National Native Title Tribunal

Registration test decision

Application name	Mount Jowlaenga
Name of applicant	Rona Charles and Laurie Charles
NNTT file no.	WC2013/005
Federal Court of Australia file no.	WAD306/2013
Date application made	8 August 2013
Date of reasons	12 September 2013

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 am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 6 September 2013

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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 30 July 2013 and made pursuant to s. 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the Registrar's delegate, for the decision to accept the claim made in the application for registration pursuant to s. 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Mount Jowleagna claimant application to the Registrar on 8 August 2013 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.

[4] Given that the claimant application was made on 8 August 2013 and the claim has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 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 190B and 190C of the Act. This is commonly referred to as the registration test.

[5] The Mount Jowlaenga application has been filed in response to the issuing under s. 29 of a future act notice by the State of Western Australia (the state government) in relation to the grant of mining lease application, M04/457. The notification date for the notice is 8 May 2013. The Mount Jowlaenga application was filed within the statutory three month time period over the area affected by the future act notice and I have therefore used my best endeavors to finish considering the claim by the end of 4 months after the notification date (6 September 2013)—see s. 190A(2).

Registration test

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

Information considered when making the decision

[7] 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.

[8] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application, while other conditions allow me to consider wider material.

[9] The following lists information and documents that I have considered in reaching my decision:

- Rona Charles & Anor v State of Western Australia (Mount Jowlaenga) native title determination application and accompanying documents and affidavits, as filed in the Court on 8 August 2013;
- the Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) of 14 August 2013, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent;
- material provided by the applicant, additional to the application:
  - Affidavit of Ms Rona Charles, dated 7 August 2013,
  - Map of sites referred to in Ms Rona Charles' affidavit,
  - A key to the map of sites referred to in Ms Rona Charles' affidavit,
  - Certification, Kimberley Land Council, dated 13 August 2013.

Procedural fairness steps

[10] 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. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31].

[11] The additional material referred to above was provided to me in three parts, on 8, 13 and 14 August 2013. In an email of 20 August 2013, the applicant's legal representative submitted that the certificate is a public document and that he 'would firmly disagree with any proposition that the delegate could not be satisfied that the requirements of s. 190C(4)(a) have been met unless the certificate is included in the application itself'.

[12] In my view, the state government is a person to whom procedural fairness is owed if it appears that the application may be accepted for registration—see *Western Australia v Native Title Registrar and Belotti* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v Registrar*) at [29], [31] to [38]. The state government's right to procedural fairness is supported by provisions of the Act, particularly s. 190A(3)(c), which requires the Registrar to have regard to information supplied by the state/territory government to the extent it is reasonably practicable to do so. The additional material was forwarded to the state government on 20 August 2013 and the submission on 2 September 2013, providing it with an opportunity to comment. The state government made no comment in relation to either any of the additional material, nor the brief submission in respect of the certificate.

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.

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

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

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

[16] Below I consider each of the particular parts of ss. 61 and 62 that require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s. 61(1)

[17] The task at this condition is limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1) and as such, the task does not require me to look beyond the contents of the application itself. In assessing the application and whether it contains the details and information required by s. 61(1), I am not entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group. That said, in seeking to verify that an

application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*Doepel* at [35] to [37], [39] and [47].

[18] Part A of the application contains the information regarding persons authorised to make this application, listing the names of the applicants, and providing details regarding their authorisation by the native title claim group. Schedule A of the application contains a description of the native title claim group stating that it comprises the descendents of a single ancestor. The application provides (at Attachment F) information in respect of the ancestral links of the native title claim group to this ancestor, specifically in relation to the internal distribution of rights in accordance with Nyikina Mangala traditional law and custom such that the native title claim group holds the common or group rights and interests comprising the particular native title claimed in this application.

[19] More specifically, the application asserts that the native title claim group relies on the Nyikina Mangala normative system to claim their 'country area' or *buru* in which the area covered by the application falls. It therefore asserts to possess common rights and responsibilities under those laws and customs in relation to the claim area. Based on this proposition, the application, in my view, appears to be made by all the members of native title claim group.

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

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

[21] Part B of the application states on page 11 the name and address for service of the persons who are the applicant.

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

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

[23] Schedule A provides a description of the persons in the group as being those who are the descendents of one man.

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

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

[25] The application is accompanied by affidavits from each of the two persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and make all the statements required of this section.

[26] The application is accompanied by the affidavit required by s. 62(1)(a).

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

[27] Subsection 62(2)(b) requires that the application contain all details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

[28] Schedule B provides a description of the external boundaries of the area covered by the application at paragraph 1. It lists at paragraphs 2 and 3 those areas not covered by the application.

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

[29] Schedule C refers to Attachment C being a map showing the boundary of the area covered by the application.

Searches: s. 62(2)(c)

[30] Schedule D states that the applicant has not carried out any searches in relation to the area covered by the application.

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

[31] A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Attachment E. This description (included as an excerpt within my reasoning at s. 190B(4)) consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that may not have been extinguished, at law.

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

[32] Schedule F refers to Attachment F which is a general description of the factual basis for the claim made in the application. The application also relies on an affidavit affirmed on 7 August 2013 by one of the persons comprising the applicant.

Activities: s. 62(2)(f)

[33] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

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

[34] Schedule H provides the statement that there are no such applications of which the applicant is aware.

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

[35] Schedule HA states that the applicant is not aware of any such notices.

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

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

[37] Schedule I provides the details of the current notice issued under s. 29 and the statement that the application is lodged in response to this notice.

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

Conclusion

[39] The application does contain the details specified in ss. 62(2)(a) to (h), and therefore contains all details and other information required by s. 62(1)(b).

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.

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

[41] The geospatial assessment and overlap analysis of 14 August 2013 (the geospatial report) identifies that no native title determination applications fall within the external boundaries of the current application.

[42] As the application is not overlapped by any other applications in the sense discussed in s. 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group membership.

[43] I am therefore satisfied that the current application meets the requirements 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.

[44] I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

[45] The application does not purport to having been certified. The application at Schedule R of the Form 1 does not complete the section at (1) that pertains to certification but instead refers to Attachment R in the section at (2) which requires information in relation to the authorisation of the applicant to make and deal with the application. Attachment R makes the statement that the applicant is a member of the native title claim group and briefly sets out the grounds on which the applicant has been authorised, including the decision-making process by which this occurred.

[46] On 8 August 2013 (the date the application was filed), the applicant's legal representative advised (the case manager for the matter) that although Attachment R was completed on the basis that the application had not been certified, certification was to take place shortly. The applicant's legal representative provided the certificate to the Registrar by email on 13 August 2013. The email noted that it attached 'the certificate evidencing the fact of the application having been certified under Part 11 of the Act by the KLC, in its capacity as the only representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part'.

