National Native Title Tribunal

Registration test decision

Application name	Camfield Pastoral Lease
Name of applicant	Billy Campbell
State/territory/region	Northern Territory
NNTT file no.	DC10/6
Federal Court of Australia file no.	NTD10/10
Date application made	29 July 2010

Name of delegate Lisa Jowett

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

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

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

Date of decision: 27 September 2010

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to not accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) (the Act) unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application Overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Camfield Pastoral Lease claimant application to the Native Title Registrar (the Registrar) on 29 July 2010 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

As the application has not been amended since it was made on 29 July 2010 I am not required to consider whether subsections 190A(1A) or 190A(6A) apply. Therefore, in accordance with subsection 190A(6) I must accept the claim for registration *if* it satisfies all of the conditions in sections 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain information and be accompanied by specified documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

The result of my consideration, pursuant to ss. 190A(6) and (6B), is that the claim in the Camfield Pastoral Lease claimant application **must not** be accepted for registration because it **does not satisfy** all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I have considered the information in the application and accompanying documents received from the Federal Court. I have also had regard to the documents contained in the Tribunal's case management/delegates files (reference 2010/02087 Vol 1). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in

relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4) (see *Northern Territory v Doepel* (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) at [16]).

I have *not* considered any information that may have been provided to the Tribunal in the course of:

- the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.
- undertaking its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'. Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker.

On 3 August 2010, the Tribunal informed the applicant that the registration test would be applied to this application. Further, in the event of the provision of additional material to the Registrar for the purpose of the registration test, the Registrar would be obliged to give the Northern Territory Government an opportunity to consider and comment on that material. The applicant has not provided additional material.

Also on 5 August 2010, the Tribunal provided a copy of the application and accompanying documents to the Northern Territory Government, giving it the opportunity to provide any additional material to the Registrar to be considered for the purpose of the registration test. The Government has not provided submissions.

As no adverse or additional material has been submitted in relation to this application, neither I, nor other officers of the Tribunal, have been required to undertake any further steps in relation to procedural fairness obligations.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

I am **not satisfied** that the application contains all details and other information, and is accompanied by any document required by ss. 61 and 62 because the application is not accompanied by an affidavit meeting all the requirements of s. 62(1)(a). This is explained in the reasons below.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is essentially procedural in nature and requires me to be satisfied that the application contains the details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court and do not require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

My consideration of each of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below:

Native title claim group: s. 61(1)

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

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

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. Thus, I have confined my assessment of this requirement to the details and information contained in the application itself. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [35], [37] and [39].

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

Part A of the application contains the information and details pertaining to the persons authorised to make this application. Schedule A of the application describes the persons in the native title claim group.

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a sub-group of the native title claim group.

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

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

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

The application contains both the name of the applicant and an address for service on page 26.

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

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

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

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

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application **is not accompanied** by the affidavit required by s. 62(1)(a).

The application includes an affidavit affirmed by the person who comprises the applicant and is signed and competently witnessed.

Amendments to the Act in 2007 included certain new provisions. In this instance, the *Native Title Amendment(Technical Amendments) Act 2007* provides that for applications made from 1 September 2007 the application must be accompanied by an affidavit in which the applicant sets out 'details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it' (see s. 61(1)(a)(v)). The affidavit accompanying this application makes the following statement in relation to this requirement:

> I am authorised, in accordance with decision making processes under traditional laws acknowledged and customs observed, to make this application—at [5].

I infer from the statement that the process utilized for the purposes of authorising the applicant was a process of decision-making required under the system of traditional laws and customs. This is also confirmed by statements made in relation to the NLC's certification of the application (contained at Schedule R) which refer to 'the identification of the traditional decision-making process' — at [5].

Whilst the condition does not require a lengthy explanation of the process complied with, it does however call for more than simply providing the basis on which the applicant is authorised. This statement does not provide any details as to the form that the traditional decision-making process takes or what is involved in reaching decisions.

I am of the view that the affidavit does not set out the details of the process of decision-making complied with in authorising the applicant to make and deal with the application. Therefore the affidavit does not contain all the statements required of this condition.

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

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

The application **contains** all details and other information required by s. 62(1)(b).

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

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

Schedule B of the application describes the external boundaries of the application area as being within the bounds of the Camfield Pastoral Lease (Perpetual Pastoral Lease No. 1025).

Schedule B also states that the application excludes any area in relation to which an exclusive possession act has been made. This exclusion is subject to the statement at Schedule L that any extinguishment is to be disregarded pursuant to s. 47B.

