National Native Title Tribunal

REASONS FOR DECISION COVER SHEET
REGISTRATION TEST

DECISION MAKER	Christina Lange

APPLICATION NAME	Town of Jabiru

NAMES OF APPLICANTS	Yvonne Margarula, Irene Nayinggul and Raymond Gamarrawu on behalf of the Mirrar people.

NNTT NO	DC97/7
FEDERAL COURT NO	DG6027/98

REGION	Northern Territory

DATE APPLICATION LODGED	1 September 1997 (original)

I have considered the native title claimant application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993.

DECISION

The application is ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (as amended)("the Act").

Written notice of the decision, and the reasons for the decision, are to be provided to the applicant.

_____ _____

Christina Lange ***DATE***

Delegate of the Registrar pursuant to sections 190, 190A, 190B, 190C, 190D.

Introduction

Yvonne Margarula and Ors v Northern Territory and Ors DG6027 of 1998 ("the application")

The original application was lodged with the Darwin Registry of the National Native Title Tribunal on 1 September 1997 and registered the same day.

The application was amended on 6 May 1998 to clarify the description of the area of land and waters covered by the claim, following submissions from the Northern Territory and the Commonwealth in relation to NT Portion 2272 in particular.

With the commencement of the amended *Native Title Act* on 30 September 1998, the application was deemed to be filed in the Federal Court, and referred to the Tribunal.

The application came before O'Loughlin J on 17 March 1999. According to the report of listing provided to the Tribunal, orders were made that the matter be referred to the Native Title Registrar.

On 21 September 1999, the Northern Land Council (NLC), as solicitors for the applicants, filed a Notice of Motion seeking orders to amend the original application, and an Affidavit containing the amended application.

The notice to amend came before O'Loughlin J on 1 October 1999. Justice O'Loughlin granted leave to amend the application as per the Notice of Motion and to make further corrections, including the annexure of the "Mirrar submission in reply to information with respect to the registration test pursuant to section 190A of the *Native Title Act* 1993 (as amended)" to the application. In response to these orders a further amended application was filed in the Federal Court on 4 October 1999 and a copy was forwarded the Tribunal on 7 October 1999.

Unless otherwise indicated, the "application" referred to in this document means the further amended claimant application filed with the Federal Court on 4 October 1999.

Delegation Pursuant to Section 99 of the Native Title Act 1993 (Cth)

On 17 March 1999 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the Native Title Act 1993 (Cth). On 13 May 1999 the delegation of 17 March 1999 was revoked and replaced by a delegation in identical terms to a different list of Tribunal staff including myself.

On 28 July 1999 the delegation of 13 May 1999 was revoked and replaced by a delegation in identical terms to a different list of Tribunal staff including myself. The delegation of 28 July 1999 has not been revoked as at this date.

Information considered in making the decision

In considering the application and reaching the decision above, the following material was considered :

- The Case Management files for the application;
- The Registration Test File, and Federal Court Application for the application;
- Submission from the Solicitor for the Northern Territory, dated 28 April 1999;
- Mirrar Submission in reply to Information with respect to the Registration Test, dated 4 October 1999;
- Alligator Rivers Stage II Land Claim, (*Report of the Aboriginal Land Commissioner,* July 1981)
- Ranger Uranium Environmental Inquiry (Second and Final Report) ("the Fox Inquiry") (*Fox, Kelleher and Kerr July 1997*)
- Legal Background Research Paper (*NNTT April 1998*)
- Social and Land Use Research Paper (*NNTT April 1998*)
- Kakadu Region Economic and Institutional Overview *Study (Greg Crough and Darryl Cronin May 1997*)
- Jabiru and the Aborigines of the Kakadu Region - Final Report to the Aboriginal Project Committee of the Kakadu Region Social Impact Study (KRSIS*) (Sue Kesteven and Dr John Lea April 1997*)
- Determination of Native Title Representative Bodies: their gazetted boundaries;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The National Native Title Register

Abbreviations

DLPE	Department of Lands Planning and Environment, Northern Territory
JTDA	Jabiru Town Development Authority
Mirrar Submission	The submission filed by the applicants in the Federal Court on 4 October 1999 entitled 'Mirrar Submissions in reply to information with respect to the registration test pursuant to section 190A of the *Native Title Act* 1993 (as amended)'
NT Submission	The submission from the Solicitor for the Northern Territory, dated 28 April 1999 entitled 'Information and comments with respect to the registration test pursuant to section 190A of the *Native Title Act* 1993 (as amended)'

A. Procedural Conditions

190C(2)	***Information, etc, required by section 61 and section 62:*** ***The Registrar 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.***

Reasons for the Decision

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I am satisfied that the procedural requirements of sections 61 and 62 have been met.

The application meets the requirements of s.190C(2).

Details required in section 61

s.61(3)	***Name and address for service of applicant(s)***

Reasons: See below	***Decision : The application passes the condition***
Federal Court Form 1, Part B ("Filing and Service") has been completed and sets out details of the applicants' legal representative and their address for service together with a postal address for the applicants.	

s.61(4)	***Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons***

Reasons: See below	***Decision : The application passes the condition***
An exhaustive list of names of the adult persons in the native title claim group has been provided in Schedule A, so the requirements of s.61(4)(a) are met. For the reasons set out in relation to s.190B(3), I am satisfied that the persons in the native title claim group are described sufficiently clearly in the description provided in Schedule A of the application so that it can be ascertained whether any particular person is one of those persons in accordance with s.61(4).	

61(5)	*Application is in the prescribed form; lodged in the Federal Court, contains prescribed information, and accompanied by prescribed documents*

Reasons: See below	*Decision : The application passes the condition*

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998.

As required by s.61(5)(b), the application was filed in the Federal Court.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections.

The application is accompanied by affidavits as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

Section 190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application was accompanied by the payment of a prescribed fee to the Federal Court.

Details required in section 62(1)

62(1)(a)	*Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)*

Reasons: See below	*Decision : The application passes the condition*

Affidavits from each of the applicants, duly sworn and witnessed, have been filed in the Federal Court. The applicants depose to the matters required by s.62(1)(a)(i) to (v).

The application meets the procedural requirements of s.62(1)(a).

62(1)(c)	*Details of traditional physical connection (information not mandatory)*

Comment on details provided:

Schedule E paragraph 30 provides details of the native title rights and interests claimed.

Schedule F paragraphs 53 to 60 provide details of continuing spiritual connection; paragraphs 62 to 66 described physical and historical connection that give rise to the native title rights and interests claimed, and paragraphs 68 to 71 describe succession connection.

Schedule G and Schedule M provide details of current physical connection including some detail of activities undertaken on the area by a named individual and by the claim group in general. Schedule N states that the applicants have no information to provide on prevention of access.

The provision of this non-mandatory information in the application does not affect a decision as to whether the application meets the conditions of s.190C(2).