[47] It is unusual for a certificate to be provided to the Registrar after the filing of the native title determination application, more so in this case as the application does not indicate that it was certified. As the applicant's legal representative indicated on the day of filing that certification was to take place shortly, this, in my view, shows a clear intention on the part of the applicant, that the application be considered to have been certified and therefore considered by the delegate under s. 190C(4)(a). To date, the applicant has not filed the certificate in the Court and has not expressed any intention to do so.

[48] For the purposes of the Registrar's consideration of the application pursuant to s. 190A, the applicant has provided a document that evidences certification by the relevant representative Aboriginal/Torres Strait Islander body. Therefore, in accordance with s. 190A(3)(a), I must have

regard to the certificate, despite it having been provided after the filing of the application, as it is information contained in 'other documents provided by the applicant'.

[49] I provided a copy of the certificate to the state government inviting any comment in relation to it and other documents that the applicant provided to the Registrar after the application was filed. The state government did not make any comment, either generally nor specifically in relation to the certificate.

[50] Further, the task of the Registrar where the claim made in the application has been certified was considered by Mansfield J in *Doepel* and approved by Keifel J in *Wakaman People # 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 who said:

> The Registrar's functions do extend to a consideration as to whether the authorisation of the person or persons to bring the application has been made as required by the NTA. This would include consideration of the process of authorisation used and whether 'all' the members of the claim group participated in it (although the NTA does not require that every member of the group be present or that all those present agree: *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 at [25] and *Moran* at [48]). A consideration of aspects of the authorisation process is not to be undertaken by a Registrar where the application in question has been certified in accordance with s 203BE. Certification means that the function has been carried out by the representative body and there is no basic function for the Registrar to carry out—at [34].

[51] Therefore, in my view, the purported certification of the application by the Kimberley Land Council Corporation (KLC), provided to the Registrar for the purposes of the application of the registration test, is the only extent to which I consider the authorisation process. On this basis I now consider whether I am satisfied that the requirements of s. 190C(4)(a) are met.

The task at s. 190C(4)(a)

[52] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires 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 (or bodies) and being satisfied of its 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].

[53] 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 203BE(2)(a) and (b) have been met;
- 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) in relation to any overlapping applications.

[54] 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.

Consideration

[55] The Tribunal's geospatial report of 14 August 2013 confirms that the KLC is the only representative body for the whole of the area covered by the application. It is therefore the only body that could certify the application under s. 203BE. The certificate is dated 13 August 2013 and signed by the Executive Director of the KLC.

[56] For the purposes of s. 203BE(4)(a), the certification contains the statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is:

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

[57] For the purposes of s. 203BE(4)(b), the certificate briefly sets out the reasons for the KLC being of that opinion, namely:

- the KLC has over a number of years undertaken extensive anthropological and genealogical research and conducted community consultations with Nyikina Mangala people for the purposes of identifying who holds the particular rights to areas of country throughout Nyikina Mangala country;
- in doing so they have 'identified the members of the native title claim group for this application as the persons who collectively hold the right to speak for the land and waters within the area which is subject to this application';
- the native title clam group being the descendants of a Nyikina man have a traditional decision-making process (the proper way) for making decisions in relation to their local country (*buru*) whereby decisions are made by available members of the senior generation of the claim group together with younger members of the claim group who take an interest in such matters; and
- KLC staff observed decisions being made in accordance with this process at a meeting of members of the claim group on 7 August 2013 at Pandanus Park which resulted in the authorisation of the two members of the senior generation of the group to comprise the applicant to make and deal with the application.

[58] The certificate also states the KLC is of the opinion that it was the appropriate decision-making process in relation to authorising the making of a native title determination application over land and waters within the claim group's *buru*. In its opinion, the existence of a traditionally mandated process followed by a local landholding group is not inconsistent with the agreed and adopted decision-making process employed by the wider Nyikina Mangala society.

[59] For the purposes of s. 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s. 203BE(3). This 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, although failure to so does not invalidate the certification. The certificate does not address this requirement.

[60] For the reasons set out above, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application.

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.

[61] In assessing the claim against s. 190B(2), I am required to be satisfied that the information contained in the application as required by ss. 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention—*Doepel* at [16] and [122].

The description and map contained in the application

[62] Schedule B provides a description of the application area as covering an area of 6.97HA, located approximately 65 km westerly of Derby, and as a series of coordinate points. Schedule B also provides a list of general exclusions and notes that where there is a discrepancy between the description and map, the description prevails.

[63] Schedule C refers to Attachment C which consists of two maps showing the application area. The first map is titled "Tenement Referral Plan" produced by the department of Mines and Petroleum (WA) dated 28 March 2013 and includes:

- a mining tenement, river, roads, quarry and underlying pastoral lease labelled;
- scalebar, northpoint, and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[64] The second map is a colour copy of a diagram of mining lease M04/457 and includes:

- the application area depicted as a black outline;
- the application corner points shown as red points labelled with coordinates and the commencement point; and
- notes relating to the datum of data used to prepare the map.

Consideration

[65] Overall, the information in relation to the external boundaries of the area covered by the application allows me to identify the location of those external boundaries on the surface of the earth. The area covered by the application is the extent of the mining lease application, M04/457.

[66] In respect of those areas not covered by the application and described by general exclusion statements, a generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would so fall within the generic description provided—see *Daniel for the Ngaluma People v Western Australia* [1999] FCA 686—at [32]. For the purposes of meeting the requirements of this section the general exclusion statements in Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[67] The geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment.

[68] I am therefore satisfied that the external boundary is reasonably identifiable and, along with the general exclusion clauses that set the internal boundary, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[69] For these reasons, I am satisfied that the application satisfies the condition of s. 190B(2).

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.

[70] 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, and it is therefore necessary for me to consider whether the application satisfies the requirements of s. 190B(3)(b).

[71] I note the comments of Mansfield J in *Doepel* at [51] and [37], respectively, that the focus of s. 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group; and
- not on 'the correctness of the description . . . but upon its adequacy so that the members[sic] of any particular person in the identified native title claim group can be ascertained'.

[72] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v Registrar*) was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[73] Schedule A of the application contains the following description of the persons in the native title claim group:

> The native title claim group comprises the descendants of a man named Tjarlumbun.

[74] Attachment F to the application provides detailed information in relation to the basis under traditional laws and custom on which persons are entitled to be identified as a member of the native title claim group. I have therefore considered it necessary to be informed by this material in my consideration of whether I am satisfied that any particular person is in that group.