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

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

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

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

Searches: s. 62(2)(c)

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

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

Schedule D of the application states that the applicant has not conducted any title searches to determine the existence of any non-native title rights in relation to the area covered by the application.

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

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

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

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

Description of factual basis: s. 62(2)(e)

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

Schedule F contains details and other information pertaining to the claimant's factual basis on which it is asserted that the native title rights and interests claimed exist, and also for the particular assertions in the section. Further information in relation to the factual basis is contained in Schedule A, Schedule E and Schedule G.

Activities: s. 62(2)(f)

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

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

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

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

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

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

Schedule H contains the details of four other applications seeking a determination of native title made in relation to the whole or part of the application area—NTD 6034 of 2001 (Dungowan); NTD 6042 of 2001 (Camfield); NTD 6018 of 2002 (Camfield Montejinni) and NTD 6027 of 2002 (Buchanan Downs).

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

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

The application is silent on this requirement.

The obligation on the Registrar in regard to s. 190C(2) is explicit in the wording of the Act, that is '[t]he Registrar must be satisfied that the application contains all details and other information … required by sections 61 and 62'.

That said, the information/details required for the purpose of s. 62(2)(ga) are those 'of which the applicant is aware'. There is no information in the application to indicate that the applicant is aware of such notices under s. 24MD(6B)(c) that have been given and that relate to the whole or part of the area covered by the application.

The positive nature of this requirement, in my view, clearly relates to the provision of details and other information 'of which the applicant is aware'. While it is helpful, I do not think it is essential for the applicant to make the statement in the application that they are not aware of the existence of such notices. Where I can be satisfied (having regard to the information contained in the application) that the applicant is not aware of such details and other information, then I am of the view that I can be satisfied that the application meets the requirements of s. 62(2)(ga) for the purpose of s. 190C(2).

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

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

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

Schedule I states that this information is not applicable. I understand that to mean that the applicant is not aware of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) that relate to the whole or a part of the area covered by the application.

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

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

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

Subparagraph 190C(3)(a)—Are there any applications overlapping the area of the current application?

On 4 August 2010, the Tribunal's Geospatial Services provided a geospatial overlap analysis of the application area (GeoTrack 2010/1419). That analysis and my searches of the area against the Tribunal's mapping database and the Register confirms that the following claimant applications underly the Camfield Pastoral Lease claimant application:

NTDA	Name	Date registered	NTDA Area (sq km)	Overlap Area (sq km)	% of NTDA Overlapping DC10/6	% of DC10/6 Overlapping NTDA
NTD6034/01	Dungowan	21/06/2001	1744.187	103.023	5.91	3.70
NTD6042/01	Camfield	3/08/2001	246.048	225.784	91.76	8.12
NTD6018/02	Camfield Montejinni	2/12/2008	6397.902	2400.698	37.52	86.33

NTDA	Name	Date registered	NTDA Area (sq km)	Overlap Area (sq km)	% of NTDA Overlapping DC10/6	% of DC10/6 Overlapping NTDA
NTD6027/02	Pigeon Hole	27/09/2002	1447.329	48.266	3.33	1.74

Subparagraph 190C(3)(b)—were the applications entered on the Register when the current application was made?

The current application was made when it was filed in the Court on 29 July 2010. All of the above listed applications were made and entered onto the Register at the time the current application was made. All of these applications thus satisfy the criterion in subparagraph (b).

Subparagraph 190C(3)(c)—were the entries for the applications on the Register made, or not removed, as a result of a consideration under s. 190A?

All of the above listed applications have remained on the Register as a result of their consideration for registration by a delegate of the Registrar and thus satisfy the criterion in subparagraph (c).

For these reasons I find that all of the above listed applications are previous applications which overlap the area covered by the current application in the sense discussed in s. 190C(3)(a) to (c). I therefore need to be satisfied that there are no common claim group members between these previous applications and the current Camfield Pastoral Lease claimant application.

Common Claimants

I must be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for the underlying previous three applications.

In order to ascertain whether or not the three native title claim groups include some or all of the same people, I have compared what each of the applications say about the identity of the claim group as well as the applicant. I note that Schedule O of the current application makes the statement that:

> None of the claimants are members of any other native title claim group (regarding the area claimed or part thereof) in respect of any previous application entered on the Register of Native Title Claims

The native title claim group descriptions for each of the previous applications include the names of persons or groups captured in the description of the group for this current application.