Details required in section 62(2) by section 62(1)(b)

62(2)(a)(i)	*Information identifying the boundaries of the area covered*

Reasons: See below	*Decision : The application passes the condition*
Schedule B item (a) sets out a physical description of the application area. For the reasons set out in consideration of s.190B(2), I am satisfied that this physical description is sufficient to meet the procedural requirements of s.62(2)(a)(i).	

62(2)(a)(ii)	*Information identifying any areas within those boundaries which are not covered by the application*

Reasons: See below	*Decision : The application passes the condition*
Schedule B item (b) sets out a description of the areas within the external boundary which are not covered by the amended application. For the reasons set out in consideration of s.190B(2), I am satisfied that the description provided is sufficient to meet the procedural requirements of s.62(2)(a)(ii).	

62(2)(b)	*A map showing the external boundaries of the area covered by the application*

Reasons: See below	*Decision : The application passes the condition*
Schedule C refers to : A map of the whole area (Sheet 1 of 3) Map of enlargement of southern portion of NTP 2272 (Sheet 2 of 3) Map of enlargement of northern part of NTP 2272 (Sheet 3 of 3) The Department of Lands Planning and Environment (DLPE) have professionally completed the maps. Boundary co-ordinates are not provided for the boundaries of the claim areas, however the claim area has been described entirely in terms of NT portions, the locations of which are readily identifiable. For the reasons set out in consideration of s.190B(2), I am satisfied that the application meets the procedural requirements of s.62(2)(b).	

62(2)(c)	*Details/results of searches carried out to determine the existence of any non-native title rights and interests*

Reasons: See below	*Decision : The application passes the condition*

The requirements of s.62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect the applicants to have knowledge of, and obtain details of all searches carried out by every other person or body.

Schedule D paragraphs 22 to 28 describes the searches undertaken by the applicants, and lists in detail the results of those searches.

I am satisfied that the application meets the procedural requirements of s.62(2)(c).

62(2)(d)	*Description of native title rights and interests claimed and any activities in exercise of those rights and interests*

Reasons: See below	*Decision : The application passes the condition*

Schedule E, paragraph 30 sets out the native title rights and interests claimed, and they include the matters particularised at sub-paragraphs (a) to (j).

The listed rights and interests are introduced by the phrase "include the following". I interpret the claim as being for the rights and interests as listed in sub-paragraphs (a) to (j) and not a non-exhaustive list of particulars of some larger unspecified rights not permitted under s.62(2)(d). These rights are expressly stated to exist and to have existed throughout the whole of the application area claimed (Schedule E, paragraph 33).

The rights listed in Schedule E, paragraph 30 (a)-(j) are stated as subject to certain acknowledgments and limitations set out in paragraphs 31 and 32. There is also a general description of the differences that may exist within the native title claim group as to method of exercising those rights and responsibilities in relation to the land (paragraph 34).

The question of whether or not the description is sufficient to allow the native title rights and interest described to be readily identified is addressed in consideration of 190B(4).

I am satisfied that the application meets the procedural requirements of s.62(2)(d).

62(2)(e)	*Application contains a general description of the factual basis on which it is asserted that the native title rights an interest claimed exist*

Reasons: See below	*Decision : The application passes the condition*

The application must contain a description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. The general description of the factual basis must include each of the three elements identified in each of sub-sections 62(2)(e) (i), (ii) and (iii). A consideration of the extent or sufficiency of the description is not required here. That inquiry is conducted in relation to s.190B(5).

I refer to the separate reasons set out below in relation to each of the particular facts identified in each of sub-sections 62(2)(e) (i), (ii) and (iii).

62(2)(e)(i)	*Factual basis – claim group has, and their predecessors had, an association with the area*

Reasons: See below	*Decision : The application passes the condition*
A detailed description of the factual basis on which it is asserted that the native title claim group has, and their predecessors had, an association with the area is provided at Schedule F(A), paragraphs 35 to 71, and also in Schedules E, G and M. I am satisfied that the application complies with the procedural requirements of s.62(2)(e)(i).	

62(2)(e)(ii)	*Factual basis – traditional laws and customs exist that give rise to the claimed native title*

Reasons: See below	*Decision : The application passes the condition*
A general description of the factual basis on which it is asserted that there exist traditional laws and customs that give rise to the claimed native title is provided at Schedule F(B), in paragraphs 72 and 73. I am satisfied that the application complies with the procedural requirements of s.62(2)(e)(ii).	

62(2)(e)(iii)	*Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs*

Reasons: See below	*Decision : The application passes the condition*
A general description of the factual basis on which it is asserted that the native title claim group has continued to hold native title in accordance with traditional laws and customs is provided as Schedule F(C), in paragraphs 74 to 77. I am satisfied that the application complies with the procedural requirements of s.62(2)(e)(iii).	

62(2)(f)	*If the native title claim group currently carry on any activities in relation to the area claimed, details of those activities*

Reasons: See below	*Decision : The application passes the condition*
Schedule G of the application provides a non-exhaustive list of a number of activities of the native title claim group members on, and associated with, the application area. Further particulars of current activities are provided at Schedule M, which includes details of activities by a member of the native title claim group. I am satisfied that the application complies with the procedural requirements of s.62(2)(f).	

62(2)(g)	***Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)***

Reasons: See below	***Decision : The application passes the condition***
Schedule H of the application states that the claimants are not aware that any other applications seeking a determination of native title or a determination of compensation have been made in relation to the whole or a part of the area covered by the application. I am satisfied that the application meets the procedural requirements of s.62(2)(g).	

62(2)(h)	***Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of***

Reasons: See below	***Decision : The application passes the condition***
Schedule I of the application states that the claimants are not aware of any notices under section 29 of the Native Title Act 1993 (or under a corresponding provision of a law of a State or Territory), that have been given and that relate to the whole or part of the area covered by the application. I am not in possession of any information that would lead me to conclude that the applicants are aware of any other such notices. I am satisfied that the application meets the procedural requirements of s.62(2)(h).	

190C(3)	***Common claimants in overlapping claims:*** ***The Registrar 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:*** ***the previous application covered the whole or part of the area covered by the current application; and*** ***an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*** ***the entry was made, or not removed, as a result of consideration of the previous application under section 190A.***

The application meets the requirements of section 190C(3)

Reasons for Decision

There are no other claimant applications for determination of a native title over or overlapping with the area of this application. Therefore, there is no application which meets the criterion in subsection 190C(3)(a). Consequently, no further consideration of this section is required.

I am satisfied the application meets the requirements of the section.

190C(4)(a)	***Certification and authorisation:*** ***The Registrar must be satisfied that either of the following is the case:*** ***the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or***

The application meets the requirements of section 190C(4)(a)

Reasons for Decision

The application is certified by the Northern Land Council (NLC) pursuant to s.202(4)(d) of the Act (Schedule R, paragraph 1).