[75] As I understand it, the area covered by the application falls within an area of Nyikina country known to Nyikina people as *"Jumbun"*—at [9]. In accordance with Nyikina and Mangala traditional law and custom, the Nyikina people as described (the native title claim group) are the country (or local landholding) group for this area. They have acquired rights in relation to the area by virtue of their descent from Tjarlumbun, who is the grandfather of members of the senior generation of the native title claim group. Ownership of this country area, known in the Nyikina language as *buru*, is governed by descent from this one ancestor and inextricably linked to the associated rules and obligations imposed on the native title claim group by that descent. While the description is very clear as to the composition of the native title claim group, the application also elucidates that it is the observance and acknowledgement of the traditional laws and customs of the wider Nyikina and Mangala society that governs the internal distribution of rights to country.

[76] In this sense, the description of the native title claim group found at Schedule A is informed by information contained elsewhere in the application. In my view, this information does not obscure the description of the native title claim group and I am satisfied it is described sufficiently clearly so that it can be ascertained whether any particular person is in the group and am therefore satisfied that the native title claim group has been sufficiently described.

[77] The application therefore satisfies the condition of s. 190B(3).

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

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

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

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

[79] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner.

[80] Schedule E of the application refers to Attachment E which contains the description of native title rights and interests claimed in relation to the application area, as required by s. 62(2)(d). They are prefaced by five qualifications to which the claimed rights and interests are subject, including other rights created under State or Commonwealth laws and the operation of other provisions under the NTA. The rights and interests claimed are as follows:

> The particular native title claimed in this application is the title held by those Nyikina people whose *buru* includes the application area, being the members of the native title claim group as described in Schedule A. Other people whose *burus* are located in other areas (including other Nyikina people) have secondary rights which permit them to undertake certain of the activities covered by rights (b) to (i) below within the application area, but must "*come behind*" the members of the native title claim group.* The rights and interests claimed, subject to the above qualifications, are the following:
>
> (a) the right to speak for the application area;
> (b) the right to live, being to enter and remain on, camp and erect shelters and other structures for those purposes on the application area;
> (c) the right to hunt and gather for personal, domestic, cultural and non-commercial communal purposes;
> (d) the right to take and use flora and fauna for personal, domestic, cultural and non-commercial communal purposes;
> (e) the right to take, use, share and exchange the natural resources of the application area including soil, sand, clay, gravel, ochre, timber, charcoal, resin and stone for personal, domestic, cultural and non-commercial communal purposes;
> (f) the right to engage in cultural activities in the area, including the transmission of cultural heritage knowledge;
> (g) the right to conduct and participate in ceremonies;
> (h) the right to hold meetings; and

(i) the right to visit, maintain and protect from physical harm, areas, places and sites of importance in the application area.

[81] A footnote in the description (*) refers to Attachment F of the application at paragraph [31] which provides the following by way of explanation:

> The internal distribution of rights in relation to a country area amongst those persons who hold rights in an area is discussed by Dr Palmer at [462] to [464]:
>
> "In my view the manner whereby rights are pressed depends upon a number of factors. These include social status derived from age, ritual knowledge and experience and, to some extent, sex. Knowledge and familiarity of the country wherein the rights are pressed is also important. This may be considered to be a reflection of place of residence, since familiarity with country implies at least a degree of physical presence. Together I call the social effect of these factors 'standing'. Thus a person's 'standing' in relation to a *buru* or *ngura* is a significant factor in the operationalising of his or her rights to that country. These views are supported by the following data."
>
> "Amongst those with whom I worked, recognition of standing is a concomitant of status derived from spiritual seniority. … Conversely, lack of ritual experience, perhaps as a consequence of wrong action, prevents achievement of authority and status. While ritual status yields recognition of standing it does not over-ride the privileges of those with rights to *buru* gained through descent or spiritual imbuement. Senior claimant [Name Deleted] told me of an area that we visited that it was Nyikina country. He named those who could exercise rights in it. While he acknowledged that Law men had a role to play in this regard, he stated that they would 'have to come behind'."
>
> "Others with whom I worked recognised that their own lack of knowledge and experience in the customary religious life meant that they did not press rights with respect to religious practice. Senior claimant [I.M.] (now deceased) stated that he was able to exercise his rights to his FFF country but that his claims to that country, which is south of the application area [for WAD 6099 of 1998], might 'come behind' claims to his country of residence with which he has both ancestral as well as a personal spiritual connection. The data I collected also demonstrates that claimants recognised areas adjacent to those which they regarded as being their *buru* or *ngura* as ones in which they might exercise limited rights which would be subject to the command of others. In such cases they would 'help them out' but 'come behind' and support them."

[82] In my view, the native title rights and interests claimed as listed (a) to (i) can be 'properly understood'. The opening paragraph serves to explain that the native title claim group is bound by certain traditional laws and customs that govern the claim to the rights and interests and who can exercise them. This proposition is further extrapolated in Attachment F.

[83] In reading the rights and interests listed in Attachment E, together with and subject to the qualifications, I am of the view that the native title rights and interests claimed can be 'readily identified', and that there is 'no inherent or explicit contradiction' in the description which prevents me from reaching the level of satisfaction required by s. 190B(4)—*Doepel* at [123].

[84] I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified and meet the requirements of s. 190B(4).

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

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

Introduction

[85] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s. 190B(5). In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[86] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*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 ss. 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticize 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) and his approach in *Gudjala 2009* was in accord with this.

[87] In my view, the above authorities establish clear principles which guide the Registrar when assessing the sufficiency of a claimant's factual basis. In summary, 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].

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

- 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 ss. 190B(5)(a) to (c)?—*Doepel* at [17].

[88] The Full Court in *Gudjala FC* held that a 'general description' (as required by s. 62(2)(e)) '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'—*Gudjala FC* at [92].

[89] Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

> … 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—at [29].

Information considered

[90] *Doepel* is authority that when making an assessment at this condition, I can have regard to information beyond the application, a view held also by the Full Court in *Gudjala FC* at [90]. Attachment F comprises information going to the factual basis assertions supported by the findings of Dr Kingsley Palmer in his anthropological report of 16 November 2012. In addition to the application and its accompanying documents, I have also relied on an affidavit affirmed by Rona Charles on 7 August 2013 and a map of the locations referred to her affidavit, which the applicant provided to me on 8 August 2013.

The area of the application

[91] The area covered by the application is the extent of a 6.97HA (0.0697km^2) mining lease application. Ms Charles provides in her affidavit the context in which this area falls in relation to her country:

> The area covered by this application ... falls squarely within my *buru* [our country]. As owners of that *buru*, the members of the native title claim group are the ones that have the right to speak for that country under Nyikina Mangala law—at [6].

[92] Attachment F also provides information in relation to the application area and its vicinity:

> Although this area lies outside the boundary of the registered Nyikina Mangala application WAD 6099 of 1998 (which focuses on "core" parts of Nyikina Mangala country), it falls within an area of Nyikina country known to Nyikina people as "Jumbun"—at [9].

and

> The application area falls within an area of swampy *jila* [permanent water sources] country, which is rich in animals for hunting. It is also in the vicinity of two of the main sources for ochre within Nyikina country, used in ceremony—at [9].