I have made a comparison of the claim group description for the current application against the claim group descriptions in the Register Extracts for the previous applications. The descriptions of the groups for the previous applications reveal the common ancestors of Charlie Mulyungkari (Ngapurr – Pinkakujarra estate group), Old Paddy Langajarlwari (Walanypirri estate group), King Nyirtikurlkarri, Robin Parranjini and Bungree Yungkupalyi (Yingawunarri estate estate group). The names of numerous descendants of the apical ancestors identified in the claim group descriptions for the previous applications are also found in the description of the group in the current application. There may potentially be further members in common that are not readily

identifiable merely from a brief examination of the descriptions of the native title claim groups, however it is, in my view, unnecessary to undertake further inquiry into the issue.

It is clear from my examination that there is likely to be descendants of identified ancestors who are members of the native title claim group for the previous application who are included in some or all of the nine estate groups which are said to comprise the native title claim group for the current application.

I am therefore not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any relevant previous applications.

The application does not satisfy the conditions of s. 190C(3).

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

The nature of the task at s. 190C(4)(a)

Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J in *Doepel,* are straightforward—at [72]. All that the task requires of me is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body and being satisfied of their power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s. 203BE —Doepel at [80] and [81].

Pursuant to s. 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s. 203BE(2)(a) and (b) have been met; and
- briefly set out the body's reasons for being of that opinion; and

- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 203BE(3).

Pursuant to s. 203BE(2), a representative body must not certify . . . an application for a determination of native title unless it is of the opinion that:

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Identification of the representative body

Scheduel R contains statements that support certification of this application by the Northern Land Council (NLC).

The certification has been signed by the Manager of the Anthropology Branch of the NLC on 22 July 2010. It states that the NLC, as the representative Aboriginal and Torres Strait Islander body responsible for the land and waters covered by this application certifies this Claimant Determination Application pursuant to s. 203BE of the *Native Title Act* 1993.

The Tribunal's Geospatial Services assessment of 4 August 2010 confirms that the NLC is the only representative body for the whole of the area covered by the application. Therefore the NLC is the only body that could certify the application under s. 203BE.

The requirements of 203BE

To be satisfied about 'the fact of certification', the certification must meet the requirements of s. 203BE, namely s. 203BE(4)(a) to (c) —*Doepel* at [78].

Subsection 203BE(4)(a)

For the purposes of s. 203BE(4)(a), the certification includes a statement at paragraph 2 that the NLC is of the opinion that the provisions of paragraphs 203BE(2)(a) and (b) have been met.

Subsection 203BE(4)(b)

For the purposes of s. 203BE(4)(b), the certification briefly sets out the NLC's reasons for being of that opinion. The certification states:

(i) the NLC has provided representation to the claimants since 1976 wich has included anthropological, archival, historical, archaeological and field research completed for the purpose of prosecuting claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* and under the NTA since 1994— at [4]; and that

(ii) this research has considered the system of traditional laws and customs which operates in relation to the claimants, the composition of the traditional owning group, and identification of the traditional decision making process— at[5].

Further, the certification contains the following statements that specifically address the requirements of s. 203BE(2)(a) and (b):

(i) the NLC has conducted meetings with the claimants regarding this application and the applicant was authorised to make the application and deal with matters arising in relation to it on behalf of all the other persons in the native title claim group— at[6]; and

(ii) the NLC is satisfied that the term claimants, as more particularly described in Schedule A, fully describes or otherwise identifies all persons in the native title claim group— at[7].

I understand the above statements to provide the basis upon which the NLC holds the opinion that the requirements of s. 203BE(2)(a) and (b) have been met.

Subsection 203BE(4)(c)

A further requirement of s. 203BE(4) is that the representative body must also set out how it has met the requirements of s. 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. The subsection also states that a failure to do so does not invalidate any certification of the application issued by the representative body. As noted at s. 190C(3), part of the land and waters of the Camfield Pastoral Lease claimant application is overlapped by four other applications, brought by claimant groups which may include or are the same as the group in this matter.

In my view the requirement in s. 203BE(4)(c) that the certification must briefly set out what the representative body has done to meet the requirements of subsection (3) is countered by the preceding words to this subsection, 'where applicable'.

The certification does not make any statement about what the representative body has done to meet the requirements of s. 203BE(3). From this I infer that the NLC has not considered it applicable for the certification to set out what has been done to meet the requirements of subsection (3). In my view, this interpretation is open to the representative body in circumstances where it is aware of overlapping applications but has not made reasonable efforts to achieve agreement between the overlapping groups or to minimise the number of applications covering the claim area.

