

Contested findings of the Delegate

[95] In seeking reconsideration of the Delegate’s decision, Ms Megan Brayne of the Northern Land Council outlined the following matters.

“APPLICATION

1. *Pursuant to s 190E of the Native Title Act 1993 (Cth) the Applicant applies to the National Native Title Tribunal to reconsider the claim made in the Amended Native Title Determination Application filed on 20 October 2009 in Federal Court Proceeding No. DG6027 of 1998, known as the Jabiru Township Native Title Claim and accorded Tribunal No. DC97/7.*
2. *The bases on which reconsideration of the claim made in the Amended Application is sought are as follows:*
 - (1) *the claim satisfies all of the conditions in ss 190B and 190C of the Native Title Act, including those referred to at [3];*
 - (2) *the grounds upon which the Delegate of the Registrar decided that the claim did not satisfy the conditions referred to at [3] differ to those set out in a letter dated 23 February 2010 that conveyed what was said to be the preliminary view that had been formed by the Delegate;*

- (3) *the Delegate did not, subsequent to the letter of 23 February 2010, and before deciding not to accept the claim on the grounds referred to at [3], notify the Applicant of the difference in grounds, and that the Application may be amended under the Federal Court Rules.*
3. *On 20 August 2010 a Delegate of the Native Title Registrar decided, pursuant to s 190A(6B) of the Native Title Act, not to accept the claim for registration of the grounds that the claim did not, in the respects mentioned below, satisfy the conditions in:*
- (1) (a) *section 190C(2), in respect of the requirement in s 62(2)(b) for a map;*
 (b) *section 190B(2), dealing with identification of the claim area;*
- Because the maps referred to in Schedule C of the Amended Application, which accompanied the Application before amendment, were not reproduced in the Amended Application as filed (reasons, pp13, 21);*
- (2) *section 190B(3), dealing with the description of the native title claim group, because the Delegate made findings that:*
- (a) *Ascertaining the persons referred to at [4](a), (b) and (c) of the Amended Application required identification of earlier members of the three groups referred to at [4](a) (reasons, pp22-23);*
 (b) *Ascertaining the persons referred to at [4](d)(i) and (ii) of the Amended Application required identification of particular groups or the various rules and principles by which members are recruited into them (reasons, p.23);*
 (c) *The description of the persons referred to at [4](d)(iii) of the Amended Application was not, in the Delegate's opinion, clear or otherwise explained (reasons, p.24);*
- (3) *section 190B(5)(a), dealing with the sufficiency of the factual basis of the assertion that the native title claim group have, and the predecessors of those persons had, an association with the claim area, because the Delegate made the finding that:*
- (a) *what the Delegate called "the Mirarr groups" were part of, but not the whole, native title claim group;*
 (b) *there was no factual basis to support an assertion that "predecessors of persons other than Mirarr people" had an association with the claim area (reasons, p.29);*
- (4) (a) *section 190B(5)(b) and (c), dealing with the sufficiency of the factual basis to support assertions about:*
- (i) *the existence of traditional laws and customs acknowledged and observed by the native title claim group (s 190B(5)(b));*
 (ii) *the native title claim group continuing to hold native title in accordance with those traditional laws and customs (s 190B(5)(c));*
- (b) *section 190B(6), dealing with whether, prima facie, at least some of the claimed native title rights and interests can be established;*
- because the Delegate made findings that:*
- (i) *at, and prior to, the acquisition of sovereignty there was within the claim area what the Delegate called "the Mirarr society";*

(ii) the persons referred to at [4](d) of the Amended Application were not, according to the Delegate, "members of the Mirarr society" or connected to members of the Mirarr society"; (reasons, pp.31-34).

4. The Applicant has requested the Delegate to identify the documents to which the Delegate had regard that are mentioned at page 7 of his reasons for decision. Subsequent to receipt of that information, the Applicant proposes to provide:
 - (1) a written submission in support of the contentions referred to at [2];
 - (2) information to which the Tribunal may have regard under s 190E(7).
5. This Application will be provided to the following Respondents to the Jabiru Township Native Title Claim:
 - (1) Northern Territory of Australia (First Respondent).
 - (2) Commonwealth of Australia (Second Respondent).
 - (3) Energy Resources of Australia Limited (Third Respondent).
 - (4) Jabiru Town Development Authority (Fourth Respondent).
 - (5) Director of National Parks (Fifth Respondent)."

[96] I have already dealt with the matters outlined in paragraph 1(2) and (3), and will now address the assertion in paragraph 1(1) that the claim satisfies all of the conditions of ss 190B and 190C. In that regard I will refer throughout to the submissions of Mr. Glacken in the Applicant's Submission on Registration dated 29 October 2010.

Subsection 190C(2)

[97] Subsection 190C(2) provides that the Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62.

[98] Subsection 190C(2) prescribes conditions of a procedural kind and, as such, focuses attention on the "application". As Mansfield J pointed out in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]): "Section 190C, dealing with procedural and other matters, largely but not exclusively directs attention to the terms of the application itself. Section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62."

[99] The Delegate carefully set out (at page 9) the legal basis for her consideration of the requirements mandated by s. 190C(2). She referred to *Northern Territory v Doepel* and summed up her task as follows: "In other words, does the application contain the prescribed details and other information." I find no error in the stated legal approach of the Delegate in her consideration of s. 190C(2), and agree with it.

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

[100] The Delegate was not satisfied the application contains all of the details and other information required by s. 62(1)(b). In particular the Delegate was not satisfied that the requirement of s. 62(2)(b) had been met, namely, that the application was accompanied by a map showing the boundaries of the area covered by the application.

[101] The Delegate stated (at page 13) that Schedule C of the amended application referred to an Attachment B which comprised three maps: a map of the whole application area, an enlarged map of the southern part of NT Portion 2272 and an enlarged map of the northern part of NT Portion 2272. Paragraph 10 of the amended application states:

“To avoid any doubt, the area marked as ‘freehold’ on the maps contained in Attachment B is land vested in the Director of National Parks and Wildlife and/or the Commonwealth and is not intended to indicate a freehold estate which would operate to extinguish native title pursuant to section 23B(2)(c)(ii) of the Act.”

[102] The amended application did not contain an Attachment B, and the Federal Court confirmed that no maps were included with, or otherwise filed with, the 20 October 2009 amended application. The Delegate noted (at page 13) that the application filed prior to 20 October 2009 did contain three maps and that the failure to include the maps appeared to be an oversight. The Delegate then said:

“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).”

[103] Mr. Glacken pointed out (at para 31) that no change has been made to the area covered by the application. Paragraphs 62(1)(b) and (2)(b) reveal in this context, a contrary intention such that “claimant application” does not equate, in all respects, to an amended application, only to those parts that have been amended. Reference was made to the definition of “claimant application” in s. 253:

*“**claimant application** means a native title determination application that a native title claim group has authorised to be made, and, unless the contrary intention appears, includes such an application that has been amended.”*

[104] The conclusion reached by the Delegate was entirely open to her, and flowed from a strict reading of the Act. However, I have reached a different conclusion. The extent to which the amended application meets the requirements imposed by s. 62 should be assessed in

conjunction with the unamended parts of the extant original application. Where the original application is not amended by the amended application, then regard can be had to the material already filed with the Federal Court with the original application. In this instance, the external boundaries of the claim were not amended. The maps referred to in the amended application were already filed with the Court with the original application. A beneficial interpretation should be given, such that a slip of the type that appears in this matter, is not read in a way that would otherwise be fatal to the registration of the claim. Accordingly when reference is made to the “claimant application” in s. 62(1) it is to the totality of the application or applications filed with the Court. Where an amended application does not amend parts of the original application, then regard can be had to the information and material in that original application when assessing the extent to which the amended application has met the requirements of s. 62.