[93] Given this context, in my view, my consideration of the connection of the native title claim group to the area covered by the application is guided by the following statement in Attachment F:

> Both the general assertions which are made, and the illustrative examples which are given, in this Attachment regarding the continuing connection of the Nyikina Mangala people generally to their country generally since prior to 11 June 1829 through to the present, apply equally to the connection to the application area on the part of the members of the native title claim group for this application, and on the part of their predecessors in title to the application area, back to 11 June 1829—at [9].

[94] I therefore consider all of the information before me against the backdrop of a core or wider Nyikina Mangala society, whose traditional laws and customs are acknowledged and observed by the native title claim group for this application. It is in this way that I understand that rights to the area covered by the application are asserted to be held by the members of the native title claim group.

[95] I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn in my reasons below.

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

[96] This subsection requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. Whilst it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time, it is necessary to show that cumulatively, there is material before the Registrar that shows an association between the whole group and the whole area of the claim—*Gudjala (2007)* at [51] and [52]. Further, Dowsett J also observed:

> 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—at [52].

[97] As referred to above, it is clear to me from the information provided in the application and in Ms Charles' affidavit that the persons in the native title claim group hold rights and interests in the area covered by the application pursuant to the traditional laws and customs acknowledged and observed by the wider Nyikina Mangala society. Further, it is clear that the area covered by the application is part of a wider region of land and waters to which the native title claim group had, and continues to have, an association in accordance with those Nyikina Mangala traditional laws and customs. With this in mind, it is my view that, because the area of the application is so small, it is sufficient for the applicant to provide a factual basis to support association with the claim area relative to the surrounding and wider region.

[98] Attachment F sets out the relevant facts that show, firstly, the basis on which Nyikina Mangala jointly constitute the relevant society under which rights and interests were held within Nyikina Mangala country at and prior to sovereignty (at [7]); and secondly the basis on which the native title claim group for this application hold the relevant rights and interests for the area covered by the application. The country over which the wider Nyikina Mangala society is said to assert connection is the Fitzroy Valley in the Kimberley region of Western Australia, including the town of Derby, country to the west of King Sound and country south of Derby covered by pastoral stations including, Mount Anderson, Yeeda and Liveringa.

[99] Ms Charles sets out the extent of Nyikina and Mangala country stating that the Fitzroy River is important in setting out Nyikina country; that this country 'goes as far south as the Edgar Ranges and across to Yarri Yarri and goes as far north as the places I include in my *buru*'—at [2]. She provides information about the reach of Mangala country, the extent of Nyikina country relative to the neighbouring groups—at [3] to [4].

Predecessors' association with the application area

[100] Attachment F of the application asserts an association of the predecessors of the native title claim group with the area covered by the application at and prior to the acquisition of sovereignty in 1829. It asserts effective settlement of the area occurred in the early 1880s during the period of first contact and settlement in the Fitzroy and Ord river valleys—at [8] and [10].

[101] There is information about the association of the wider Nyikina Mangala society with the country in which it asserts rights. Nyikina people have been associated with the pastoral stations in the area since 1882, living and working on the stations as a means to maintaining a connection to the wider country—at [11]. When people moved off the pastoral stations in the 1960s, it was to the towns of Fitzroy Crossing, Derby and Broome, from where they continued to move freely around their traditional country—at [15].

[102] Attachment F states that the area in which the application falls is the *buru* of Ms Charles' grandfather's grandfather who would have been born in the 1870s—at [19]. Ownership of that *buru* is said to have been passed down to the members of the native title claim group by virtue of this descent. Under Nyikina Mangala traditional law and custom rules for the ownership, use of and responsibility for country govern the holding of rights in land—at [1] to [2]. Firstly rights are obtained through 'filiation to a father, mother or grandparent who themselves held rights in that country area' or secondly, through a 'totemic relationship to a country area, which has its source in events which befell the person's parents in that country, and which led to the realization that the person's mother was pregnant'—at [2](a) and (b) respectively.

[103] On the second means, Dr Palmer relates the phenomenon of 'spiritual imbuement' and the two components of *ray* and *jarin*, the operation of which 'indissolubly links a person to the country from whence the *ray* originated'—at [2](b). This is the totemic relationship to a country

area, which works to establish a person's spiritual relationship to country and is transmissible by cognatic descent.

[104] Ms Charles supports the assertion in her affidavit that she knows the area covered by the application is her *buru* because 'the old people told [her] where it was and her responsibility to look after it was given by her grandfather, the named ancestor from whom the native title claim group descends—at [6]. The area has been used since before her grandfather's time for hunting and the predecessors of the native title claim group have always travelled through and camped in the area—at [23] to [25]. Attachment F states that the *ray* of Ms Charles' son and nephew are within her *buru* and that the laws relating to obtaining rights in a country area continue to be acknowledged and observed by virtue of *ray* and *jarin*—at [29] and [30].

[105] The members of the native title claim group have acquired primary rights to certain tracts of country in accordance with Nyikina Mangala law and custom, through descent and through the activities and life events of their predecessors who were connected to that same country. In my view, the contemporary holding of such rights is indicative of the association of their predecessors with the country in which the application falls.

The native title claim group's current association with the area

[106] Attachment F relates the accounts of two Nyikina and Mangala Elders, one of whom Ms Charles attests to being the Nyikina person who 'holds the knowledge for that country' (of the application area) and has passed it on to her and other members of the claim group—at [6]. She was born in 1932 and grew up on and around the pastoral stations of Mount Anderson and Yeeda. Some of her experiences are set out in Attachment F that show a regular and physical association with Nyikina Mangala country – hunting, fishing, camping, travelling across it with her family and elders. Her accounts and those of the other elder, reveal knowledge of their country and its resources by virtue of transmission from elders and their regular association with Nyikina country and the ongoing acknowledgement and observance of their traditional laws and customs in relation to that country—[33] to [38].

[107] Ms Charles's affidavit is replete with examples of the activities she and other members of the native title claim group undertake on the area of the application:

- people regularly camp and build shelters on Nyikina country—at [11];
- the area covered by the application is used and occupied regularly by Nyikina people because under their traditional laws and customs it is a main source of ochre—at [23];
- members of the claim group regularly hunt on the area, cooking and sharing the meat that is caught (goanna, kangaroo, turkey, emu)—at {27] to [37]; and
- she often uses the plants, trees and woods found in the particular parts of her *buru* for ceremonial, medicinal and cooking purposes—at [13] to [18].