Therefore, in order to meet the requirements of s. 203BE(4), it is sufficient in the circumstances before me that the certification only includes the statement set out in subsection 203BE(4)(a) and the reasons referred to in subsection 203(BE(4)(b).

My decision

For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s. 190C(4)(a).

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

Schedule B at 1 describes the area covered by the application as:

> The land and waters subject to this application are within the bounds of the Camfield Pastoral Lease (Perpetual Pastoral Lease No.1025). This includes:
> (a) Northern Territory Portion 3736;
> (b) Part of Coolibah and Wave Hill Stock Routes;
> (c) Northern Territory Portion 3531;
> (d) Northern Territory Portion 4779;
> (e) Northern Territory Portion 4780;
> (f) Northern Territory Portion 3736 – Part designated as Northern Territory Portion 4853(A).

The following general exclusions to the application are made:

- at Schedule B—any area in relation to which a previous exclusive possession act under section 23B has been done; and
- Schedule E—there is no claim that the native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others in relation to any area in relation to which a previous non-exclusive possession act under s. 23F has been done.

These exclusions are both subject to Schedule L in which it is stated that pursuant to s. 47B, extinguishment is to be disregarded in relation to vacant Crown land on the basis that the claimants occupied the area claimed when the application was made. I understand this to mean that should any land or waters falling within these provisions would, therefore, be included in the area covered by the application.

Schedule C refers to Attachment A.

Attachment A is an A4 colour copy of an A4 map, entitled "Camfield Native Title Claim" (NLC GIS#: 2010_0376_A4P_Camfield); prepared by the Northern Land Council dated 15 July 2010 and includes:

- The application area depicted hatched in purple;
- Surrounding cadastral information labelled with pastoral leases shaded green;
- Roads and localities shown and labelled;
- Scalebar, northpoint, coordinate grid, legend and locality map; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Section 190B(2) requires that the information in the application describing the areas covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied that this can be said, the written description and the map should be sufficiently consistent with each other.

The geospatial assessment indicates that the map and description are not consistent and do not identify the application area with reasonable certainty. That assessment is based on discrepancies between the written description and the map. The geospatial assessment notes:

(i) the reference in the written description to '*Part of Coolibah and Wave Hill Stock Route'* and states that the map at Attachment A does not identify these stock routes; and

(ii) that the Wave Hill Stock Route does not fall within the application area.

Further the written description refers to '*Northern Territory Portion 3736 – part designated as Northern Territory Portion 4853(A)*' which the Tribunal's geospatial services is not able to locate or determine which part of Portion 3736 is in fact included in the area of the application.

Section 190B(2) requires that both the information and the map be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters. Given the lack of clarity and uncertainty surrounding the written description contained in the application and its inconsistency with the map, I cannot be satisfied that the information and map within the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

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

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

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

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description in accordance with s. 190B(3)(b). Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can ascertained whether any particular person is in that group.

In *Doepel*, Mansfield J held that the focus of this task was 'not upon the correctness of the description...but upon its ***adequacy so that the members ...in the identified native title claim group can be ascertained'*** [emphasis added]—at [37].

In my view the question, as it was for the Court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*)—at [67], is whether applying the conditions (or rules) specified in Schedule A will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group.

Of this, Carr J in *WA v NTR* stated that:

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

The description of the native title claim group appears in Schedule A of the application as follows:

1. The native title claim group ("the claimants") in relation to the area claimed is comprised of the Primary Native Title Holders and Other Native Title Holders who, according to traditional laws acknowledged, and customs observed:

   (a) are traditionally connected with the area described in schedule B ("the area claimed") by reason of:

      i. patrilineal descent;
      ii. his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent;
      iii. having been adopted or incorporated into the descent relationships referred to in (a) or (b) hereof;

   (b) have a communal native title in the application area, from which rights and interests derive.

2. The Primary Native Title Holders by definition in relation to the area claimed are comprised of six estate groups:

   (a) the Ngapurr – Pinkakujarra group;
   (b) the Narrwan group;
   (c) the Walanypirri group;
   (d) the Yingawunarri Group;
   (e) the Purrurruka Group;
   (f) the Yilyilyimarri Group;
   (g) the Japuwuny-Wijina Group;
   (h) the Billinara Group;
   (i) the Wampana Group.

   By definition, the **Ngapurr - Pinkakujarra** estate group is comprised of all persons descended from one apical person being the late Charlie Mulyungkari.