[105] Accordingly I find that the application does contain all details and other information required by s. 62(2)(b). and that the requirements of s. 190C(2) are **met**.

Subsection 190B(2)

[106] Subsection 190B(2) flows from s. 62(2)(a) and (b), namely that the Registrar or her Delegate must be satisfied that the information and map contained in the application as required by the stated paragraphs 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.

[107] The Delegate (at page 21) reached the same conclusion on the basis that the application did not contain a map of the application area.

[108] As I have previously found, the application should be read to include the original application in those instances where the relevant part of the original application is not amended by the amended application. Such an approach is consistent with the non-technical and beneficial manner in which the registration test requirements of the Act have been interpreted by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317.

[109] Accordingly I am satisfied that the requirements of s. 190B(2) have been **met**.

Subsection 190B(3)

[110] Subsection 190B(3) requires that the Registrar, or her Delegate, must be satisfied either that the persons in the native title claim group are named in the application or that they are described sufficiently clearly so that it can be ascertained whether any particular person is in the claim group.

[111] It was the view of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 119/[16]) that s. 190B “has requirements which do not appear to go beyond consideration of the terms of the application: s 190B(2), (3) and (4).” Later in his judgment (128/[51]) Mansfield J said

“The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application subs (3)(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so. Hence, in my judgment, the Registrar’s approach to the condition imposed by s 190B(3) was correct.”

[112] In short, when assessing compliance with s.190B(3) a Delegate should focus on the wording of the application itself, and extraneous material should not be relied upon to cure what is patently an ambiguity or deficiency in the claim group description in the application.

[113] In this matter the claim group description as set out in Schedule A has previously been set out. The description does not name all the members of the claim group, so the task before me is to ascertain if that description satisfies the condition of s. 190B(3)(b). This task is a relatively narrow one. It is not the duty or responsibility of a Delegate, or a Member on reconsideration, to consider if the description is correct or not. As Dowsett J explained in *Gudjala No 1* (at [33]): “subs 190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification.”

[114] In addition, when making such an assessment it is necessary to remember that “*the Act is clearly remedial in character and should be construed beneficially*” – Carr J *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at 109/[67].

[115] The task required by s. 190B(3) necessarily involves a weighing exercise. The key factor which a Delegate needs to focus on is the issue of identification. But care needs to be taken not to assume that an overly forensic and arithmetic approach is adopted.

[116] The Delegate, when considering the claim group description discussed the principle of patrilineal descent, explaining how people are recruited into the Mirrar group. She then stated (at page 22): “*However, there is not sufficient information to enable it to be ascertained whether any particular person is a member of the Mirrar group.*” The Delegate then said (at pages 22 – 23):

“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 know first 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."

[117] The same defect was found by the Delegate with respect to those persons in paragraph (b) of the claim group description, namely those holding rights through matrilineal descent and (c) namely the spouses of persons referred to in (a).

[118] The Delegate was also not satisfied that the group of persons who were members of the claim group by virtue of being a member, or the spouse of a member, of a neighbouring group were capable of identification. She said (at page 23): *"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."*

[119] Finally the Delegate dealt with those persons who have connections with the claim area by virtue of related spiritual affiliations or ritual authority in relation to the claim area – (d)(iii). The Delegate said (at 24): *"I do not understand what is meant by this description and in particular the term ' related spiritual affiliations and spiritual 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."* In the view of the Delegate the description was entirely unclear such that it would be impossible to ascertain whether any particular person was a member of the claim group.

[120] Mr. Glacken, on behalf of the Applicant, drew attention to the fact that the description of the native title claim group in the amended application is not relevantly different to the claim group descriptions the subject of a number of Northern Territory native title determinations. My attention was directed to *Attorney- General (NT) v Ward* (2003) 134 FCR 16 at 18 – 19 (clauses 2 – 4), *Gumana v Northern Territory (No 2)* [2005] FCA 1425 (clauses 2 – 3), *Griffiths v Northern Territory* (2007) 165 FCR 391 at 440 – 442 (clauses 2 – 4) and *Alyawarr v Northern Territory* (2004) 207 ALR 539 at 620 – 621 (clause 2). I have perused each of these determinations, and agree that the claim group descriptions are not relevantly different to the description before the Tribunal.

[121] Mr. Glacken pointed out (at para 35) that the Delegate found each of limb of the description of the native title claim group wanting because further factual inquiry was required. However, Mr Glacken had earlier submitted (at para 33) it may be necessary to engage in some factual inquiry when ascertaining whether any particular person is in the claim group. The need for such an inquiry, he submitted, does not mean that the claim group has not been

described sufficiently. In support of that proposition he referred to the decision of Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93. His Honour said (at 109/[67]): “It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the passage of time and the movement of people from one place to another.”

[122] I accept, then, the general proposition that the need for some factual inquiry to ascertain whether a person or persons is or are a member of the claim group is not of itself an indication that the persons in the claim group have been described insufficiently for the purposes of s. 190B(3). It would be erroneous, however, to extend such a proposition too far. The fact that some factual inquiry is required is not, of itself, fatal, but the greater the nature of the inquiry to ascertain the link of a person to a claim group, the more likely it is that the claim group description will be found to be insufficient for the purposes of s. 190B(3).

[123] Mr. Glacken then contended (at para 35) that the inquiry required by s. 190B(3) is not aimed at the identification of individuals per se, but about how the native title claim group has been described.

[124] Next, Mr. Glacken contended (at para 36) that if the approach taken by the Delegate were correct, then s. 190B(3) would prevent the registration of a claim that describes a claim group in the same terms as accepted by the Federal Court when determining under s. 225(a), who the persons, or group of persons, holding the common or group rights comprising native title are. It was his contention that there was no warrant for, as he described it, such an asymmetrical outcome. In advancing this contention he said (at paras 37 and 38):

“The result arrived at by the Registrar would produce gridlock in the disposition of native title claims. This is because before any determination may be made that native title exists and is held by a particular group, someone authorised by that group must apply for the determination. If registration can occur only by describing a claim group in terms different to that which would be determined by the Court as the group that in fact holds the native title, the claim group description will not describe the persons who hold native title and authorise the making of the application. Obstacles in last minute amendment (and notification) of the application to facilitate a correct determination of native title by the Court would be encountered.

As was noted in Commonwealth v Clifton, the procedures in the Act require that before any determination may be made that a particular group holds native title, an application must be made by someone authorised by that group in the manner required by s 61(1). The procedures in Pt 3 Div 1 for the making of claims interlock with the requirements of the registration test in Pt VII. The object of the measures respecting the composition of a claim and proper authorisation of named applicants is to control the ability of individuals and groups to claim determinations of native title.”

[125] It was Mr. Glacken's contention that if registration of a claim could only occur by describing a claim group differently to the description of claim groups the subject of favourable native title determinations: "*the jurisdiction of the Federal Court is undermined.*" I do not think that this last contention has much force. The Court is not limited in making a determination pursuant to s. 13 by the presence or absence of a claim on the Register of Native Title Claims – see also the finding of Carr J in *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [26]. As Mr. Glacken would be well aware, numerous Northern Territory applications have recently failed the registration test, yet it is inconceivable that the cumulative weight of these failures will inhibit the Northern Land Council, as legal representative of the named claim groups, seeking determinations under s. 13.

[126] Nonetheless, Mr. Glacken drew my attention to the findings of the Full Federal Court in *Moses v Western Australia* (2007) 160 FCR 148. In that matter the native title holders were described as follows (at 235/[362]):

"Ngarluma People' are Aboriginal persons who recognise themselves as, and are recognised by others as, members of the Ngarluma language group.

'Yindjibarndi People' are Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group."