[108] Ms Charles attest in her affidavit to a knowledge and understanding of her *buru* and Nyikina country in accordance with traditional law and custom that is clearly brought about through regular association and a deep connection with her country. This is evidenced by:

- her understanding of the boundaries of Nyikina Mangala country and the spiritual dimensions that determined that country—at [1] to [4];
- her acknowledgement of the rules and obligations that govern knowledge of country and the right to speak for country which has been passed down to her through her grandfather and his forebears—[6] to [7];
- her understanding of the seasons according to the flora and fauna of the area—at [10]; and
- the holding of rights to take and use the natural resources of the area, including the various timbers, barks, plants, fruits, grasses, sand and clay—at [13] to [22].

[109] Included in the additional material provided to me by the applicant is a map of sites referred to in Ms Charles' affidavit. The map and its key clearly show the areas that fall within close proximity to the mining lease application which is the subject of the claim made in this application. They include:

- Mt Jowlaenga Homestead where members of the claim group continue to hunt and use the natural resources found in its vicinity—site 1;
- the locations that are the main source of ochre for the native title claim group—site 2 and 5;
- locations of *ray*—site 1, 4 and 6; and
- the location of anthills used by members of native title claim group to make paint—site 3.

[110] The current association of members of the native title claim group with areas proximate to the area covered by the application is evidenced in the material with geographical specificity and points to a regularity of activity, use of the natural resources and knowledge of the traditional laws and customs associated with access to country.

Consideration

[111] In my view the factual basis that supports an association of the predecessors of the native title claim group with the area covered by the application is broad and largely a retelling of the history of settlement in the area. The examples in Attachment F provided to illustrate the association of Nyikina Mangala people with the pastoral stations in their country are not particularly geographically specific, limited to the naming of the stations.

[112] However, given the extent to which the native title claim group's current association with the area is governed by its ancestral links to the predecessors of the group, coupled with the outline of the history of the area since first contact, it is clear to me that the group has a strong previous association with the area of the application. Further, the current association is evident to the degree it is because that connection has been passed down through the generations. Particularly, this is demonstrated by the ancestral links and rules that govern the ownership and responsibility of the *buru* of which the area covered by the application is a part. These 'operative

principles' of filiation and totemic relationships are what currently relate the native title claim group to its *buru* and have instilled it with the vitality and sophistication that is evident in Ms Charles' affidavit.

[113] I am therefore satisfied that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

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

[114] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

[115] Justice Dowsett considered the requirements of s. 190B(5) for a second time in *Gudjala 2009* when he addressed the adequacy of the factual basis underlying an applicant's claim. Relevant to assessing the application's assertions in relation to s. 190B(5)(b), in Dowsett J's view, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters—at [29]. Therefore, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs that give rise to the claim to native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty. This is the proposition that emerged from the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (*Yorta Yorta*), relied on by Dowsett J in his earlier *Gudjala 2007* decision—at [26].

[116] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate (and this was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]):

- that the laws and customs currently observed by the claim group have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

[117] In the context of the registration test (and explicitly the task at s. 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala (2007)* at [62] and [63].

[118] In my view, there is sufficient factual account in this application to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

The relevant society

[119] Attachment F provides information in relation to the normative pre-sovereignty Nyikina Mangala society:

- the predecessors of the native title claim group acknowledged and observed a set of laws and customs which governed, amongst other things, rights in relation to land, the use and exploitation of resources and the protection of sites of significance—at [1];
- rights and interests in land and who could exercise them were governed by these laws that set down rules for the ownership, use and responsibility of that country—at [2];
- these rules existed under traditional laws and customs and prescribed such things as people's relationships with each other, the way people married, which animals were hunted, prepared and cooked, and people's conduct in relation to rights to country ('the proper way')—at [6].

[120] In turn, 'the proper way' was the basis for the society's spiritual beliefs and practices and was the 'fundamental point of reference for the explanation and justification of all matters spiritual'—at [6].

[121] Dr Palmer's expert opinion is provided in respect of the basis on which the 'Nyikina and Mangala jointly constitute the relevant society under which rights and interests were held within Nyikina and Mangala country at the time of effective sovereignty and before'—at [7]:

- they were neighbours sharing an indeterminate zone of transition south of the Fitzroy River;
- they married, shared ritual observances traded and borrowed aspects of each other's language;
- members of the two groups would have shared fundamental beliefs in relation to ritual practices and how rights in land were obtained and passed on; and
- they most probably traded goods, exchanged wives, shared resources and spoke each other's languages.

[122] These conclusions are said to be supported by evidence arising from the oral traditions of the Nyikina Mangala claimants and the intergenerational transfer of knowledge and information, being the subject of Dr Palmer's research.

[123] Under the traditional laws and customs of this normative society, areas of country (*buru*) were owned by 'country groups'. Rights were obtained either through filiation to parents or grandparents who themselves held rights in that country area, or totemic relationships to a country area, otherwise explained by Dr Palmer as 'spiritual imbuement' (as summarised above in my reasons under s. 190B5(a)).

[124] The area covered by the application falls within such a country area for the Nyikina people, and the persons who have the right to speak for the area being those persons described in Schedule A as the descendants of Tjarlumbun. He is the grandson of [name removed], who, it is asserted, 'was himself descended from members of the Nyikina Mangala society who were in occupation of the Nyikina country' prior to and at the time of sovereignty. It is stated that the application area falls within [name removed]'s *buru*, ownership of which has been passed down to members of the native title claim group through the process of filiation. It is said that he was likely to have been born circa 1870s—at [19].

[125] Attachment F refers to 1829 as the date of acquisition of sovereignty in Western Australia and asserts that 'effective sovereignty' in respect of Nyikina Mangala country occurred through the process of European settlement of the area approximately in the early 1880s. Dr Palmer makes the inference therefore 'that prior to the date of effective sovereignty, laws, customs, beliefs and normative referents would have remained substantially as they were at or before the date of the acquisition of sovereignty'—at [8].

[126] As a result of increased European settlement in the Fitzroy Valley during the 1890s and its consequent impacts on the resident Aboriginal population, the majority of Nyikina Mangala people moved onto the pastoral stations in the region. The ancestors of the native title claim group (as part of the wider Nyikina Mangala society) settled into camps and seasonal work that allowed them to continue to use the land and its resources in accordance with their traditional law and customs. By the 1960s Nyikina Mangala people had largely moved off the pastoral stations and into the towns of Fitzroy Crossing, Derby and Broome but continued to move around their traditional country and exercise their rights and interests in relation to it. Towards the end of the 20th century, Nyikina Mangala people had begun to establish their own communities. In this way, Nyikina people maintained connection to their wider country and their *burus*, continuing to practice and teach to their children 'the proper way'—at [10] to [17].