   The descendants from Charlie Mulyungkari include:
   [names of persons who are descendants of Charlie Mulyungkari as listed in Schedule A]

   By definition, the estate group **Narrwan** is comprised of all persons descended from three apical persons and brothers being the late Number-one-warra.

   The descendants from Number-one-warra include:
   [names of persons who are descendants of Number-one-warra as listed in Schedule A]

   By definition the estate group **Walanypirri** is comprised by all persons descended from one apical person being the late Old Paddy Langajarlwari.

   The descendants from Old Paddy Langajarlwari include:
   [names of persons who are descendants of Old Paddy Langajarlwari as listed in Schedule A]

By definition the estate group **Yingawunarri** is comprised by all persons descended from one apical person being the late King Nyirtikurlkarri, Robin Parranjini and Bungree Yungkupalyi.

The descendants from King Nyirtikurlkarri include:
[names of persons who are descendants of King Nyirtikurlkarri as listed in Schedule A]

The descendants from Robin Parranjini include:
[names of persons who are descendants of Robin Parranjini as listed in Schedule A]

The descendants from Bungree Yungkupalyi include:
[names of persons who are descendants of Bungree Yungkupalyi as listed in Schedule A]

By definition the estate group **Purrurruka** is comprised by all persons descended from one apical person being the late Old Kelly Niwu:

The descendants from Old Kelly Niwu i include:
[names of persons who are descendants of Old Kelly Niwu as listed in Schedule A]

By definition the estate group **Yilyilyimarri** is comprised by all persons descended from one apical person being a late unnamed Jurlama man.

The descendants of the unnamed Jurlama man include:
[names of persons who are descendants of the unnamed Jurlama man as listed in Schedule A]

By definition the estate group **Japuwuny - Wijina** is comprised by all persons descended from one apical persons being two late unnamed Jurlama men.

The descendants of the first unnamed Jurlama man include:
[names of persons who are descendants of the first unnamed Jurlama man as listed in Schedule A]

The descendants of the second unnamed Jurlama man include:
[names of persons who are descendants of the second unnamed Jurlama man as listed in Schedule A]

By definition the estate group **Billinara** is comprised by all persons descended from one apical person being the late Lily Jurulngul, Lilly Kapalngal and Minyaminya:

The descendants from Lily Jurulngul include:
[names of persons who are descendants of Lily Jurulngul as listed in Schedule A]

The descendants from Lilly Kapalngal include:
[names of persons who are descendants of Lilly Kapalngal as listed in Schedule A]

The descendants from Minyaminya include:
[names of persons who are descendants of Minyaminya as listed in Schedule A]

By definition the estate group **Wampana** is comprised by all persons descended from one apical person being the late Alligator Tommy Jampiyin and Joe Lingari Jampiyin:

The descendants from Alligator Tommy Jampiyin include:
[names of persons who are descendants of Alligator Tommy Jampiyin as listed in Schedule A]

The descendants from Joe Lingari Jampiyin include:
[names of persons who are descendants of Joe Lingari Jampiyin as listed in Schedule A]

3. Other Native Title Holders

In accordance with traditional laws and customs, other Aboriginal people have rights and interests in respect of the determination area, subject to the rights and interests of the estate group members, such people being:

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

In my view there must be clarity around the description of the native title claim group. To that end, the description must be capable 'without elaboration, of conveying meaning'—*Colbung v Western Australia* [2003] FCA 774 at [41]. That is an issue which 'is largely one of degree with a substantial factual element'—*Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 (*Ward v Registrar)* at [27].

I will deal firstly with that part of the description in Schedule A that relates to the Primary Native Title Holders. I understand Part 1 of Schedule A to contain the criteria of membership that apply to the members of the four named estate groups identified in Part 2 of Schedule A, being the Primary Native Title Holders. Part 2 also identifies with further specificity the persons who will comprise the members of the four named estate groups by reference to descent from named ancestors.

Within this part of the description there is a clear starting or external reference point with which to commence an inquiry about whether a person is a Primary Native Title Holder. In that regard I refer to the definition of the four named estate groups in Part 2 of the description, which includes descent from a number of named ancestors. The inquiry into the Primary Native Title Holders, in my view, is further assisted by the naming of some of those descendants who it is asserted fall within that descriptor.

Describing a claim group in reference to named ancestors, including being the biological or adopted descendants of named ancestors, is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b): see *WA v NTR* at [67]. While, in my view, the criteria of membership in Part 1 of Schedule A, is more complex than simply biological descent or adoption, I am of the view that when read with Part 2 of Schedule A, the description of the Primary Native Title Holders is sufficiently clear.