The NLC is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under s.202(4)(d). I am satisfied that it is the proper body to provide the required certification.

A separate certificate is not provided, however this is not a requirement, as a particular form of document is not prescribed. The information is set out in writing in Schedule R, as required by s.202(4)(d).

Schedule R of the application includes all statements required by s.202(7) of the Act.

Schedule R is signed by Mr Norman Fry, Chief Executive Officer of the NLC, an officer authorised and delegated to execute the certificate. The certificate is not dated. However I take the date the application was filed in the Federal Court as being the date of execution of the certificate.

I am satisfied that the application meets the requirements of s.190C(4)(a).

190C(4)(b) **and** **190C(5)**	***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.*** ***Evidence of authorisation:*** ***If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:*** ***includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*** ***briefly sets out the grounds on which the Registrar should consider that it has been met.***

Application not considered under section 190C(4)(b).

Reasons for Decision

A certificate has been provided, pursuant to s.190C(4) above, so the application is not considered further under this condition.

B. Merit Conditions

190B(2)	***Description of the areas claimed:*** ***The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.***

The Application meets the requirements of section 190B(2)

Reasons for Decision

In order for the application to meet the requirements of this section, I 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.

Map and External Boundary Description

Three maps are provided with the application at Attachment B:

A map of the whole area (Sheet 1 of 3)

Map of enlargement of southern portion of NTP 2272 (Sheet 2 of 3)

Map of enlargement of northern part of NTP 2272 (Sheet 3 of 3)

The Department of Lands Planning and Environment (DLPE) have professionally completed the maps. Coordinates are not provided for the boundaries of the claim areas. However, the claim area has been described entirely in terms of NT portions, the locations of which are gazetted and are therefore readily identifiable.

The maps meet the requirements of s.62(2)(b) as the boundaries of the areas covered by the application can be identified.

A description of the area covered by the application is supplied at Schedule B, paragraphs 16 and 17. Paragraph 16 states that :

'The area covered by the application is within Kakadu National Park in the Northern Territory of Australia, being an area also within the Mirrar Estate as defined in Schedule A. It includes all that land and waters within the boundaries of NT Portions 2271, 2272 and 2273.'

I understand this description to mean that the area of the claim comprises all of, and only, the three named NT Portions.

Paragraph 17 clarifies this further by stating that:

'To avoid any doubt, the area covered in both the original application and the amended application includes all lots of land within original NT Portions 2271, 2272 and 2273 regardless of whether they hold a different section or lot number.'

The application also specifies that the areas marked "freehold" on the maps prepared by DLPE are land vested in the Director of National Parks and Wildlife (for the Commonwealth), and the description is not intended to indicate a freehold estate which would operate to extinguish native title under s.23B(2)(c)(ii) of the Act.

Reasons for Decision (s.190B(2) cont)

I am satisfied that the application clearly identifies the external boundary of the area subject to the claim as the area bounded by the external boundaries of Lots 2271, 2272 and 2273, and as shown on the maps prepared by DLPE, but not including the Arnhem Highway running through NTP 2272. I am also satisfied that there is no contradiction between the physical description of the external boundaries of the application area and the maps provided.

Internal Boundaries

Schedule B of the application sets out at paragraphs 18 and 19 a description of the areas within the external boundary which are excluded from the application. Paragraph 18 states that:

'Subject to Schedule L, any area in relation to which a previous exclusive possession act under s23B of the Act has been done, is excluded from this application.'

The application further clarifies the exclusion by stating, at paragraph 19, that:

> To avoid any doubt, and as stated in the original application, the claim excludes all that land which may be commonly referred to as 'private' freehold constituting a previous exclusive possession act pursuant to s.23B(2)(c)(ii) of the Native Title Act. However, as all the land in the claim area is vested in the 'public' authority of the Director of National Parks & Wildlife and/or the Commonwealth, the applicants are not aware of any area of 'private' freehold constituting a previous exclusive possession act within the application area.

I note that s.23B of the Act defines previous exclusive possession acts. I interpret this paragraph to mean that the applicants are excluding from the application areas in relation to which Commonwealth and Northern Territory previous exclusive possession acts have been done.

I am satisfied that the description of the claimed areas, in conjunction with the exclusion from the claim area of s.23B acts, establishes a formula that can be applied objectively to establish whether any particular area of land within the external boundary of the application area is excluded from it.

Whether the exclusions identified by this formula are sufficient to meet the conditions of s.190B(8) and 190B(9) is discussed in my reasons for decision for each of those criteria.

The NT submission raises a number of issues relating to this section of the registration test. This submission was prepared prior to the filing of amendments to the application in the Federal Court. Consequently, a number of the assertions made in the submission are no longer relevant. The NT Submission provides a detailed analysis of the tenure history of the application area to which the applicants have responded in the Mirrar submission. I have discussed the content of this submission in my reasons for decision in relation to s.190B(8) and 190B(9).

Conclusion

I am satisfied that the information and maps contained in the amended application are sufficient for it to be said with reasonable certainly whether native title rights and interests are claimed in relation to particular land or waters. The application meets the requirements of s.190B(2).

190B(3)	***Identification of the native title claim group:*** ***The Registrar must be satisfied that:*** ***the persons in the native title claim group are named in the application; or*** ***the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.***

The Application meets the requirements of section 190B(3)

Reasons for the Decision

Schedule A of the application provides information about the claim group. Paragraph 10 lists the names of 27 persons who are the adult members the native title claim group as at 10 September 1999. The list separately identifies the members of the native title claim group which come from each of three clan groups within the Mirrar. These clan groups are the Mirrar Gundjehmi, Mirrar Urningangk and Mirrar Mengerrdji clans.

Membership of the native title claim group is defined by reference to specified criteria set out in Schedule A , at paragraphs 4 to 8 and also paragraphs 11 to 15. These paragraphs outline the processes through which individuals are recognised as members of the native title claim group. These descriptive paragraphs do not result in an expansion of the native title claim group beyond the named adult members.

Paragraph 9 provides information about the recognition of traditional rights for those 'whose mother are or were Mirrar, or whose mother's mother are or were Mirrar'. These rights are secondary to the land-owning rights of the Mirrar and are mediated by members of the native title claim group. Such persons are not included in the native title claim group.

The NT Submission was prepared prior to the amendment of the application, and the substantive issues raised in the Submission have been addressed in the amendments to the application.

I am satisfied that the listing of the adult members of the native title claim group, plus further explanation of how membership of the group is recognised, means that the condition contained in s.190B(3)(a) has been met, and that I need not further consider s.190B(3)(b).

190B(4)	***Identification of claimed native title:*** ***The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.***

The Application meets the requirements of section 190B(4)

Reasons for the Decision

I refer to my reasons for decision in relation to s.62(2)(d). I am satisfied that the description of native title rights and interests and of the activities in relation to those rights and interest is sufficient to meet the procedural requirements of that section.