[127] In this sense it is clear to me that the factual basis addresses the three propositions (outlined above) that Dowsett J came to in *Gudjala 2007*. As such, the laws and customs currently acknowledged and observed by the native title claim group in this application have their source in the pre–sovereignty Nyikina Mangala society and have been acknowledged and observed since that time by a continuing society.

[128] In my view, the factual basis materials demonstrate that the members of the pre-sovereignty society and their descendents have continued to live, move about freely and meet throughout the claim area – exercising their rights in relation to country, hunting and gathering, performing ceremonies, maintaining and protecting areas of importance and passing on their traditional laws and customs from one generation to the next. The members of the native title claim group by virtue of their descent from their Nyikina ancestor continue to be united in and by their observance and acknowledgment of the Nyikina Mangala body of law and customs.

Traditional laws and customs regarding rights to country

[129] Attachment F sets out information pertaining to the holding of rights to country under the traditional laws and customs of the Nyikina Mangala people, some of which has been set out above. Relevant to my consideration of the claim made in this application is that the native title claim group has primary rights in relation to an area of country, their *buru*, and this is the area in which the application falls. The right to speak for one's *buru* is governed by the traditional laws and customs of the wider Nyikina Mangala society. The 'standing' a person has in respect of the rights held in country is said by Dr Palmer to be governed by factors such as age, ritual knowledge and experience, gender and knowledge and familiarity of the country. However, the rights to one's *buru* gained through descent or spiritual imbuement override the rights gained through such standing. As such, there is an internal distribution of rights whereby persons of 'standing' 'might exercise limited rights which would be subject to the command of others ... they would 'help them out' but 'come behind' and support them'—at [31]. It is in this sense that it is asserted that the native title claim group has the right to speak for the area of the application.

[130] The area covered by the application is included in the *buru* owned by the country group that is those Nyikina people described in Schedule A. Ms Charles attests in her affidavit to having responsibility for her *buru* from her grandfather, the named apical ancestor at Schedule A. She has been taught by her elders that she must make use of that country so that the country and the spirits in it do not die. She states that there are many rules about the right way to do things on Nyikina Mangala country and she passes knowledge of these onto the younger generations—[7] to [8]. Ms Charles, as a senior member for the native title claim group, states that 'the *ray* for both her son and nephew are within her *buru*', at locations in the vicinity of the area covered by the application—at [29].

[131] With the right to speak for country brings the rights to use the resources of the country and the obligations to care for and protect both the country and its resources. Ms Charles' affidavit provides numerous examples of occupation of her country, including the area of the application, and her knowledge of its geography, history and spiritual landscape that has been passed onto her by her forbears.

Traditional laws and customs regarding social relationships and cultural knowledge

[132] Attachment F states that the continuing acknowledgment of laws and customs is best evidenced in the 'survival of social structures for ensuring that members follow 'the proper way'. Based on his field research Dr Palmer is of the opinion that 'claimants continue to observe a process whereby social relationships are both classified and regulated by reference to a normative system'—at [21]. This is illustrated by examples:

- young boys still go through the law, with grandparents monitoring progress and teaching the proper way—at [22];

- skin business is still taught and followed, with avoidance relationships and refusal to use names in certain circumstances as part of the social interaction of people—at [22];
- sharing and exchanging the proceeds of hunting and gathering the natural resources of the area—at [22]; and
- law and custom governing the joint interaction between members of the Nyikina and Mangala language groups—at [24].

[133] Connection to their traditional country is through belief in the *bugarigara* (dreamtime), to the spiritual beings which performed actions to shape and create the natural features of the landscape. The activities and tracks of these beings link the places in the country which 'are regarded as focal aspects of the *bugarigara* and so have heightened significance for the claimants'—at [32]. The stories of the *bugarigara* have been orally transmitted through the generations of Nyikina Mangala people. They were and continue to be intrinsic to the activities of people as they travel through country, as they hunt and use the resources of the land and waters and serve to pass on their traditional laws and customs—at [33].

[134] Ms Charles refers in her affidavit to the ceremonial activities that have always been held in the vicinity of the area covered by the application – because 'the spirits call you back to it, we belong to it'—at [24]. Members of the native title claim group have the right to take the ochre that can be found in the area of the application which has been used for law business, and continues to be so, in accordance with Nyikina traditional law and custom—at [23].

Traditional laws and customs regarding the use of resources of Nyikina country

[135] Ms Charles' affidavit illustrates the traditional laws and customs under which the rights and interests of the native title claim group are possessed by providing many examples of the activities the group undergoes in exercise of those rights:

- members of the claim group have the right to use the wood of Nyikina country, to choose the right wood for cooking, for smoking ceremonies, for making tools, boomerangs, carry baskets,—at [12] to [15];
- people continue to practice bush medicine using the natural resources of the application area – the sap, bark, leaves and flowers of various flora found on the *buru*, the traditional names and particular applications which are all known to the current generation—at [16] to [18];
- members of the claim group also have the right to take and use the fruits, nuts and grasses of various plants to eat and for ceremonial purposes, whilst observing the laws and customs that regulate their application, when they can be taken and with whom they must be shared—at [19], and [34] to [36];
- there are many rules and obligations acknowledged and observed in accordance with traditional law and customs that relate to hunting, cooking, preparing and eating the animals to be found in the area of the application, all of which have been taught to members of the claim group by their forebears and through the *bugarigara* (Dreaming)—[25] to [36].

[136] Ms Charles attests to knowing and having learnt all of these things and the rules about the right way to do things on country because they were taught to her by 'the old people'—at [10]. She and the native title claim group are now teaching the younger members about 'our country, and how to use and protect its resources'—at [38].

Consideration

[137] It is not the purpose of the registration test to come to definitive conclusions about what in fact was the society at sovereignty, only whether the factual basis can support the assertion that the society at sovereignty has continued a vital existence (largely uninterrupted) since that time to the present. In my view, the material I have considered is sufficient to support this.

[138] The historical information and anthropological references cited at Attachment F provides evidence of the society as it existed at the time of sovereignty in the area of the application. Ms Charles has provided extensive examples of the continuing exercise of rights and interests by the claim group, the practice of which has been passed down to members of the claim group by their elders. Both documents illustrate aspects of Nyikina Mangala traditional law and custom, in respect of the area of the application as well as the wider vicinity that is the group's *buru*, by relaying information pertaining to family and ancestors, the rules in relation to land and the holding of rights in that land, special places and stories, spirits, hunting, fishing and foraging and the passing on of traditional and cultural knowledge.

[139] References in Attachment F and the examples given by Ms Charles demonstrate the inter-generational transmission of traditional law and custom that has occurred between the native title claim group and its predecessors, in the sense defined in *Yorta Yorta*. The affidavit and material compiled from Dr Palmer's research and findings contains information to provide the link between the named apical ancestor and the area covered by the application, and identifies those predecessors of the native title claim group who, at the time of European settlement, acknowledged and observed the laws and customs of Nyikina Mangala society. This is, in my view, sufficient to invite an inference that there has been continuous existence of the laws and customs of the wider Nyikina Mangala society from the time before and at sovereignty in the claim area, since European settlement of the area and in particular in relation to the basis under which country is held by the native title claim group for this application.