[127] On appeal both the State of Western Australia and the Commonwealth submitted that s. 225(a) of the Act requires a more precise description of the native title holding group than the above description, which was accepted by the trial judge. It was their contention that s. 225(a) should be read with s. 61(4) which requires a native title determination application to name the members of the claim group or otherwise describe them so that it can be ascertained if any particular person is a member of that group. In rejecting this submission Moore, North and Mansfield JJ said (238 - 239/[370] – [375]):

" 370 Section 225(a) requires that persons who hold individual rights and interests be specified in the determination and groups of persons holding group rights be specified in the determination. In the case of group claims, s 225(a) will ordinarily be satisfied if the name of the group is provided. There is no automatic requirement that the determination set out in detail how the group membership is constituted or the criteria by which membership is attained. That is all Ward (FC) 99 FCR 316 meant on the subject. Whether the group of persons is sufficiently described will depend on the facts of the particular case. Often a statement of the group name will identify the group of persons sufficiently for the purposes of s 225(a). This explains the many determinations which have adopted that formulation. In other cases, for instance, where the constitution of the membership of the group is unclear, the determination will need to clarify by supplying some definition of the way membership of the group is attained so that s 225(a) can be satisfied.

371 Section 61(4) of the NTA deals with the requirements for authorisation for the bringing of an application. It provides.....

372 *The wording of s 61(4) is different from s 225(a), and the subject matter is also different. Nevertheless, it is likely that the considerations to which we have just referred apply in much the same way to this section.*

373 *In the present case the argument on appeal was essentially confined to establishing that s 225(a) is not satisfied by the naming of the native title holding group but must go further and stipulate a method by which individual group members can be ascertained. This proposition cannot be accepted as a general statement. It is only where the group description leaves doubt who are members of the group that such a description would need to be supplemented by further detail..*

374 *Further the descriptions of native title holders in the cases referred to by the State, do not provide the level of specificity contended for by the State. In Alyawarr 207 ALR 539, the native title holders are described as members of landholding groups; or recognised as members of landholding groups through adoption or birthplace affiliation; or spouses who are recognised as members of the landholding groups. In De Rose (No 2) (FC) 145 FCR 290, the native title holders are described as people who are nguraritja according to the relevant traditional laws and customs of the Western Desert Bloc people through country of birth, long-term physical association, ancestral connection or by geographical and religious knowledge. The native title holders in Gumana (No 2) [2005] FCA 1425 are described as members of the relevant clans by virtue of descent; or who are guardians or successors to the rights of a clan in relation to its estate; or who have kinship connections. It is only in Sampi (No 3) [2005] FCA 1716 that the native title holders are described as descendants of apical ancestors. In each case except Sampi (No 3), membership of the native title group is a matter to be determined by the holders of native title according to their traditional laws and customs.*

375 *The State has not demonstrated that the group descriptions in the present case fail to identify the group of persons who hold native title as is required by s 225(a). Indeed the descriptions go beyond the mere nomination of the group and define membership by reference to two criteria, namely, self recognition and recognition by others in the group. The State did not seek to show that this formulation differed in result from the proposed formulation proffered by it. There is nothing on the face of the description of the native title holders chosen by his Honour which suggests a failure to comply with s 225(a), and there is no argument on the facts which persuades us that the description fails to comply with the section."*

[128] Apart from Moses Mr. Glacken also drew my attention to the Full Court decision of *Attorney-General (NT) v Ward* (2003) 134 FCR 16 where Wilcox, North and Weinberg JJ said (22/[15]): *"It is not necessary to identify native title holders by name; it is sufficient that the persons be members of an identified group or groups."* In that matter the proposed determination identified the native title holders by reference to three estate groups: the Dmberal estate group, the Bindjen estate group and the Nyawamnyawam estate group. However clause 4 of the proposed determination then provided:

"In accordance with traditional laws and customs, other Aboriginal people have rights in respect of the land and waters of an estate which is not their own, subject to the rights and interests of estate group members, including:

- (a) members of estate groups from neighbouring estates;*
- (b) spouses of the estate group members; and*

(c) *members of other estate groups with ritual authority.*”

[129] The Full Court made the following observations about this clause (23 – 24/ [14] – [15]):

“14....Clause 4 states that ‘other Aboriginal people’ have rights subject to the interests of the estate group members. Those people (the secondary native title holders) are identified in subcl (a), (b) and (c). However, because of the word ‘including’ immediately before those three subclauses, this is not presented as an exhaustive identification of secondary native title holders. A determination in this form leaves open the possibility of there being other, unidentified, secondary native title holders. Counsel for the Commonwealth of Australia and the State of Western Australia argue the result is a failure to comply with the description of ‘determination of native title’ in s 225 of the Act....

15 It will be noted that para (a) of s 225 requires determination of ‘the persons or each group of persons, holding the common or group rights comprising the native title’. It is not necessary to identify the native title holders by name; it is sufficient that the persons be members of an identified group or groups. Clauses 2 and 3 of the proposed determination proceed on that basis. No issue is raised about them. However, cl 4 leaves open the possibility that there are native title holders who are neither members of an estate group identified in cl 2 or of a secondary group identified in subcl (a), (b) or (c) of cl 4. We agree with counsel that this is impermissible. Cl 4 should be turned into an exhaustive definition of secondary native title holders. This can be effected by omitting the word ‘including’ and substituting ‘such people being’”.

[130] It is clear from the above extensive quotations from the Full Court decisions that the jurisprudence on s. 225(a) has some relevance to the interpretation of s. 61(4), and, by analogy to an assessment pursuant to s. 190B(3). However, it should be noted that the reference to s. 61(4) by the Full Federal Court in *Moses* was strictly obiter. When considering s. 190B(3) it is still necessary to have regard to the only direct Federal Court authority on point which is *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732. In that case Carr J considered the following claim group description:

“The Miriuwung Gajerrong people including the named applicants being Ben Ward, John Toby, Jimmy Ward, Ronnie Carlton, Jeff Janama, Button Jones, Ben Barney, Dodger Carlton, Kim Aldus, Murphy Simon, Sheba Dignari, Joe Lissadell, Peter Newry, Toby Banmar, Ronnie Yundun and Chocolate Thomas, also including those people who are descended from the traditional owners of the land and waters claimed at the time of sovereignty, including those considered within the native title claim group by way of birth, adoption, marriage or other traditionally recognised method of inclusion who today identify as Miriuwung or Gajerrong.”

[131] His Honour found (at [21]) that the Delegate did not err in finding that she was not satisfied that the persons in the claim group were described sufficiently clearly so that it could be ascertained whether any particular person was in that group.

[132] It will be noticed that the claim group is described as the Miriuwung Gajerrong people included named persons, but also including *“people who are descended from the traditional owners of the land and waters claimed at the time of sovereignty”*. This description is much broader and

vaguer than that contained in the amended application. As Carr J said (at [27]) the assessment of s. 190B(3)(b) is “*largely one of degree with a substantial factual element*”. This decision remains of relevance for the purposes of s. 190B(3) registration test assessments, but the particular claim group description before Carr J can be distinguished from the claim group description before the Tribunal on this reconsideration.

[133] In the context of an assessment pursuant to s. 190B(3) I take these Federal Court decisions to require that a Delegate when making an assessment will, on the basis of the application, and any other factual inquiry undertaken, be satisfied if it is reasonably clear that the claim group description would enable the ascertainment of whether a person was or was not a member of the claim group. It is not necessary that the description have the specificity of a named apical ancestor or ancestors and then a list of descendants. It may be adequate, as in this case, that the claim group be described by reference to named estate or clan groups and with membership further identified by reference to descent from, for example, a patrilineal line. As the Full Court said in *Moses*, the adequacy of the description will depend ultimately on the facts presented in each case, and it is not helpful to attempt a generic formulation. A Delegate must look at the claim group description and make an assessment on all the facts presented.