Section 190B(4) requires me to be satisfied that the native title rights and interest claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished in law'. To meet the requirements of this section I need to be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

Schedule E, sub-paragraphs (a) to (j), of the application sets out a list of ten particularised native title rights and interests claimed.

The first right listed is the right to possess, occupy, use and enjoy the area. I note that possession, occupation, use and enjoyment is a right identified in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Thus it is known to the law and has been regarded by the High Court of Australia as capable of identification.

The rights and interests listed in paragraphs to 2 to 11 also closely reflect the orders of Lee J in *Ward v State of Western Australia* (1998) 159 ALR 483, who found that these rights were known to the law and capable of identification.

I am satisfied on the basis of the findings above that the definition particularises the rights and interests claimed into an exhaustive list of specific rights and interests that are comprehensible and identifiable.

The particularised rights and interests are claimed 'subject to any native title rights and interests which may be shared with any others who establish that they are native title holders of the area'.

Information is then provided at paragraphs 31, 32 and 34 allowing the identification of areas in relation to which the particularised rights and interest claimed are impaired to the extent of inconsistency with non-native title rights and interests.

In paragraph 31, the applicants acknowledge that the rights and interests claimed are subject to all valid and current laws of the Commonwealth and the Northern Territory and that the:

> [E]xercise of such rights and interests may have been or currently might be regulated controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws.

Paragraph 32 states that, subject to Schedule L:

> '[T]he claimants do not claim that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of all others on any area in relation to which a previous non-exclusive possession act under s.23F of the Act has been done'. I note that s23F of the Act defines previous non-exclusive possession acts.

These limitations amount to exclusions of tenure by formula. I am of the view that these formulas can be applied to allow the identification of the areas where native title rights and

interests are impaired and the extent of that impairment. Research of tenure data held by the Northern Territory Government and other custodians may be required in order to identify these areas. However, it is reasonable to expect that the task can be done on the basis of the information provided in the application.

Paragraph 34 asserts that although the rights and interests claimed are held communally the possession or exercising of these rights and interests may vary according to traditional law and custom and according to age, gender, physical and mental capacity of different individuals within the native title claim group.

These qualifications do not detract from the ready identification of the listed rights and interests claimed.

In my view the description of native title rights and interests are readily identifiable. The description is more than a statement that native title rights and interests are 'all native title interests that may exists, or that have not been extinguished at law'.

I am satisfied that the description in Schedule E of the application allows the native title rights and interests claimed to be readily identified in compliance with s.190B(4).

190B(5)	***Sufficient factual basis:*** ***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:*** ***that the native title claim group have, and the predecessors of those persons had, an association with the area;*** ***that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;*** ***that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.***

The Application meets the requirements of section 190B(5)

Reasons for Decision

This condition requires that I be satisfied that the factual basis on which it is asserted that there exist native title rights and interests, as described at Schedule E of the application, is sufficient to support that assertion. In reaching this decision I must be satisfied that the factual basis supports the three criteria identified at s.190B5 (a) – (c).

(a) the native title claim group have, and the predecessors of those persons had, an association with the area

This criteria requires that I be satisfied that:

the members of the native title claim group have an association with the area (under claim), and

the predecessors in title or antecedents of the members of the native title claim group had an association with the area (under claim).

Schedules F, G and M of the application provide information that supports these criteria.

Schedule F clearly states that the claimants have had a traditional association with the claim area since time immemorial, including at the time when British sovereignty was asserted and at the time of contact with non-Aboriginal people (paragraph 35 and 36).

Paragraph 37 cites documented evidence that has acknowledged the claim group as the local descent group for the purposes of granting adjacent lands to them as the traditional landowners under the Aboriginal Land Rights (NT) Act 1976.

Paragraph 41 cites documentation that identifies a deceased person, who is an ancestor of one of the applicants, as the head of one of the families of the region remaining in their traditional country following the social disruption which began in the early 20th century.

Schedule M attests to the ongoing association with the area covered by the application. Some particulars of this ongoing traditional physical association of the applicants are set out.

Schedule M also describes the cyclical activities of one of the members of the claim group in terms of the claimant's current occupation and use of the application area.

Reasons for Decision (s.190B(5) cont)

I am satisfied that the information provided in the application constitutes sufficient factual basis to support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area. The requirements of s.190B(5)(a) are met.

(b) that there exist traditional laws acknowledged by and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

This subsection requires me to be satisfied that:

traditional laws and customs exist;

those laws and customs are respectively acknowledged and observed by the native title claim group, and

those laws and customs give rise to the native title rights and interests claimed.

As stated in relation to s.190B(5)(a), the traditional connection of the native title claim group with the application area, and native title rights and interests, are said to have been inherited from their ancestors in accordance with traditional laws and customs.

Schedule F, part (B), under the heading 'The Claimants' Traditional Laws and Customs' states that:

According to the claimants' traditional laws and customs, the physical and cultural landscape, along with the legal, social, kinship and religious systems, and the conditions for their continuity were established by na-yuhyunggi who travelled on, above or below the land in a creative era long ago… It is from this period and these ancestors that Mirrar derive their rights to land.

Paragraph 47 identifies the continuity of spiritual and ancestral connection being based on a foundation, communally acknowledged, that na-yuhyunggi created the land and waters and ongoing human relationships with it.

Paragraphs 48 to 55 describe in detail the traditional laws and customs which give rise to the claimed native title rights and interests, in relation to religious customs, observances relating to sites, use of traditional Aboriginal language(s) of the region, regional inter-relationships and customary practices, traditional decision-making, and kinship and classificatory descent relationships.

Paragraphs 56 and 57 describe the ongoing use of Mirrar place names in the application area, and stories that contained detailed knowledge about places and sites, and site restrictions.

Paragraph 63 asserts that each generation of Mirrar in the application area, from time immemorial to the present, has acquired interests and entitlements in the land and waters in accordance with the applicants' traditional laws and customs.

Further details of the activities associated with the observation, maintenance and passing on of a body of traditional law and customs are provided in Schedule G, paragraphs 5 to 10.

I am satisfied that the information provided in the application constitutes sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests. The requirements of s.190B(5)(a) are met.

Reasons for Decision (s.190B(5) cont)

(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

This subsection requires that I be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

Information on the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive is provided as follows :

Paragraph 74 states that the claimants have a continuing connection with the application area, as described in (A) above, and have continued to hold title in accordance with those traditional laws and customs described in (B) above.

The claim group continue to hunt for animals within the application area in accordance with the customs, traditions and practices of their ancestors. Introduced species (such as wild pig) now frequent the area and these have been incorporated in to the claimant group's hunting activities.

The claim group continues to use walking tracks and Mirrar place names.

The claimants' laws and customs are passed from generation to generation through modes of oral transmission, and the claimants' knowledge of descent connections is transmitted orally.