[140] In my view, there is a clear articulation that members of the claim group possess rights and interests under Nyikana Mangala traditional laws and customs by virtue of those laws and customs being handed down to them by their predecessors. The material supports the assertion that there was a society at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived—see *Gudjala 2009* at [33], [66] and [72].

[141] Therefore, the application and additional material provide a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

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

[142] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. 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 2007* at [63], [65] and [66] (as summarised above).

[143] Continued acknowledgement and observance of Nyikana Mangala traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel through the area covered by the application despite the impacts of European settlement. They have continued to practice their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country (including the area of this application). Dr Palmer's view is that it is reasonable to conclude the narrative and oral accounts of the Nyikina Mangala people 'represent a continuing part of customary belief and practice and represent a tradition that stretches back into the distant past'—at [32].

[144] Dr Palmer cites one of the few changes since European contact in Nyikina law and custom relates to the acquisition of rights in land through cognatic descent as opposed to patrifiliation, and an increase in the assertion of rights to country by reference to totemic links. In his view, it is clear that Nyikina and Mangala people continue to legitimate their claims to country (and ownership of *buru*) by reference to descent and totemic attachments and that such principles or processes would have characterised the system whereby rights to country were asserted at the time of effective sovereignty and before'—at [27] to [30].

[145] Ms Charles' affidavit and the illustrative examples provided in Attachment F demonstrate that these and other Nyikina Mangala laws and customs have been passed from generation to generation and continue to be acknowledged and observed today among the current generations of the claim group.

[146] There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Conclusion

[147] The application therefore satisfies the condition of s. 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s. 190B(5).

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.

[148] Under s. 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s. 190B(6):

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

[149] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

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

[150] I note that, in my view, as set out above at s. 190B(5), the application provides a sufficient factual basis 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 claimed native title rights and interests.

How the rights are claimed

[151] I have considered the description in Schedule E of the rights and interests claimed and have come to the view that the rights and interests are claimed non-exclusively by the native title claim group – that is, they are not rights claimed to the exclusion of all others. My understanding that this is the way in which the rights and interests are claimed is informed by the following:

- confirmation through the Tribunal's geospatial datasets that the area covered by the application is wholly overlapped by a pastoral lease (PL H910623)[2] (a previous non-exclusive possession act);
- paragraph (iii) of the qualifications in Attachment E states that 'the applicants do not make a claim to native title rights and interest which confer possession, occupation, use and enjoyment to the exclusion of others ... in respect of any areas in relation to which a previous non-exclusive possession act ... was done in relation to an area ...';
- as a matter of construction, the listing of the rights (a) to (i) would appear to place them in a single category; and

[2] The map at Attachment C labels the Mt Jowlaenga pastoral lease number.

- Attachment J at paragraph 6 which states that 'the native title rights and interests do no confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others'.

[152] All this would seem to support a conclusion that the application does not make a claim to exclusive possession. Further, the factual material provided in the application does not appear to assert the existence of rights encapsulated by a claim to exclusive possession. The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' [emphasis added]. The material before me does not evidence an 'assertion of rights of control over the land' to the exclusion of all others— *Ward HC* at [89] and [93].

Consideration

(a) the right to speak for the application area;

[153] I have to take into account long held Court authority that says the right to 'speak for country' involves a right of ownership such that its recognition is as an exclusive right. In *Ward HC* the High Court was of the view that it may be accepted that…'a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others'—at [88] and [90] to [93].

[154] In *Neowarra v Western Australia* [2003] FCA 1402 Justice Sundberg was of the view that 'the right to speak for country involves a claim to ownership' and could only be recognised in relation to areas of exclusive native title rights and interests—at [4]. French J also stated in *Sampi v State of Western Australia (No 2)* [2005] FCA 1567 that 'the right to speak for land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [75].

[155] I note however that in *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2004] FCAFC 187 the Full Federal Court on appeal allowed non-exclusively 'the right to speak for'. It did so by expressly disallowing 'the right to make decisions about use and enjoyment' when it deleted the phrase found in the original determination. On this basis it could, in my view, be arguable that the right as it is expressed in this application, takes it out of the ambit of a right claimed exclusively and therefore one capable of recognition in relation to areas claimed non-exclusively. However, what 'the right to speak for' actually entails could be said to be unclear.

[156] As referred to earlier in these reasons, the content of Nyikina Mangala traditional laws and customs reveals that 'the right to speak for the application area' (part of the group's *buru*) is held at a local level by the native title claim group. The right is held pursuant to their acknowledgement and observance of the traditional laws and customs of the wider Nyikina and Mangala system. The 'preamble' to the list of rights and interests infers that the governing of internal distribution of rights dictates the 'right to speak for the application area' separately to the

others such that it operates as a right held by the native title claim group exclusively, but not in the common law sense 'as against the whole world'.

[157] In my view, the material before me does disclose that this system of 'internal distribution' of rights has existed since before the assertion of sovereignty. It is clearly articulated in the material at Attachment F and illustrated by the detailed descriptions and examples provided by Ms Charles in her affidavit. However, when claimed as a non-exclusive right, it is not sufficiently clear what the right 'to speak for the application area' entails. The expression of the right suffers from a lack of specificity that could limit it to applying to 'Aboriginal people who recognize themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders'—for example, *De Rose v State of South Australia (No 2)* [2005] FCAFC 110. A more specific expression of the right would take it out of the global right to exclusive possession and likely allow it to be established prima facie as a non-exclusive right.

[158] If I am wrong about my interpretation and the right is claimed exclusively, in my view there is not sufficient material provided in Attachment F and Ms Charles' affidavit evidencing that such a right exists under Nyikina Mangala traditional laws and customs. The material does not reveal anything about the right of the native title claim group to exclude or regulate the access of people who are not Nyikina or Mangala and in doing so control access to land as against the whole world.

[159] For these reasons, as currently framed, the claimed 'right to speak for the application area' is not one that can be claimed non-exclusively.

[160] I consider that this right is not established, prima facie.

(b) the right to live, being to enter and remain on, camp and erect shelters and other structures for those purposes on the application area

[161] This right is evidenced in the affidavit of Ms Charles and in Attachment F, suggesting the right exists under the traditional laws and customs of the native title claim group.