[134] A common sense approach is required. In this matter I agree with Mr. Glacken that the claim group description is consistent with the approach adopted by the Full Court in *Moses*. The estate groups are named ([4](a)) and non-members making up the balance of the claim group are described by specified criteria ([4] (b) – (d)). The description is not open-ended, such as would be contrary to the *Ward* decision. The only issue that I have residual concerns about relate to the description in paragraph 4 (d) (iii) of persons who have “related spiritual affiliations or ritual authority in relation to the claim area”. This description lacks the clarity and specificity of the other portions of paragraph 4. Nonetheless, I note that the Full Court in *Ward* was prepared to make a determination where the claim group was described, inter alia, to include members of other estate groups with ritual authority. I also accept, as Mr. Glacken contended, that the key object when describing a claim group is to describe the right people for country, which is the core concept of connection. That concept, as he contended, is reflected in the authorisation provision (s. 61(1)) and the certification of a representative body pursuant to s. 203BE(2). In this instance if, according to traditional laws and customs, membership of the claim group is determined, inter alia, by related spiritual affiliations or ritual authority in relation to the claim area, then I would read s. 190B(3) in a way which would allow the sensible and correct means of describing the claim group.

[135] In reaching this conclusion I am persuaded, particularly, by the jurisprudence of the Federal Court in the Northern Territory cases referred to by both Mr. Glacken and the Full

Court decision in *Moses*. In those cases as well as in the extensive native title jurisprudence involving Kimberley applications, where Aboriginal law and custom has been the subject of decades of litigation and study, the naming of estate or clan groups is not an exercise undertaken lightly and without significant secondary material to substantiate the assertion. A similar approach in other parts of Australia without the unique history presented in this case may well produce a different result. Indeed, I think that the Full Court in *Moses* was fully alive to this self-evident proposition. Each case presents its own unique issues, and in this matter, on the balance, I believe that the claim group description provides the specificity required for me to be satisfied pursuant to s. 190B(3).

[136] Finally, I do not believe that this conclusion is necessarily inconsistent with the previous approach of the Registrar and her Delegates. I have reached a somewhat different conclusion to the Delegate in this matter, because I have factored into my assessment the approach of the Federal Court to s. 225(a) matters, and, in so doing, have given greater leeway to the claim group description. I have been able to do so because, without significant factual inquiry, it was clear to me that:

- (a) The claim group description was founded on asserted traditional laws and customs;
- (b) The membership of the claim group based on the description was capable of independent and objective assessment;
- (c) The claim group description was not open-ended;
- (d) Persons could not claim membership based on self-identification or subjective grounds;
and
- (e) The description was clear and consistent with Federal Court authority.

[137] For the above reasons, I am **satisfied** pursuant to s. 190B(3) that the native title claim group is described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Subsection 190B(5) – Factual basis for claimed native title

[138] Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that 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;
- (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 interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[139] The Registrar's task, pursuant to s. 190B(5), is relatively narrow. The Registrar is to consider the asserted facts and, assuming they are true, assess whether they support the claimed assertions.

[140] 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 be ultimately adduced to establish the asserted facts"* per Mansfield J in *Northern Territory v Doepel* at 120/[17] endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 at 338/[83].

[141] Prior to the Full Court decision in *Gudjala*, there was a series of Federal Court judgments that suggested that the Registrar would need to be presented with some additional information or evidence to support the assertions, and that the assertions alone in the application may not suffice. Further, those judgments also suggested that, whilst there was a correlation between s. 190B(5) and s. 62(2)(e), the latter provision only referred to a *"general description"* whereas the former provision *"may require more, for the Registrar to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to suggest a wider consideration, of the evidence itself, and not some summary of it"* per Kiefel J *Queensland v Hutchison* (2001) 108 FCR 575 at 584/[25] and *Wulgurukaba People #1 v Queensland* [2002] FCA 1555.

[142] The correct approach to interpreting s. 190B(5) has now been determined by the Full Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317. The Full Court considered the interaction between ss. 62 and 190A, the former mandating the requirements for commencing an application and the latter establishing the registration test regime. The Court held (at 340/[90]) that:

"... the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit."

[143] The Court then dealt with the nature and quality of the information required by s. 62, and in particular the details required by s. 62(2)(e). It should be noted that the matters referred to in s. 62(2)(e)(i), (ii) and (iii) are worded almost identically to s. 190B(5). The Court said (at 340-341/[92]):

“The fact that the detail specified by s 62(2)(e) is described as ‘a general description of the factual basis’ is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly, or by inference the facts necessary to establish the claim.”

[144] The Court (at 341/[93]) went on to observe that if the primary Judge “*approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim ... then it involved error.*”

[145] Nonetheless, a Delegate, or Member on reconsideration, must be provided with more than mere restatements of the claim. This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 as follows (at [29]): “*it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.*”

[146] The Delegate was not satisfied that the requirements of s. 190B(5) (a) – (c) were met. First, with respect to s. 190B(5)(a), she set out, at some length (at pages 27 – 29) a summary of the material found in Annexure F of the application which was aimed at meeting the requirements of s. 190B(5)(a). I adopt that summary for the purposes of this reconsideration. The Delegate’s reasons for not being satisfied are set out at pages 29 -30 of her reasons. Basically she was of the view that the claim group was a composition of persons from a number of groups, including Mirarr groups, non-Mirarr groups neighbouring the Mirarr Gundjeihmi estates and non-Mirarr people having a connection to the claim area. She concluded as follows (at page 30):

“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 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 claim group.”

[147] With respect to s. 190B(5)(b), which focuses on traditional laws and customs, the Delegate summarised the material filed with the Federal Court in support of this (at page 31). Again, I adopt this summary for the purposes of this reconsideration. The conclusion reached by the Delegate was that at, and prior to, sovereignty there was a society within the application area which was the Mirarr society.

[148] The Delegate quoted this extract from the judgment of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 at [40]: *“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.”*

[149] The Delegate accepted that those persons within the named claim group who identified as Mirarr People could trace their connection to a pre-sovereignty society. However, she was not satisfied of the connection of the remaining members of the named claim group with the Mirarr society. She went to say (at page 32):

“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.”

[150] In conclusion, the Delegate found that in the absence of information explaining the connection of the identified claim group with the Mirarr society, the factual basis was insufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the claim group.

[151] I have reached a different conclusion to the Delegate. In coming to my conclusion I have given careful consideration to the judgment of the Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*Alyawarr*) as well as a number of subsequent Federal Court decisions.

[152] The Full Court (Wilcox, French and Weinberg JJ) explained at length the development of the law of native title (at 460 – 470), and, in doing so, their Honours deal with the way in which native title law deals with the issue of the group which holds the native title in the relevant claimed area. The Court commenced this discussion by noting (at 465/[77]):

“The laws and customs, from which the native title rights and interests derive their existence, must necessarily be those of a society or group. This proposition was derived from the general observation of Professor Honore that ‘all laws are laws of a society or group’ ([49]-[50]). It followed that the rights and interests possessed under a body of laws and customs are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes them.”

[153] The Court then discussed what was meant by the term “society” (466/[78]):

“The concept of a ‘society’ in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the meaning in Yorta Yorta. The relevant ordinary meaning of society is ‘a body of people forming a community or living under the same government’ – Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word that appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into judgments required by the NT Act, technical jurisprudential or social scientific criteria for the classification of groups or aggregations of people as ‘societies’. The introduction of such elements would potentially involve the application of criteria for the determination of native title rights and interests foreign to the language of the NT Act and confining its application in a way not warranted by its language or stated purposes.”