The claimants' use and occupation of the application area (including the activities described in Schedule G and the traditional physical connection described in Schedule M) have, where necessary, co-existed and continues to co-exist with the activities of non-Aboriginal people in the region.

Paragraph 77 states that no other landholding groups are asserted in the historical literature to occupy the application area as of traditional right. Nor do any other landholding groups or language groups today assert the right to possess, occupy, use and enjoy the application area in accordance with their traditional laws and customs.

The application describes the modes use to determine and regulate membership, and recruitment to and transmission of rights and duties, concerning the land and waters within the landholding group (Schedule G paragraph 16).

Particulars of exercise of native title rights and interests in accordance with traditional laws and customs by members of the claim group in relation to social, cultural and economic use of land, protection of sites, decision-making about use of land, and the organisation of, and participation, in ceremonial life, as described in Schedule G.

The application also refers to connection to, and traditional laws and customs in relation to, land proximate to the application area, and refers (in Schedule A paragraph 6) to :

[T]he Second and Final Report of the Ranger Uranium Environmental Inquiry ("the Fox Inquiry"), in which the Kakadu Aboriginal Land Trust was granted estate in fee simple to Kakadu National Park, and the Mirrar are members of the Aboriginal Land Trust.

The Alligator Rivers Stage II Land Claim (Justice Toohey) reaffirmed and expanded recognition of the Mirrar as traditional Aboriginal landowners of their lands through scheduling of the Jabiluka Aboriginal Land Trust which includes areas of the Mirrar Gundjehmi estate not located within the Kakadu Aboriginal Land Trust.

The Kakadu National Park Board of Management recognises and includes Mirrar people as traditional owners, and there has been extensive research undertaken and documentation prepared by Commonwealth, Northern Territory and other agencies which describe and recognise Mirrar traditional ownership of the application area.

I have also discussed information relevant to this subsection in the two previous subsections.

I am satisfied that this information constitutes sufficient factual basis to support the assertion that the native title claim group has continued to hold the native title in accordance with those

traditional laws and customs. The requirements of s.190B(5)(c) are met.

Conclusion

There is evidence to support the factual basis for each of the three criteria identified at s.190B5(a) - (c). This evidence is sufficient to satisfy me that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.

I have not examined each of the specific rights and interests claimed as they are set out in Schedule E of the application. I do so when considering the application under s.190B(6).

190B(6)	***Prima facie case:*** ***The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.***

The Application meets the requirements of section 190B(6)

Reasons for the Decision

'Native Title Rights and Interests' are defined at s.233 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:

the rights and interests to be linked to traditional laws and customs;

those claiming rights and interests to have a connection with the relevant land and waters; and

those rights and interests to be recognised under the common law of Australia.

This definition is closely aligned with all the issues I have already considered under s.190B(5) and I refer to my reasons in relation to that section. I am satisfied that there is sufficient factual basis, in general terms, for the claim to native title rights and interests.

Under s.190B(6) I must consider whether each of the particular native title rights and interests claimed in Schedule E of the application may, prima facie, be capable of being established.

The term prima facie was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase 'prima facie' is: "At first sight, on the face of it; as appears at first sight without investigation. [Citing the Oxford English Dictionary (2nd ed 1989)].

I have adopted the ordinary meaning referred to by Their Honours when considering the requirements of this section.

With reference to s.223(C), whether the rights and interests can be recognised under the common law of Australia, I have already noted in relation to s.190B(4) that the applicant has limited the native title rights and interests claimed subject to the valid rights and interests of others, including native title rights and interests established by others.

I am satisfied that the rights and interests claimed by the applicant are not inconsistent with the rights and interests granted to others with respect to the claim area.

Each native title right and interest claimed in Schedule E, paragraph 30 (a)-(j), is considered individually. One interpretation may be that if the rights set out in paragraph (a), 'to possess, occupy, use and enjoy', are found, prima facie, to be capable of being established, all other rights must flow from this.

However, I take the view that each right and interest particularised needs to be examined. This is particularly the case where, as here, the claim to "possess, occupy, use and enjoy" is framed not as a compendium right from which others flow as a non-exhaustive list of particulars, but where each right claimed is listed separately as part of an apparently exhaustive list of rights and interests claimed.

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others

The claim to exclusive possession, occupation, use and enjoyment of the area is qualified in the application. It is potentially limited by reason of valid concurrent rights and interests in others by or under laws of the Commonwealth or Territory (Schedule E, paragraph 31).

It is expressly stated that the applicants do not claim possession, occupation, use and enjoyment of the application area to the exclusion of all others in relation to any area on which a previous non-exclusive possession act within the meaning of s.23F has been done (Schedule E paragraph

32). The applicants provide information on a system of laws and customs from which possession, occupancy, use and enjoyment of the application area derives from – and is held by – a group whose membership is determined in accordance with such traditional laws and customs. Citations of paragraphs from the application in the reasons for decision in relation to sections 190B(3), 190B(5) and 190B(7) are relevant. The applicants state they and their predecessors have occupied the area of the application since time immemorial, up to and including when British sovereignty was asserted, and at the time of contact with non-Aboriginal people (Schedule F(A) paragraph 35). The basis for occupation is the traditional laws a customs detailed in Schedule F(A) – F(B). Exercise of this right and interest claimed by members of the native title claim group is provided in Schedule E sub-paragraphs 30(a), (c), (d) and (e).

Reasons for the Decision (s.190B(6) cont)

Further, Schedule G states that the current activities of the claim group include regulating the activities of others in relation to all such activities, including the regulation of entry onto – and use of – the application area.

The certification provided by the Northern Land Council (Schedule R) states the NLC is not aware of any other application or proposed application that partly or wholly covers the application area, and nor is there any other documentation showing that native title holders other than the native title claim group exist.

Based on the above, the extent that the claim to "possession, occupation, use and enjoyment" is made to the exclusion of others, may be capable of being grounded in the historical and current practice of traditional laws and customs by the native title claim group, and by other neighbouring indigenous communities.

I am satisfied that this right is, prima facie, capable of being established.

(b) to speak for and to make decisions about the use and enjoyment of the application area

Schedule G (paragraphs (11), (12), (14), (15), and (17)) state that the claim group regulates access to, and usage of, the area and its resources within and among the claim group. There is information also on practices for the protection of sacred sites and decision-making about activities on the land.

I am satisfied that this right is prima facie capable of being established.

(c) to reside upon and otherwise have access to and within the application area

There is information that members of the native title claim group have had access to and resided on the land in accordance with traditional laws and customs. (Schedule G paragraph 78 (1) to (4), and (7) to (9)) - and the description of activities by claim group members in Schedule M, cited in the reasons for decision in relation to s.190B(7)).

I am satisfied that this right is, prima facie, capable of being established.