Part 3 of the description in Schedule A relates to the 'Other Native Title Holders'. Part 1 of Schedule A contains the criteria of membership that applies to both 'Primary Native Title Holders' and 'Other Native Title Holders', the latter comprising the members of estate groups from neighbouring estates and the spouses of the estate group members.

I will deal firstly with that part of the description of the Other Native Title Holders that relates to the 'spouses of the estate group members', namely Part 3(b). I understand this to refer to the

spouses of the Primary Native Title Holders. Given my conclusion in relation to Part 2 of Schedule A that the description of the Primary Native Title Holders is sufficiently clear, I am of the view that Part 3(b), when read in conjunction with Part 1 and 2, is also sufficiently clear. That is, I am of the view that the members of the native title claim group, in so far as they are spouses of the Primary Native Title Holders, can be readily identified via this description.

There is, however, in my view, an obvious distinction between the clarity of the description contained in Part 3(a) and that contained in Part 2 and Part 3(b). The starting or external reference point with which to commence an inquiry about whether a person is an Other Native Title Holder, in that they are a member of an estate group from a neighbouring estate, for the purpose of Part 3(a) of Schedule A is relatively unclear. It would appear that they must be a member of a neighbouring estate of one of the four named estate groups in Part 2 of Schedule A. In that regard, it would seem that the Other Native Title Holders would need to be a member [meeting the requirements of Part 1 of Schedule A] of an estate group neighbouring any of the nine estate groups listd at Part 2 which go to comprising the native title claim group.

The issue then arises as to how the Other Native Title Holders, who are members of estate groups from neighbouring estates, would be identified without any starting or external reference point to guide in the identification task. For instance, it is clear that the Other Native Title Holders must be a member from a neighbouring estate, but is a neighbouring estate determined entirely by proximity, by close relations existing between the estate groups and the neighbouring estate or by some other undefined dynamic existing between the unnamed neighbouring groups and the four named estate groups.

I understand that s. 190B(3) does not require 'a cognent explanation' as to the basis upon which members qualify for their inclusion into the group—*Gudjala [2007]* at [33].

The description of the Other Native Title Holders contained in Part 3(a) of Schedule A (and read in conjunction with Parts 1 and 2) is such that it lacks the sufficiency required to facilitate the identification of persons falling within that component of the native title claim group description: see *Doepel* at [51] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34]. For instance, the starting or external reference point with which to commence an inquiry about whether a person is an Other Native Title Holder, for the purpose of Part 3(a), is unclear. The description, in my view, requires some further elaboration before it would be capable of conveying meaning.

Thus, I am not satisfied of the sufficiency of the description, contained in Schedule A, for the purpose of s. 190B(3)(b).

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

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

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

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

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

The description of the native title rights and interests claimed in relation to particular land or waters is found at Schedule E. I am satisfied that the description of the claimed native title rights and interests is sufficient to allow them to be readily identified in the sense that they are described in a clear and easily understood manner.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

The nature of the Registrar's task at s. 190B(5) was explored by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence...'—at [17].

The Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) agreed with Mansfield J's characterisation of the task at s. 190B(5)—at [83], and also held that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. Further, the nature and quality of the information required for s. 62(2)(e) purposes was held to be indicative of what may satisfy the Registrar for the purpose of s. 190B(5), but '[o]f course the general description must be in ***sufficient detail to enable a genuine assessment*** of the application by the Registrar under s. 190A and related sections …' [emphasis added]—*Gudjala FC* at [92].

In my view, the above authorities establish clear principles by which the Registrar must be guided when assessing the sufficiency of a claimant's factual basis. They are:

- The applicant is not required 'to provide anything more than a general description of the factual basis'— *Gudjala FC* at [92].
- The nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala FC* at [92].
- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- The Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at s. 190B(5)(a) to (c)—*Doepel* at [17].

The decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) also give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

Thus, in line with those authorities, it is in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that ' it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

The claimant's factual basis material

The information contained in the application in relation to the asserted factual basis on which the claimed native title rights and interests exist is found at Schedule F and G. Schedule F consists of largely general assertions in relation to the claimants' traditional country, of which this application area is a part. The statements do not appear to contain any material/information of any specificity to the native title claim group, but assert the following:

- the claimants are, traditionally, the owners of the land and waters in the claim area;
- the traditional connection of the claimants with the claim area, and the native title rights and interests, were inherited from their ancestors, in accordance with the traditional laws and customs;
- the group has acknowledged and observed traditional law and custom since time immemorial including at the time sovereignty was asserted by the British and at the time of first contact;
- the group continues to acknowledge and observe traditional law and custom, possess and exercise its native title rights and interests in relation to its traditional country;

[1] See *Gudjala FC* [90] to [96].