[154] Having given an elastic definition of what can constitute a “society” for the purposes of native title law, the Court then proceeded to outline various examples of what can constitute a society for the purposes of making a native title determination by reference to various Federal Court decisions. The Court said (466 – 468/ [79] – [81], [83] – [84]):

*“ 79 The determinations which may be made under s 225 cover a range of possibilities which depend upon the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title rights and interests claimed. In some cases the members of the community identified as the relevant society may enjoy communal ownership of the native title rights and interests, albeit that they are allocated intramurally to particular families and clans. This was the case in *Sampi v Western Australia* [2005] FCA 777....*

*80 If, on the other hand, the society identified as the repository of the traditional laws and customs is a cultural bloc whose members are dispersed in groups over a large arid or semi-arid area an inference of communal ownership of native title rights and interests derived from its laws and customs may be difficult if not possible to draw. In *De Rose v South Australia (no 2)* [2005] FCFAC 110 the Court held that a native title determination could be made in favour of individuals or small groups who held native title rights under the traditional laws and customs of a society or community of which they are part. That was identified as the Western Desert Bloc. It was not necessary that the native title holders constituted a society or community in their own right. Each case will, of course, depend on its own facts.*

*81...In *Ward Lee J* found the Miriuwung and Gajerrong groups, which were territorially adjacent and shared economic and social links, could be regarded as a composite community with shared interests. There was ‘an ancestral connection’ with the Aboriginal community or communities which occupied the claim area at sovereignty..The Full Court rejected a contention on appeal that the evidence before the trial judge did not show that the Miriuwung and Gajerrong people were a single community. Although there were witnesses whose full array of rights only existed in particular estate areas, this did not preclude the existence of ‘a Miriuwung and Gajerrong community which acknowledges and observes traditional laws and customs under which different members of the community employ differing ways of rights within and outside their*

particular family or estate country' Ward FC 1 at [239]. What this says, relevant to the present case, is that a composite community which enjoys communal ownership of the native title rights and interest albeit there may be intramural allocations between particular family or clan groups or other sub-sets of the community....

83 *Wandarang People v Northern Territory (2000) 104 FCR 380* was an application by 12 groups of Aboriginal people in respect of land and waters associated with four language groups on the basis that the claim area encompassed the whole or part of the traditional country of the several groups. In that case the Northern Territory accepted that the community of native title holders comprised the members of the 12 groups. It was also common ground that the contemporary claimant community had a 'substantial degree of ancestral connection' with the original inhabitants of the claim area.

84 In *Neowarra*, the State submitted that the native title should be recognised on a 'dambun' or perhaps language level. But Sundberg J found that the claimants regarded themselves as part of a community. There was an emphasis on shared customs and traditions that transcended the particular dambun or language area with which individuals were associated. His Honour rejected a dambun-based formulation of the native title rights and interests in that case because 'it would not accommodate the evidence the close relatives of dambun members have rights and interests in the land': (at [387])."

[155] The Court referred to, and did not override, the following statement by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 at [334]:

"Sections 223 and 225 do not require the Court to search for an anthropologically identified form of community or group. The NTA makes clear the Court is to examine the evidence to see who holds native title, if anyone, and so whether they are communal, group or individual rights and interests."

[156] The Full Court upheld (475/[112]) the finding of the trial judge (Mansfield J) that a society for the purposes of that matter constituted four language groups and seven landholding groups, with each landholding group associated with a particular part of the claim area.

[157] More recently, in *King v Northern Territory (2007) FCR 89*, Moore J made a determination in favour of a claimant group comprising nine different estate groups and six neighbouring estate groups. The estate groups spoke either Mudburra, Jingili or a mixture of the two. It was commonly accepted that despite these differences they constituted one community.

[158] The Full Federal Court in *Sampi v Western Australia* [2010] FCFAC 26 said (at [71]):

"The circumstances of each native title application are different. They depend heavily on the facts concerning the beliefs, histories and practices of the particular native title claim group. It is therefore not normally useful to compare the facts in one case to the facts in others. However, the Court has ruled on quite a large variety of circumstances of native title claim groups so that certain lines have emerged between the characteristics of those groups which fall within the requirements laid down by Yorta Yorta and those which do not....it is noteworthy that the Court has found in a number of cases that a native title claim group which adhered to an overarching set of fundamental beliefs constituted a society notwithstanding that the group was composed of people from different language groups linked to specific areas within the larger territory which was the subject of the application."

[159] Mr. Glacken contended (para 51) that the amended application did not speak of a Mirrar society, rather it referred to identification with languages associated with the claim area and wider region, to regional inter-relationships of clan exogamy, intermarriage between language groups, co-residents, and the conduct of ceremonial and other activities based on traditional laws and customs – Schedule F paras [16] – [18].

[160] Mr. Glacken further contended (at para 52) that the term “Mirrar society” was an invention of the Delegate, and then referred to the findings in the Land Claims Reports relevant to the question of the community of Aboriginal peoples with whom the claim group observes laws and customs in common. He also referred to various findings of the Ranger Royal Commission.

[161] I have perused the original Registration Test Decision which was made on 14 December 1999. The Delegate in that matter referred, in her consideration of s. 190B(5) to the findings of the Second and Final Report of the *Ranger Uranium Environmental Inquiry* as well as the *Alligator Rivers Stage II Land Claim Report*.

[162] I have reached a different conclusion from the Delegate for the following reasons.

[163] First, I had factored into my consideration the Federal Court jurisprudence quoted above. I find from that jurisprudence a preparedness by the Court to recognise claim groups composed of various estates or clans, united not necessarily by language or a united body of laws and customs but by a shared acknowledgement of laws and customs that unite them and provide a foundation for the filing of a native title determination application. In that regard I note the following finding by Finn J in *Akiba v Queensland (No 2)* [2010] FCA 643 at [169]:

“I reject the implication in the Commonwealth’s submission that the Applicant must establish a body of laws and customs which united people across Torres Strait. This turns the Yorta Yorta HC requirement on its head. The society is required to be united in and by its acknowledgment and observance of a body of laws and customs.”

[164] The material before the Delegate indicated that this indeed was the case in this application. As an example of this I refer to paragraphs 16 – 18 of Annexure F which state:

“16 The identification with, and use of, Aboriginal languages traditionally associated with the application area is a continuing daily reality for the majority of claimants. Many of the claimants are multilingual in the languages traditionally associated with the application area and wider region.

17 The claimants share regional interrelationships and observe customary practices. This is evidenced by institutions such as clan exogamy where clan members must marry outside of their own gunmlgirrurr, intermarriage between language groups, co-residence and the conduct of ceremonial and other activities based on acknowledged traditional laws and customs.

18 Traditional decision making processes within the clan groups focus on the role of senior clan members have within the broader group. Decisions are reached through the group advising and counseling their seniors, with the seniors then expected to make final decisions reflecting the views of the group. Typically the decisions of the senior people are then followed and supported by the wider group."

[165] Second, unlike the Delegate, I have had the benefit of submissions from Mr. Glacken which not only drew attention to most of the jurisprudence I have referred to, but, in addition, addressed squarely the "society question" posed by the Delegate.

[166] Mr. Glacken drew my attention to the work of Ronald and Catherine Berndt, *Man, Land & Myth in Northern Australia: the Gunwinggu People* (1970). The Tribunal was provided with copies of chapters one and nine and appendices I, II and III of the book. Mr. Glacken submitted as follows (paras 53 – 55):

"53...The Berndts considered the region known as Western Arnhem Land that extends from present day Kakadu National Park almost to Cape Stewart, and with the western parts of Kakadu and the Liverpool-Cape Stewart areas as a transition or intermediate zone between the cultures of West Arnhem and those to the east and west (p. 4). They described among the Aboriginal peoples living around the Arnhem Land Plateau a socio-cultural bloc with common religious views, a common association with land by occupancy, and shared customs about land holding and land use, but local variations including language differences, making for contrast which define their socio-cultural identity in relation to one another. Thus, specific stretches of country are owned by specific persons or groups of persons and land-owning, land-occupying, and land-utilising groups are localized territorially (pp. 212-6).