[162] The following matters have been referred to in my discussion above of the factual basis material provided in support of the assertions at s. 190B(5) and are relevant to my consideration that this right is prima facie established:

- the area covered by the application falls within an area of Nyikina country held by the native title claim group in accordance with Nyikina Mangala traditional laws and customs – this is the area of their *buru*—Attachment F and affidavit of Ms Charles;
- rights to this country (*buru*) have been obtained through filiation or totemic relationships based on ancestral links to that particular country and the events or activities that occurred to those ancestors—Attachment F;
- as the owners of their *buru* (in which the area covered by the application falls) Nyikina people have occupied, travelled through and accessed prior to and since sovereignty—Attachment F; and
- the native title claim group continues to enter and remain on, and to camp in the area of the application, and in doing so, erect shelters and other such structures in the manner in which they have been 'taught by the old people'—affidavit of Ms Charles.

[163] As the material before me evidences many activities undertaken by the native title claim group, and its predecessors, that necessarily involve the exercise of this right, it is my view that the right is possessed under their traditional laws and customs such that it can be prima facie established.

(c) the right to hunt and gather for personal, domestic, cultural and non-commercial communal purposes

(d) the right to take and use flora and fauna for personal, domestic, cultural and non-commercial communal purposes

(e) the right to take, use, share and exchange the natural resources of the application area including soil, sand, clay, gravel, ochre, timber, charcoal, resin and stone for personal, domestic, cultural and non-commercial communal purposes

[164] These rights are evidenced in the affidavit of Ms Charles and in Attachment F, suggesting the rights exist under the traditional laws and customs of the native title claim group. The material that evidences that these rights are established prima facie, is cited above under my consideration of the factual basis of the claim.

[165] Ms Charles' affidavit is replete with examples of the activities undertaken by the claim group in exercise of these claimed rights. They are rights which have been passed down to them by previous generations, taught to them in accordance with traditional law and custom, with the rules, responsibilities and obligations associated with them continuing to be acknowledged and observed. In particular, the area covered by the application is in the vicinity of two main sources of ochre used for ceremonial purposes. The locations of these sources necessarily mean that the specific area covered by the application has been regularly accessed by the predecessors of the native title claim group and continues to be used in accordance with traditional law and custom—Ms Charles' affidavit at [23].

[166] The knowledge, responsibilities and obligations that come with the possession of these rights in relation to the native title claim group's *buru* have been handed down to them by their forebears and are constant feature of Nyikina people's exercise of these rights. The information reveals traditional conservation through seasonal hunting and gathering to allow animals and plants to reproduce, and care taken not to exploit any particular resource.

[167] I am satisfied that the material before me evidences the continuing exercise of these rights by the members of the native title claim group, and its predecessors to show that the rights are possessed under their traditional laws and customs such that they can be prima facie established.

(f) the right to engage in cultural activities in the area, including the transmission of cultural heritage knowledge;

(g) the right to conduct and participate in ceremonies;

(h) the right to hold meetings

[168] The material before me documents the past and present activities of members of the native title claim group that reveal the extent of their engagement in cultural activities in the area of the application. The holding of meetings and ceremonies are intrinsic to the group's care and

protection of their *buru*, along with the continuing intergenerational transmission of cultural knowledge and practices. Participation in and the conduct of such activities are associated with the responsibilities of 'the owners of that country'—Ms Charles affidavit at [6] and [24].

[169] In my view, it is clear that these are all rights possessed under the traditional laws and customs of the native title claim group and I am satisfied there is sufficient material to establish prima facie that the rights exist under the native title claim group's traditional laws and customs.

(i) the right to visit, maintain and protect from physical harm, areas, places and sites of importance in the application area

[170] These rights are evidenced in the affidavit of Ms Charles and in Attachment F, suggesting the rights exist under the traditional laws and customs of the native title claim group. The material that evidences that this right is established prima facie, is cited above under my consideration of the factual basis of the claim.

[171] The affidavit of Ms Charles illustrates and supports through extensive examples the assertion that these rights exist under the native title claim group's traditional law and custom. Ms Charles and the informants cited by Dr Palmer in Attachment F speak of having the right to maintain and protect important sites in Nyikina Mangala country, to ensure the spirits in it do not die—Ms Charles at [7]. Attachment F states that 'contemporary Nyikina and Mangala people continue to acknowledge and observe the obligations which they hold as landowners under their traditional country'—at [38]: the old people tell them they must look after and protect their country and those with rights in a *buru* have a duty in relation to their country that accompanies their rights within it.

[172] In my view, it is clear that this right is possessed under the traditional laws and customs of the native title claim group and I am satisfied there is sufficient material to establish prima facie that the rights exist under the native title claim group's traditional laws and customs.

Conclusion

[173] I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that at least one of the rights claimed in this application can be prima facie established.

Subsection 190B(7)
Traditional physical connection

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

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

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

  (i) the Crown in any capacity, or

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

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

[174] Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

[175] In *Doepel*, Mansfield J also considered the nature of the Registrar's task at s. 190B(7):

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a 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—at [18].

[176] Ms Charles provides numerous examples throughout her affidavit in relation to residing on and regularly travelling around, hunting, camping and fishing in the area of the application. She attests to having been taught by her grandparents, aunts and uncles and parents, traditional knowledge and cultural practices relating to her *buru*. She states that she and other members of the native title claim group have custodianship for the area covered by the application and continue to have a traditional connection with its land and waters. They continue to practice and exercise the rights and interests that arise under Nyikina and Mangala traditional law and custom and pass their knowledge onto succeeding generations. This material has been extensively referred to in my consideration of the requirements at ss. 190B(5) and (6).

[177] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area and the application therefore satisfies the condition 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.

[178] In the reasons below, I look 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.

Section 61A(1)

[179] 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 14 August 2013 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[180] 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. Schedule B at paragraph 2 excludes from the application area any land or waters that is, or has been, covered by previous exclusive possession acts as they are defined in the NTA or under relevant Western Australian legislation.

Section 61A(3)

[181] 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. The relevant statement is found under the heading of 'Qualifications' in Attachment E at (iii).

Conclusion

[182] In my view the application does not offend any of the provisions of ss. 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s. 190B(8).

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.

[183] I consider each of the subconditions of s. 190B(9) in my reasons below.

Section 190B(9)(a)

[184] The relevant statement that the native title claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown is found under the heading of 'Qualifications' in Attachment E at (i).

Section 190B(9)(b)

[185] The relevant statement that the native title rights and interests claimed are not to the exclusion of all other rights and interests in relation to offshore waters in the whole or part of any offshore place is found under the heading of 'Qualifications' in Attachment E at (ii).

Section 190B(9)(c)

[186] The application does not disclose and I am not otherwise aware that the claimed native title rights and interests have been extinguished in relation to the area covered by the application.

Conclusion

[187] In my view the application does not offend any of the provisions of ss. 190B(9)(a), (b) and (c) and therefore the application satisfies the condition of s. 190B(9).

[End of reasons]