- historical, archaeological and site information in relation to the wider area of land and waters suggests that since time immemorial, and in accordance with traditional laws and customs, the area claimed has been regarded as belonging to the claimants;
- material evidence of physical connections by the ancestors of the claimants exists in their traditional country, and is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation;
- particulars of the traditional laws and customs relating to the rules and operation of the group's kinship system; and
- land use laws and obligations in relation to land and waters.

Schedule G consists of a list of activities that members of the native claim group are said to carry out within the application area.

Section 190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area

On this aspect of the factual basis, not criticised by the Full Court in *Gudjala FC*, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala [2007]* at [52] and *Gudjala FC* at [90] to [96].

The material states that the claimants are, traditionally, the owners of the land and waters subject to this application. Further, the area is a part of a larger area of land and waters which continued to be owned and occupied by the claimants after the assertion of sovereignty by the Crown of the United Kingdom. It is asserted that the claimant's retain a traditional connection to the claim area and generally to their traditional country. This was inherited from their ancestors in accordance with traditional laws and customs.

At best, the above statements and assertions provide a very limited factual basis in support of the assertion that the group's predecessors had an association with the area. For instance, it provides no details or facts in relation to those predecessors, other than the assertion that the traditional connection of the claimants with the area was inherited from their ancestors in accordance with traditional laws and customs. The statement that claimants are, traditionally, the owners of the land and waters in the application area is also of a very general and limited factual nature.

Schedule G of the application outlines a number of activities that are currently being carried out by the claim group, including camping, hunting, and caring for the land and waters. While that material provides some of the factual basis pertaining to the assertion that the native title claim group have an association with the area, nonetheless, it is, in my view, insufficient for the purpose of s. 190B(5)(a).

In *Martin v Native Title Registrar* [2001] FCA 16, French J (as his Honour was then) held in regard to the requirement at s. 190B(5)(a), that the delegate was not obliged to accept 'very broad

statements' that did not demonstrate an association with the entire application area and which lacked any 'geographical particularity'—at [26].

It is my view that the material within the application provides no information of any specificity pertaining to the claim group's continuing association with the application area since sovereignty.

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

Section 190B(5)(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

In *Gudjala [2007]*, Dowsett J recognised the importance of understanding the meaning attributed to 'native title' pursuant to s. 223 of the Act, in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c)) where he outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*)—at [26]. Again, this aspect of the decision of Dowsett J was not criticised by the Full Court—see *Gudjala FC* at [90] to [96].

Dowsett J's examination of *Yorta Yorta* led him to form the view that a necessary element of this aspect of the factual basis is the identification of the relevant Indigenous society at the time of sovereignty or, at the very least, the time of first contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary to provide a factual basis sufficient to support an assertion that the 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty' can be demonstrated—*Gudjala [2007]* at [26], [66] and [81].

The application's factual basis in support of this assertion, in my view, is limited to listing a number of laws and customs, which are asserted to be traditional in nature. This material does not include a factual basis that identifies the relevant pre-sovereignty Indigenous society, nor does it provide a factual basis pertaining to laws and customs of the claim group at sovereignty or how such laws and customs have been acknowledged and observed by the native title claim group. The assertion is that the laws and customs identified are traditional in nature, however, no factual basis is provided in support of this assertion.

In that regard, Dowsett J in *Gudjala [2009]* considered that the applicant must, at least, provide an outline of the facts pertaining to the traditional laws and customs of the native title claim group. Further, 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' in the absence of any factual details relevant to that assertion, is insufficient as it simply restates the claim—at [29].

The factual basis, in my view, must also demonstrate how the traditional laws and customs of the group give rise to the claimed native title rights and interests—*Gudjala [2007]* at [39]. Of course,

this need only be in a general sense, as it is the task at s. 190B(6) that requires the weighing of the factual material in support of each right or interest—*Doepel* at [126] and [127]. That said, I must be satisfied that there is a 'proper factual basis' on which it is asserted that the native title rights and interests exist—*Doepel* at [128]. The material within the application does not demonstrate how the asserted traditional laws and customs listed in Schedule F give rise to the claim for native title rights and interests.