54 The Ranger Uranium Environmental Inquiry was concerned with the catchments of the East, South and West Alligator Rivers, an area in the Wildman River catchment, and the Field and Barron island (report p. 15). The Ranger Commission, referring to the report on Aboriginal relations by the Woodward Commission (First Report 1973), considered relations of local descent groups and estates, and of hordes or bands and ranges, in the setting of Western Arnhem Land (pp 34, 255, 259). The Commission reported that land ownership was determined primarily through members of local descent groups, which in Western Arnhem Land are called gunmugurgur, who have an entitlement to particular territory or estates that arises from the dictates of dreamtime spirit beings (p. 255). The horde or band, with varying membership, and comprising persons from different gunmugurgur, have an entitlement to access areas adjoining the estates of its members, and areas further afield, which depend upon mytho-ritual linkages, kinship ties and clan affiliation (p. 256).

55 The Commission reported that the Ranger mining area, the Jabiru settlement, the proposed regional centre (or town) (p. 216), and the Jabiluka mine site, fall within the boundaries of the estate belonging to the Mirarr Gundjeihmi and that their claim was based on primary rights of ownership through patrilineal descent (p.262). The Ranger Commission reported on clan areas, ownership and use in respect of Mirarr Gundjeihmi and other West Arnhem land clans (pp 262-6), and patterns of traditional spiritual affiliation in the region (pp. 266-8), and proceeded to make formal findings on the extent of use or occupation by the various contiguous clans (pp. 277-9, map 16), and noting an overall conclusion that each of the Aboriginal groups or clans in the area has a traditional though qualified entitlement to the use and occupation of the lands of each of the others (p.279)."

[167] When this application was first registration tested in 1999 the Delegate had the benefit of considering the Royal Commission Report and other documents. The Delegate reached the conclusion from the material before her that the requirements of s. 190B(5) had been satisfied, and in reaching that conclusion she was implicitly of the opinion that she was considering a claim filed by persons united by an acknowledgment of shared laws and customs. Laws and customs of the type set out in the above quote of Mr. Glacken.

[168] The Delegate in this matter does not appear to have considered either the Royal Commission Report or the *Alligator Rivers Stage II Land Claim Report*, although she does refer, in passing, to the latter report at page 29 of her Decision. The Delegate was not required to engage in such an exercise. She was entitled, as she did, to consider the terms of the amended application to ascertain if she was satisfied pursuant to s. 190B(5). It is not the role of a Delegate to engage in a fact finding mission in an endeavour to go beyond and behind the material submitted. She was not satisfied on the basis of the material before her, and this was a conclusion that was open to her.

[169] In contradistinction, on reconsideration, extra material and analysis has been submitted. This material not only has shone a light on certain aspects of the application, but assists in clarifying and explaining the material. If the Delegate had the benefit of the material now before on me on reconsideration, perhaps a different conclusion would have resulted. This highlights the importance, particularly where a negative preliminary assessment is provided, for an Applicant to be vigilant in promptly submitting targeted information to a Delegate which assists their case.

[170] The material before me discloses that there is in the area in and around the Arnhem Land Plateau a socio-cultural bloc with common religious views and customary law concerning land holding and land use. I further find that there is a common acknowledgment and observance of a body of law and customs which unite these Peoples, and which has provided the foundation stone for this native title determination application. In short, I find that the application has a properly formulated claim group, bound together by an acknowledgement of common laws and customs, and thus a society in the sense described by the Full Federal Court in *Alyawarr*. Accordingly, the fundamental problem which led the Delegate to find that she could not be satisfied pursuant to s. 190B(5), has been addressed in the material before me. I can now deal with the substance of s. 190B(5).

Subparagraph 190B(5)(a)

[171] The first paragraph of s. 190B(5) requires me to be satisfied that there is a factual basis for the assertions that the native title claim group have, and the predecessors of such persons had, an association with the area.

[172] Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 stated (at [52]): “I do not mean that all members (of the claim group) must have such association at all times. However, there must be evidence that there is an association between the whole group and the area.” In short, the test is not that there is evidence before the Delegate that each of the members of the claim group have an association over the whole area, but, that cumulatively, there is material before a Delegate that shows an association between the whole group and the whole area of the claim. Further, Dowsett J also observed (at [52]): “Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty.” This analysis of Dowsett J was not disapproved of by the Full Federal Court.

[173] Annexure F of the amended application sets out at some length the information which supports the assertion that the native title claim group have, and its predecessors had, an association with the claim area. I summarise below the main elements of this association outlined in Annexure F:

- (a) the Mirrar have been accepted in two Northern Territory Land Rights claim processes in relation to the claim area and 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 the members of the group are entitled by Aboriginal tradition to forage as of right over that land” - *Alligator Rivers Stage II Land Claim*, July 1981 p. 23 – [3];
- (b) Mirrar rock art paintings are thought to display the first point of contact with European society, namely the 1866 McKinley expedition as well as contact with Macassans – [4] – [6];
- (c) Archaeological deposits on Mirrar country suggest habitation on the Mirrar estate of around 60,000 years – [8];
- (d) Since time immemorial, and in accordance with traditional laws and customs, the application area has been regarded as Mirrar country by other Aboriginal people in the region – [9];
- (e) Material evidence of physical connection by ancestors of the current claimants exists in the application by means of archaeological evidence of both pre-contact and post-contact Aboriginal habitation, including stone tool implements - [31];

- (f) Written and oral historical sources attest to the occupation of the application area by members of language groups traditionally associated with the application area at the time of, and following, sovereignty – [32]
- (g) Religious observance associated with sites and Dreamings in or near the application area occur in accordance with traditional laws and customs – [15];
- (h) The claim group continue to hunt for animals such a *gornobolo* (male agile wallaby) and collect bush tucker such as *garrbarda* (long yam) and *an-djok* (sugarbag) within the application area in accordance with traditional customs, traditions and practices. Introduced species, such a wild pig have been incorporated into the claimant group’s hunting activities;
- (i) The claim group continue to use *an-bolh* (walking tracks) known to their parents, grandparents and ancestors who regularly camped throughout the application area;

[174] In addition, Schedule M contains information about the claimants asserted current physical connection to the claim area. It is asserted (at [17]) that members of the claim group:

- (a) Hunt, collect bush tucker and generally derive sustenance from the application area;
- (b) Walk and travel across the application area;
- (c) Reside in dwellings within the application area;
- (d) Bear and raise children within the application area;
- (e) Teach children about the application area on the application area;
- (f) Work in Aboriginal organizations within the application area;
- (g) Hold meetings within the application area.

[175] It is asserted, that it is extremely rare for there not to be a member of the claimant group in the application area at any time – [18].

[176] The following example was also provided:

“To give just one example, Yvonne Margarula spends part of the week residing part-time at Kinjo Place, Jabiru; works at the Gundjehmi 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."

[177] I am conscious that the required approach in dealing with s. 190B(5) was explained by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 as follows (340-341/[92]): *"what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim."*

[178] It should be noted, that it is not the role of a Delegate, or Member on reconsideration, to undertake a forensic analysis of the material and to engage in an exercise that only a Federal Court judge can undertake. The evidence does not have to be extensive. I do not have to engage in an exercise of assessing its probative value. All a Member has to do is ascertain if relevant evidence is provided and weigh it according to the facts deposed therein.

[179] The material before the Tribunal supports the assertions that the predecessors of the claim group had an association with the claim area and that the members of the claim group continue to have such an association. The material, though slight, is not formulaic and provides, on balance, a sufficient factual basis for a genuine assessment pursuant to s.190B(5)(a). Accordingly, I am **satisfied** that the factual basis provided is sufficient to support the assertion described in s. 190B(5)(a).