(d) to control the access of others to the application area

Information is provided about protection of sacred sites in the area of the application (Schedule E, paragraph 30, (d), (f), (h) and (i), and Schedule G, paragraph 78 (2), (11), (14), and (17)). The protection of these sites necessarily involves some right of control over free access of others to the area of the application.

I am satisfied that this right is, prima facie, capable of being established.

(e) to use, enjoy and manage the resources of the application area

Information is provided throughout the application (in particular, in Schedules F, G, and M) in relation to use and enjoyment of resources of the area, and further, these rights are subject to the qualification in Schedule Q.

I am satisfied that this right is, prima facie, capable of being established.

(f) to control the use and enjoyment of others of the resources of the application area

A general activity of collecting and controlling use of, and access to, natural resources is listed in Schedule G, with examples including water, timber, stones, ochre, resin and bush medicines, on the land and waters.

Further, Schedule M describes the activities in this regard undertaken by members of the claim group.

I am satisfied that this right is, prima facie, capable of being established.

Reasons for the Decision (s.190B(6) cont)

(g) to share, exchange and/or trade resources derived on and from the application area

Activities relating to the sharing, trading and exchanging of resources from the application area are listed in Schedule G (paragraph 78 (2), (3) and (4)) and further identified as a native title right and interest in Schedule E, in particular paragraph 30 (d) to (g).

In Schedule F, the application states that the interests and entitlements listed in Schedule E are based on shared laws in relation to the land and waters since time immemorial, and derived from traditional laws and customs including economic rights and interests. Economic rights and interests include the capacity to control the use and exploitation of resources within the application area.

To the extent that this right is claimed as a separate right and not encompassed by the claimed right of possession, occupation, use and enjoyment of the land, I am satisfied that this right is, prima facie, capable of being established.

(h) to maintain and protect places of importance under traditional laws, customs and practices in the application area

The application provides information in the protection of sites (Schedule E, paragraphs 30 ((h) and (i)) and the passage of knowledge about such areas of importance (Schedule G, paragraphs (13 to (15)), which occurs within the context of the traditional laws and customs spelt out in the body of the application, and to which I have referred in other sections of these reasons.

I am satisfied that this right is, prima facie, capable of being established.

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area

The application provides information on the continuing practice, in accordance with traditional laws and customs, of the devolution of restricted cultural and spiritual knowledge to others (Schedule F, paragraph 54 and 64) and the passing on of cultural knowledge to descendants of the succeeding group (Schedule F, 70). Activities relating to the passing on of knowledge are described in Schedule G, paragraphs (5) to (8)).

I am satisfied that this right is, prima facie, capable of being established.

(j) to determine and regulate membership of, and recruitment to, a landholding group

The application provides information on the traditional laws and customs governing membership of, and recruitment to, the native title claim group and describes the differing roles and responsibilities of members recruited to the group (Schedule E, paragraph 30 (j), Schedule F, paragraph 64, 68 and 70, and Schedule G, paragraphs (15) and (16)).

I am satisfied that this right is prima facie capable of being established.

Summary

In summary I am satisfied that the rights listed below are capable of being established:

(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j).

Overall, the application meets the requirements of s.190B(6).

190B(7)	***Traditional physical connection:*** ***The Registrar 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; or*** ***previously had and would reasonably have been expected currently to 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 land or waters) by:*** ***the Crown in any capacity; or*** ***a statutory authority of the Crown in any capacity; or*** ***any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.***

The Application meets the requirements of section 190B(7)

Reasons for Decision

This section requires that I am 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 covered by the application.

Schedule M, paragraphs 88 to 90 set out particulars of past and current traditional physical connection of the claimants to the application area.

Activities related to the traditional physical connection with the claim area for one member of the native title claim group is set out at paragraph 90 of Schedule M.

The NT Submission submits that the application contains no information that would enable the Registrar to be satisfied in relation to physical connection with the subject land or any part of it.

However, for the reasons given above, and at s.190B(5), I am satisfied that there exists traditional laws acknowledged by and customs observed by the claim group sufficient to support traditional physical connection.

I am further satisfied, based on the above information, that at least one member of the claim group currently has a traditional physical connection with the land covered by the application.

Section 190B(7) is therefore satisfied.

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.***

The Application meets the requirements of section 190B(8)

Reasons for the Decision

Approved determinations of native title - s.61A(1)

The National Native Title Register shows no approved determinations of native title for the application area and the application therefore complies with s.61A(1).

Previous exclusive possession acts - s.61A(2)

Section 61A provides that the area covered by the application must not have been subject to a previous exclusive possession act attributable to the Commonwealth, or where there is State or Territory legislation, attributable to the State or Territory. In this case the acts are attributable to the Commonwealth.

The NT Submission has made detailed comments in relation to the grants of interests in the application area it considers extinguishes native title. The Mirrar Submission responds to these assertions. In my considerations I have taken both submissions into account. I have also had regard to the Commonwealth of Australia Gazette dated 29 June 1978. This Notice relates to the acquisition of NT Portions 2271, 2272 and 2273 in the Commonwealth for the public purpose of a National Park. I note that the both the applicants' and the NT government's submissions are unclear on this point as they make reference only to NTP 2271 and 2273 when they discuss the Notice in the government Gazette. The Geospatial Unit of the Tribunal has confirmed that the area described in the Notice encompasses NTP 2271, 2272 (previously 1641) and 2273 and is consistent with the external boundary of the application.

I note that at Schedule B and Schedule L of the application, the applicants excluded any areas where there may have been a previous exclusive possession act. Schedule B(b) of the application, at paragraphs 18 and 19 states:

Subject to Schedule L, any area in relation to which a previous exclusive possession act under s.23B of the Act has been done, is excluded from this application.

> To avoid any doubt the claim excludes all that land which may be commonly referred to as 'private' freehold constituting a previous exclusive possession act pursuant to s. 23B(2)(c)(ii) of the Native Title Act. However, as all the land in the claim area is vested in the 'public' authority of the Director of National Parks and Wildlife and/or the Commonwealth, the applicants are not aware of any area of 'private' freehold constituting a previous exclusive possession act within the application area.

Is the Acquisition of NTP 2271, 2271 and 227a a Previous Exclusive Possession Act?

The first issue I need to consider in relation to s.61A(2), is whether the acquisition of these three portions by the Commonwealth is a previous exclusive possession act. Because of the general exclusion clauses at Schedule B and L it is necessary for me to consider this issue as the whole of the application area is subject to this acquisition and/or grant or vesting of freehold in the Commonwealth. If this act (or acts) extinguish native title, and the applicants rely on the general exclusion clauses, then there is no area covered by the current application that is able to be claimed. Therefore, for the purposes of the registration test I need to be satisfied that this act (or acts) does not extinguish native title.

Is the Acquisition of NTP 2271, 2272 and 2273 a Previous Exclusive Possession Acts?