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

Section 190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In essence, my view is that this element of the test equates with what the majority in *Yorta Yorta,* in constructing the definition of native title, identified as the second element in their understanding of the word 'traditional'. It 'requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty'—at [47].

Of this requirement, Dowsett J, in *Gudjala [2007]*, held that 'it implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date'—at [82].

Given my conclusion above and observations on the inadequate nature of the application's factual basis, it must follow, in my view, that the factual basis is not sufficient to support the assertion in s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. For instance, I must consider whether, prima facie, the rights and interests claimed exist under the traditional laws and customs of the native title claim group.

Given my conclusion, formed above at s. 190B(5)(b), that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title, it follows, in my view, that the application cannot satisfy this requirement. I note that

this, in my view, is consonant with the approach taken by Dowsett J in *Gudjala [2007]* and *Gudjala [2009]* —at [87] and [82] respectively.

Subsection 190B(7)
Traditional physical connection

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

  (i) the Crown in any capacity, or

  (ii) a statutory authority of the Crown in any capacity, or

  (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **does not satisfy** the condition of s. 190B(7).

This section imposes 'some measure of substantive (as distinct from procedural) quality control upon the application'. It requires that the evidentiary material be capable of satisfying the Registrar or delegate of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. Although, the focus must necessarily continue to be one that is confined, as the situation is not synonymous to that when the Court hears the matter for determination, it is 'upon the relationship of at least one member of the native title claim group with some part of the claim area—*Doepel* at [18].

I also understand that the term traditional, as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89].

Schedule M of the application provides that the claimants have maintained a traditional physical connection with the land or waters covered by the application, including that claimants reside on their country. Other examples of their physical connection are stated to include entering and travelling across the claim area, hunting, fishing and collecting resources on the claim area and visiting and protecting sites of significance.

Schedule G also consists of a list of activities that are stated to be currently carried out by the native title claim group in relation to the application area.

In my view, both Schedule G and M lack the specificity that is necessary to satisfy the requisite traditional physical connection. For instance, neither Schedule G nor Schedule M contain any information on who within the native title claim group carries out such activities, nor does it give any information pertaining to the context surrounding the carrying out of such activities.

There is also the further fundamental issue that the application's factual basis is not sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed

by the native title claim group that give rise to the claim to native title rights and interests. In *Gudjala*, Dowsett J held that the absence of any basis to support the inference that there was a pre-sovereignty society having laws and customs, necessarily meant that the application did not satisfy the requirements of s. 190B(7).

Subsection 190B(8)
No failure to comply with s. 61A

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
>
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If:
> (a) a previous exclusive possession act (see s. 23B) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (a) a previous non-exclusive possession act (see s. 23F) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;
> a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
> (4) However, subsection(2) and (3) does not apply if:
> (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
> (b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

The geospatial report dated 28 July 2010 and a search that I made of the Tribunal's geospatial databases on 21 September 2010 reveals that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. In my view the application **does not** offend the provisions of s. 61A(2).

The area covered by the application is within the bounds of a non-exclusive pastoral lease (Perpetual Pastoral Lease No. 1013). There is nothing on the face of the application that indicates, and I am not otherwise aware, that the application is made over areas covered by a previous exclusive possession act.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

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

The application claims the right to possession, occupation, use and enjoyment of the claim area to the exclusion of all others (Schedule E—1(a)) but does not make this claim in relation to any area regarding which a previous non-exclusive possession act under s. 23F has been done (Schedule E—3).

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

The application at Schedule Q states the following:

> The claimants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown. The claimants assert that the Crown does not wholly own minerals, petroleum or gas in the area subject to the application

I take this to mean that the claimants are not making a claim to ownership but want to note their assertion that the Crown does not wholly own the resources.

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

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

The application at Schedule P provides the statement that this requirement is not applicable. The area covered by this application does not include any offshore place.

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

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

The application does not make a statement that it excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

The affidavit accompanying the application, in accordance with s. 62(1)(a), contains the affirmation that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application.

There is nothing on the face of the application and accompanying documents to the contrary, and I am not otherwise aware that the application claims any rights and interests that may have been extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Camfield Pastoral Lease**
NNTT file no.	**DC10/6**
Federal Court of Australia file no.	**NTD6/10**
Date of registration test decision	**27 September 2010**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Not met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Not met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

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

Section 190B conditions

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

Test condition	Subcondition/requirement	Result
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document}