Subparagraph 190B(5)(b)

[180] Subparagraph 190B(5)(b) requires that the factual basis supports the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[181] It will be noted that the wording of s. 190B(5)(b) is almost identical to paragraph 223(1)(a) which is part of the section defining native title rights and interests. In undertaking a s. 190B(5)(b) assessment, therefore, close attention needs to be placed on the relevant authorities explaining the operation of s. 223(1)(a). Of most significance in this regard is the decision of the High Court in *Yorta Yorta*. I adopt for the purposes of this reconsideration the statements of law found at paragraphs [46] – [47] and [86] – [87] of the lead judgment.

[182] Of further assistance is the useful summary of the *Yorta Yorta* principles by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [26]. This analysis was not overturned by the Full Federal Court on appeal, and I adopt it for the purposes of this aspect of

the reconsideration. I have also found helpful the following summation by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 of what is required to demonstrate traditional laws and customs for the purposes of the definition of “native title” and “native title rights and interests” (at [22]):

- *“a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;*
- *that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and*
- *that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs.”*

[183] In summary I need to be satisfied, pursuant to s. 190B(5)(b), that I have material before me that would establish a factual basis that the traditional laws and customs currently acknowledged and observed by the claim group are rooted in the traditional laws and customs of a society in existence at sovereignty over the area of the claim and which has continued in existence in a substantially uninterrupted form since sovereignty to the present day.

[184] The Full Federal Court in *Gudjala* did indicate that it is necessary for a Delegate to be satisfied that at sovereignty there was an Indigenous society in the claim area observing identifiable laws and customs (at [96]). The Full Court also held (at [93]) that it would be an error to approach a s. 190B(5) assessment *“on the basis that it should be evaluated as if it was evidence furnished in support of the claim.”*

[185] I note, in particular, the thrust of the Full Court’s direction in *Gudjala*. Plainly it is not the role of a Delegate to engage in a “second guessing” exercise or to impose on an Applicant too high a duty. Instead all a Delegate need do is look at the material, whether positive or prejudicial, and form a view in accordance with the statutory mandate. In doing so a Delegate should not analyse material with a view to ascertaining its probative strength or weakness.

[186] Annexure F of the application deals, at some length, with the traditional laws acknowledged by, and traditional customs observed by, the native title claim group. The following is a summary of the information provided:

- (a) Interests and entitlements held by the Mirarr are based on shared laws and customs and an established and special relationship with the land and waters since time immemorial – [10];
- (b) The claimants’ possession, occupation, use and enjoyment of the claimed area is derived from their system of traditional laws and customs, including linguistic

linkages, kinship, intermarriage, spiritual ancestry and co-existence, and their shared historical, economic, religious and social interests – [11];

- (c) The continuity of spiritual and ancestral connections is based on a foundation, commonly acknowledged, that *na-yuhyunggi* created the land and waters and ongoing human relationships with it – [13];
- (d) The believed spiritual origin of the application area and the claimant's connection with it, is acknowledged in the observance of traditional religious customs and the holding of cultural knowledge associated with land and waters in the application area – [14];
- (e) Religious observances associated with sites and Dreamings in or near the application area occur in accordance with traditional laws and customs – [15];
- (f) The claimants share regional interrelationships and observe customary practices, evidence in institutions such as clan exogamy where clan members must marry out of their own *gunmogurgurr*, intermarriage between language groups, co-residence and the conduct of ceremonial and other activities based on acknowledged laws and customs – [17];
- (g) The learning and transmitting of shared laws and customs is evidenced by the continuing transmission of oral traditions and the observance of secular and religious cultural practices – [20];
- (h) The continuity of acquisition of customary rights and interests in land and waters is usually mediated by reference to those having Mirarr *gunmogurgurr* established by a patrilineal connection with the application area – [28];
- (i) The claimants' laws and customs are passed from generation to generation through modes of oral transmission. The claimants' knowledge of descent connections is transmitted orally – [30];
- (j) Succession or progressive replacement processes are an acknowledged part of the claimants' system of traditional laws and customs, and result in maintenance of knowledge and connections to land and waters and its spiritual properties. Succession to, incorporation into and/or fusion into the claim group may be triggered by dramatic events, such as the death of senior and knowledgeable members, or more subtly through the acquisition of interests and entitlements gained over a long time as a result of social, religious, ecological, demographic and historical change – [35];

- (k) Under the claimants' system of laws and customs, processes of succession may occur even in the absence of demonstrable genealogical relationships. The original group's land and waters and identity can thereby be safeguarded and re-established in accordance with traditional laws and customs, a process which includes transmission of interests, entitlements and cultural knowledge to descendants of the succeeding group – [36]; and
- (l) 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 remain evident today throughout the landscape. The Mirarr describe in their oral tradition of song-poetry, legend and ritual the ancestral past or Dreamtime. It is from this period and these ancestors that the Mirarr derive their rights to land – [38].

[187] The Delegate concluded (at page 32) that insofar as the claim group description related to Mirarr people, the connection between the pre-sovereignty society and those persons was clear. The Delegate also formed the same view with respect to those members of the claim group whose mother or mother's mother was or is a member of one of the Mirarr groups or a spouse of a Mirarr member. She was not satisfied, however, about the connection of the remaining members of the claim group with Mirarr society. It was on this basis that she was not satisfied that the factual basis provided supported the assertion described by s. 190B(5)(b).

[188] I have reached a different conclusion to the Delegate about the claim group, as was previously explained. However, it is clear that the Delegate would have been satisfied pursuant to s. 190B(5)(b) but for her view of the remaining members of the claim group. The material before the Tribunal satisfies me that there was an indigenous society at sovereignty in the claim area observing identifiable laws and customs. The evidence also establishes that the claim group practice laws and customs which are rooted in those traditional laws and customs of a society in existence at sovereignty over the claim area.

[189] Accordingly, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Subparagraph 190B(5)(c)

[190] The final paragraph of s. 190B(5) requires a consideration of whether there is a factual basis that the native title claim group have continued to hold the asserted native title in accordance with their traditional laws and customs.

[191] There is a clear linkage between this paragraph and s. 190B(5)(b). If a Delegate was not satisfied that the factual basis supported the assertion in s. 190B(5)(b), then a Delegate could not be satisfied pursuant to s. 190B(5)(c) - *Martin v Native Title Registrar* [2001] FCA 16 at [29].

[192] In order for a Delegate to be satisfied that there is a factual basis for s. 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [63], [65] and [66].

[193] As previously highlighted in the discussion of s. 190B(5)(a) and (b), I have formed the view that the material before me provides a sufficient factual basis to be satisfied that the native title claim group and its predecessors have and had an association with the claimed area and there exist traditional laws and customs acknowledged and observed by the claim group.

[194] It necessarily follows from those conclusions that the claim group continue to hold the claimed native title in accordance with traditional laws and customs.

[195] Without setting out at length the material contained in Annexure F, it is clear that there are numerous named traditional activities that are practiced, including hunting, gathering, ceremonial activities, speaking in language, camping and travelling through the application area. In addition traditional customs continue to be practised including marriage, ceremonies, beliefs and religion, speaking in language, succession of rights, adoption and other matters. In short the cumulative weight of the material before me leads inevitably to the conclusion that there is a firm factual basis for the assertion that the claim group continue to hold the claimed native title in accordance with traditional laws and customs.

[196] I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

Combined result for s. 190B(5)

[197] The application does **satisfy** the condition of s. 190B(5) because the factual basis provided is sufficient to support the assertions in s. 190B(5)(a) – (c) as set out in my reasons above.

Subsection 190B(6)

[198] This subsection requires that the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. The implications of this requirement are explained in the Note to the subsection which states that if the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie,

be established. It is only those registered rights and interests that can be taken into account in a “right to negotiate” process or by the arbitral body pursuant to s. 39.