The area, now described as NTP 2271, 2272 and 2273, was acquired by the Commonwealth by Notice dated 27 June 1978 published in the Commonwealth of Australia Gazette No. S116 dated 29 June 1978. The Notice states that 'the acquisition of the fee simple interest in the land described in the Schedule for the following public purpose approved by the Governor-General, namely: National Park'.

I am unable to ascertain from the information before me whether this acquisition by the Commonwealth can be characterised as an act separate from the grant or vesting of freehold in the Commonwealth or whether they are the same act. Hence, prima facie, the acquisition was a separate act.

Section 23B refers to 'grants or vestings', it does not refer to an 'acquisition'. Therefore the acquisition of NTP 2271, 2271 and 2272 is not a previous exclusive possession act. The acquisition by the Commonwealth falls within the definition of a Past Act under the Act and would be validated by s.14 of the Act. An acquisition by the Commonwealth such as this would be a Category D past act. The effect of the validation of a Category D past act is that the non-extinguishment principle applies (s.15(1)(d)).

I am satisfied that the acquisition of the area by the Commonwealth is a separate act from the grant or vesting of freehold in the Commonwealth and that it is not a previous exclusive possession act.

Are the Grants or Vestings of NTPs 2271, 2272 and 2273 Previous Exclusive Possession Acts?

Because of the general exclusion clauses at Schedule B and L of the application, it is necessary for me to consider this issue as the whole of the application area is subject to the grant or vesting of freehold in the Commonwealth. If this act extinguishes native title, and the applicants rely on the general exclusion clauses, then there is no area covered by the current application that is able to be claimed. Therefore, for the purposes of the registration test I need to be satisfied that the grant or vesting of freehold in the Commonwealth does not extinguish native title.

The NT Submission states at pages 5 and 6 that, under s.23B the application area has been the subject of a number of previous exclusive possession acts.

The Mirrar Submission relies on the arguments set out in paragraphs 32 and 33 in relation to NTP 2272, that the provisions under s.23B(9A) also apply to NTPs 2271 and 2273. In relation to s.23B(9A) they submit, at paragraph 36, that 'the acquisition involved the establishment of a national park area' and that it is 'fairly arguable' that this acquisition was not a previous exclusive possession act.

I agree with the submission put forward by the applicants that, on a prima facie level, these grants or vestings fall within s.23B(9A). As discussed above the Notice in the Government Gazette of 29 June 1978 sets out the purpose of the acquisition as 'National Park'.

For the purposes of the registration test I am satisfied the vestings fall within s.23B(9A).

If I am wrong about this, it is my view that they would fall within s.23B(9C). I note that in relation to s.23B(9C) it is necessary to consider whether the grant or vesting extinguishes native title at common law.

The NT Submissions states, at page 6, that if the act was a grant or vesting within the meaning of s.23B(9C) then 'the land and waters have been used in a way that, apart from the Native Title Act, extinguishes native title' and therefore, notwithstanding s.23B(9C), the act is a previous exclusive possession act.

The applicants submit, that s.23B(9C) applies because the act involved a grant or vesting in the Crown. They further argue, at paragraphs 39 to 53, that in relation to 23B(9C) the land has not been used in a way that extinguishes native title.

I note that this issue, of whether these vestings extinguish native title at common law, is a

complex legal question that should be dealt with by the Court at a later date. It is not appropriate for me to produce a concluded view of the common law effect of the grant or vesting, where no concluded view has been expressed by the courts.

The decision required under s.190A is an administrative decision. Therefore, I consider that I am not required to answer this question in a substantive form, but only in accordance with the purpose of the registration testing process, pursuant to s.190A of the Act.

In considering this issue I am mindful of Carr J's comments *in State of Western Australia v Native Title Registrar & Ors* 1999 FCA 1591 at paragraph 67 where he states that "The Act is clearly remedial in character and should be construed beneficially. Justice Carr relied on the decision in *Kanak v National Native Title Tribunal* (1994) 61 FCR 103 at 124, to support his view.

I have considered the arguments put forward by the NT government and the applicants. In this context I have had due regard to the NT government's assertion that if the grants or vestings were within the meaning of s.23B(9C), then the use of the land has extinguished native title notwithstanding this section. Despite this statement, it is my opinion that I do not have before me any evidence which satisfies me that there was a clear and plain intention to extinguish native title native title under s.23B(9C) (a) or (b) in respect of the whole of the application area.

I am satisfied that even if the acts are not excluded by s.23B(9A) they are excluded by virtue of s.23B(9C)

Crown to Crown Grant to the Director, National Parks and Wildlife (NTP 2272)

I note that a title has been issued in respect of NTP 2272 (but not in respect of NTP 2271 or 2273). NTP 2272 was vested in the Director of National Parks and Wildlife on or about 9 March 1982. This area is also the subject of a lease to the JTDA. The effect of this lease is relation to s.61A(s) is discussed below.

I note that at Schedule B and Schedule L of the application, the applicants have sought to exclude any areas where there may have been a previous exclusive possession act.

The NT Submission states, at page 6, this NTP was vested in the Director of National Parks and Wildlife within the meaning of s23B(2)(c)(ii) which act constitutes a previous exclusive possession act.

The Mirrar Submission does not dispute this grant or vesting but argues, at paragraphs 31, 32 and 33, that the provisions at sub-sections (9A) and (9C) of s.23B contain relevant exceptions to previous exclusive possession acts.

At paragraph 34 the applicants argue that the grant or vesting to the Director of National Parks and Wildlife 'involved the establishment of a national park area and amounts to a vesting to or in a statutory authority and/or the Crown'. Thus, they say, it is 'fairly arguable' that this grant or vesting was not a previous exclusive possession act.

I am satisfied that this Crown to Crown grant falls within the definition of s.23B(9A) and if it does not then it falls within s.23B(9C). I refer to my reasons as set out above.

Lease to JTDA and Subleases Granted by JTDA (NTP 2272)

I note that the lease to JTDA only covers NTP 2272.

As noted above, the applicants, at Schedule B and Schedule L of the application, seek to exclude any areas where there may have been a previous exclusive possession act. It is my view that these exclusion clauses effectively exclude any previous exclusive possession acts.

The NT Submission argues that the lease from the Director of National Parks and Wildlife to the JTDA conferred exclusive possession of the said land on the JTDA within the meaning of s.23B(2)(C)(viii).

The NT Submission also states that, even if the grant was a grant to or in the Crown, in any capacity within the meaning of s.23B(9C), then the land and waters in NTP 2272 have been used in a way that extinguishes native title.

On this point the Mirrar Submission argues at paragraph 38 that, because the applicants believe the underlying estate (the freehold grant to the Director of the National Parks and Wildlife Service) is not a previous exclusive possession act, then lesser rights (leases and sub-leases) that are entirely dependent on the Director's freehold estate cannot be previous exclusive possession acts.

The Mirrar Submission further argues that while s.23B(9C) (Crown to Crown in any capacity) may contain an "adverse dominion" qualification, s.23B(9A) (national parks, etc) does not contain such a qualification (paragraph 40). The applicants also assert it is 'fairly arguable' that the land and waters in NTP 2272 have not been used in a way that was intended to, or in fact has, extinguished native title (paragraph 41).

To support this contention, at paragraphs 43 to 47, they cite:

Justice Lee in *Ward v Western Australia* 1999 159 ALR 483, discussing the effect on native title of Shire by-laws, planning schemes, and related mechanisms;

The lease between the Director and the JTDA, which is for a term of 40 years with no right of renewal, and that the Lease is subject to the Kakadu National Park Plan of Management and an agreement under the Aboriginal Land Rights (NT) Act 1976;

The lease contemplates the rehabilitation of the natural environment where disturbed during the life of the town;

The Fox Inquiry, in which it is recommended that the township of Jabiru become part of the Kakadu National Park;

The Fox Inquiry, in which guidelines for the establishment of the Ranger project (including the town of Jabiru) recognise Aboriginal interests and their clear wishes.

The applicants argue that the establishment of Jabiru was not done with the intent of extinguishing native title, but rather, that the project recognises and protects Aboriginal interests (paragraph 48)

I am satisfied that exclusion clauses at Schedule B and L effectively exclude from the application area any previous exclusive possession acts. I have noted the submissions by the NT government and the applicants. Because I am satisfied that the general exclusion clauses are sufficient in respect of these leases I do not need to consider whether s.23B(9A) or (9C) apply.

Public Works

The NT Submission outlines the proclamation and establishment of the land for the town of Jabiru, which initially comprised NTP 2272, and area of approximately 1297 hectares. Since 1 June 1984, approximately 593 lots have been excised from the original NTP 2272, for the purposes of constructing and establishing the town of Jabiru and associated infrastructure.

The application area includes all land and waters within the boundaries of the original NTP 2272 and does not expressly exclude all or any of the lots excised as above. Further, the application does not expressly exclude from the claim area those lots where "permanent" public works have been established.

The applicants rely primarily on the terms of the Lease between the Director of National Parks and Wildlife and JTDA. The application cites Part VI of the lease where the rehabilitation of the area is contemplated "on any portion of the demised land … disturbed by the construction of works."

The applicants argue in the Mirrar Submission, paragraphs 44 to 53, that the establishment of Jabiru and any associated infrastructure relating to the town and/or the mining project are of a

temporary nature (limited by the life of the mining project) and not intended to permanently extinguish native title, or be held permanently by non-Aboriginal interests.

Whether or not these purported public works extinguish native title is a matter for the courts to decide. At an administrative level, and for the purpose of considering whether the application satisfies the provision of s.61A(2), it is my view that the exclusion clauses at Schedules B and L effectively exclude from the application any areas where there have been previous exclusive possession acts.

I am satisfied that if previous exclusive possession acts have occurred, then those areas are excluded from application by virtue of the exclusion clauses at Schedules B and L of the application.

The application complies with s.61A(2).

Previous Non-exclusive Possession Acts – s.61A(3)

The native title rights and interests claimed in relation to previous non-exclusive possession acts (under s.23F) attributable to the Commonwealth or the Territory have been limited as required by s.61A(3), by virtue of Schedule E, paragraph 32 of the application.

Pastoral Leases

I note that in its submission, at page 8, the NT government states that the application area has been the subject of two pastoral leases. It asserts that these pastoral eases conferred exclusive possession on the lessees. The submission cites Justice Lee's decision *in Ben Ward & Ors v State of Western Australia & Ors* that pastoral leases did not confer exclusive possession. However, the submission states, the NT government is of the view that His Honour erred in his finding.

As noted above the applicants, at Schedule B and Schedule L of the application, do not claim exclusive possession over any areas where there may have been a previous exclusive possession act. I am satisfied that the application does not attempt to claim native title rights and interests over land and waters where a previous exclusive possession act has – or may have – occurred.

The NT Submission states, as an alternative to the assertion in relation to pastoral leases being previous exclusive possession acts, that pastoral leases (PL 138 and PL 1463) issued after 1881 comprise previous non-exclusive possession acts, and to the extent that any of the native title rights and interests claims may be interpreted as being exclusive to the applicants (ie, to the exclusion of all others), the application fails s.61A(3).

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. At Schedule E the applicants have limited the native title rights and interests claimed in relation to any previous non-exclusive possession acts attributable to the Commonwealth or the Territory

The application meets the requirements of s.190B(8).

190B(9)(a)	***Ownership of minerals, petroleum or gas wholly owned by the Crown:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Common-wealth, a State or Territory wholly owns the minerals, petroleum or gas;***

The Application meets the requirements of section 190B(9)(a)

Reasons for the Decision

Schedule Q of the application states that, where minerals, petroleum or gas wholly owned by the Crown and ownership extinguished by the Crown, they are not claimed.

The NT Submission argues that the extent to which the application can be interpreted to include ownership of minerals in the application area, such native title rights and interests in minerals have been extinguished.

The Mirrar Submission in response states that the assertion in the application that the Crown does not wholly own minerals, petroleum or gas in the application area is an arguable question of law, and that the forum for its resolution is the Federal Court under s.81.

It is sufficient under this condition to consider only whether there is any claim to ownership of minerals. I am satisfied that the statement by the applicants at Schedule Q satisfies the requirements of s.190B(9)(a).

190B(9)(b)	***Exclusive possession of an offshore place:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;***

The Application meets the requirements of section 190B(9)(b)

Reasons for the Decision

Schedule P of the application does not provide details of any claim by the native title claim group for exclusive possession of all or part of an offshore place.

Paragraph 93 of that Schedule simply states “not applicable”, and this is obviously so because of the inland location of the application area.

No further consideration of the requirements of s.190B(9)(b) is necessary.

190B(9)(c)	***Other extinguishment:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).***

The Application meets the requirements of section 190B(9)(c)

Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicant that have been otherwise extinguished.

In addition to the areas excluded from the claim area as considered in s.190B(8), I have listed in my reasons for decision in relation to s.190B(4) the qualifications to the native title rights and interests claimed at Schedule E of the application.

I note the Justice French's decision in Strickland v Native Title Registrar 1999 FCA 1530. When considering the question of the definition of the areas subject to ss.47, 47A and 47B, French J said, at paragraph 55, that it was unrealistic to expect a concluded definition of these areas to be given in the application. How these sections apply to any given application area will be decided by the court as part of the hearing of the application.

I am satisfied that this exclusion clause effectively excludes any areas where extinguishment of native title rights and interests has otherwise occurred, which have not been specifically excluded or otherwise removed from the claim area as a result of being listed at Schedule B. This exclusion clause is not contradicted by any information in the application and appears to be sufficient to this point.

The application meets the requirements of s.190B(9)(c).

End: S.190A Reasons for Decision

Attached: S.186 Attachment 1(Register Entry)