[199] “Native title rights and interests” are defined by s. 223. There is, of course, a difference between those rights and interests that are claimable, and those which can be established.

[200] Of assistance when making an assessment pursuant to this subsection is the following explanation by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112 (at 145/[126] – [127]):

“126 Clearly the requirements upon registration imposed by s 190B should be read together. Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed can be established. It is necessary that only the claimed rights and interests about which the Registrar forms such a view are those to be described in the Native Title Register: see s 186(1)(g). It is therefore clear that a native title determination application may be accepted for registration, even though not all the claimed rights and interests, prima facie, can be established. Section 190B(6) requires some measure of the material available in support of the claim.

127 On the other hand, s. 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interest are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s. 190B(6)...”

[201] It will be seen from the above quote that there is a logical nexus between s. 190B(5) and s. 190B(6). It follows, as a matter of course, that if the factual basis for the claimed native title cannot be satisfied pursuant to s. 190B(5), then a Delegate would not be able to be satisfied that, prima facie, at least some of the native title rights and interests can be established – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [87].

[202] As was highlighted by Mansfield J in *Doepel* s. 190B(6) requires the Delegate, or Member on reconsideration, to engage in an exercise of weighing the factual assertions. I must be satisfied, prima facie, that each of the claimed native title rights and interests can be established.

[203] The amended application recasts the native title rights and interests set out in the original application. The Delegate considering the claim in 1999 was satisfied that each of the claimed native title rights and interests were capable of being established. This included the right to possess, occupy, use and enjoy the application area to the exclusion of all others.

[204] A perusal of the basis of the Delegate being satisfied discloses that in each instance she referred to material in the native title determination application. In particular reference was made to Schedules E, F, G, M, R and Q. In short the Delegate did not refer to any of the secondary material that was before her, nor did she refer to any primary evidence in the form of

Affidavits. I do not believe that the nature of the material referred to by the Delegate would meet the requirements of being satisfied pursuant to s. 190B(6), and certainly would not be to the standard outlined by Mansfield J, which in turn was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 at [83].

[205] Mr. Glacken provided me with a number of Federal Court documents, including a Notice of Voluntary Admissions filed on 30 March 2009 by the Northern Territory of Australia. In that document the Northern Territory admits to the native title rights and interests that are set out in the amended application. Similar admissions were made by the third and fourth respondents to the Federal Court proceedings, Energy Resources of Australia and the Jabiru Town Development Authority, in documents filed with the Court respectively on 25 June 2009 and 8 April 2009.

[206] The fact that parties to Federal Court proceedings do not dispute the claimed native title rights and interests does not of itself provide a factual basis for a Member on reconsideration being satisfied that a prima facie case has been made out for the establishment of those rights and interests. The Tribunal is not a party to these proceedings. The Tribunal is not privy to the basis upon which such concessions have been made. A voluntary admission by a party to Federal Court proceedings, while an important step in the consensual disposition of the proceedings, is not evidence that can be relied upon to satisfy the requirements of s. 190B(6).

[207] The amended application is accompanied by affidavits sworn by the persons comprising the Applicant. Unfortunately these affidavits contain no substantive primary material supporting the claimed rights and interests. In both instances the deponents simply depose to the truth of the statements made in the amended application and related matters.

[208] These statements do not provide an independent evidentiary basis which can be relied upon for the purposes of s. 190B(6). Nor do these affidavits transform the amended application into a primary source of evidence. The almost total absence of any direct evidence or targeted expert reports is a serious failing when ascertaining whether, prima facie, the claimed rights and interests are established. A prima facie case cannot be sustained on the basis of people deposing that there are rights and interests without more. The Tribunal must be presented with evidence of activities carried out in pursuance of such rights as well as times and places and events where appropriate. As Dowsett J put it in *Gudjala* (2009), there must “*be at least an outline of the facts of the case.*”

[209] However, I have considered the discussion and findings of Justice Toohey in the *Alligator Rivers Stage II Land Claim Report*, and, in particular, his discussion at paragraphs 113 to 124 of the *Mirarr* clan, *Kundjey'mi* language. The map at page 19 of the report discloses that “*Mirarr*

Gundjeibmi” territory includes the area in and around Jabiru township. His Honour stated (at [115]):

“115. The eastern and southern boundaries of this part of the claim area are dictated by the National park and the town of Jabiru. The Arnhem Escarpment runs close to the eastern boundary. The country is replete with sites of spiritual significance ‘including those classified as djang, others regarded as the marks of the actions of dreaming, increase sites and burial places (Exhibit 59, p.34). The number and spread of these sites may be seen from Exhibit 59, pp.34-6, Exhibit 121, item 6c, and Exhibit 129, Mirarr Kundjey’mi, pp.8-11. Although there is no magic in numbers, it is significant that Exhibit 129, the submission by Peko E-Z mentions more than fifty places named or visited during the hearing, of which all except seven were within the claim area. Most of them may fairly be described as sites.”

[210] A fair reading of this report, in conjunction with the other material before me, provides a sufficient factual basis for me to be satisfied that the asserted right in paragraph 7(h) can be established. That right is as follows:

“(h) the right to maintain and protect sites and places on the claim area that are of significance under traditional laws and customs of the native title holders.”

[211] This right must be read in conjunction with a right to access and travel over the claim area. Accordingly, I also find that the right claimed in paragraph 7(a) is established, namely:

“(a) the right to travel over, to move about and to have access to the claim area”.

[212] The only reference in the amended application to the activities of any named person is to be found in paragraph 19. This paragraph was cited previously, and relates to the accessing of the claim area by Ms. Yvonne Margarula. This right is dealt with in paragraph 7(a). However, it is also asserted that she collects bush tucker from the claim area. Having regard to all of the other material before me, I believe there is a sufficient basis for me being satisfied on a prima facie basis that the right claimed in paragraph 7(c) can be established, namely:

“(c) the right to gather and 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 traditional laws and customs of the native title holders.”

[213] I draw the attention of the Applicant to the provisions relating to the amendment of the Register of Native Title Claims in s.190(3A). Where the Registrar accepts for registration a claim and afterwards, but before a native title determination in relation to the amended application is made, the Applicant provides to the Registrar further information relating to claimed native title rights and interests which were not included in the Register, the Registrar can amend the Register to include the excluded rights and interests.

[214] In this matter, I would suggest that it would be appropriate for the Northern Land Council, as legal representative of the Applicant, to consider the provision to the Registrar of targeted primary evidence that supports the asserted native title rights and interests. Having regard to the concessions made by the respondent parties outlined earlier, this would be a task that should be able to be effected without the expenditure of much time or resources.

[215] I also note that the native title rights and interests which I find are established, are not merely rights and interests currently exercised by members of the claim group, but are rights and interests grounded in traditional laws and customs. As previously stated there is a nexus between the operation of s. 190B(5) and(6). Only if a factual basis for the claimed native title is sufficient to satisfy the requirements of s. 190B(5), can native title rights and interests prima facie basis be established.

[216] I consider, prima facie, some of the claimed native title rights and interests can be established and consequently that the requirements of s. 190B(6) are **met**.

Conclusion

[217] I reaffirm that this is a fresh and original decision as to whether or not, in my view, the claim meets all of the conditions for registration specified in ss. 190B and 190C of the Act.

[218] I conducted a reconsideration of the claim made in this application against each of the conditions contained in ss. 190B and 190C in accordance with s. 190E of the *Native Title Act 1993*.

[219] For the reasons outlined above, I give notice that the Native Title Registrar should accept the claim for registration pursuant to s. 190E(10) of the *Native Title Act 1993*, as it satisfies all of the conditions in ss. 190B and 190C.

John Sosso
Deputy President