National Native Title Tribunal

# Registration test decision

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|---|---|
| Application name | Widjabul Wia-bal |
| Name of applicant | Murray John Roberts, Reginald King, June Gordon, Michael Ryan, Jim Speeding, Queenie Speeding, Ashley Moran, Steven Roberts, Jenny Smith, Lois Johnson |
| State/territory/region | New South Wales |
| NNTT file no. | NC2013/005 |
| Federal Court of Australia file no. | NSD1174/2013 |
| Date application made | 24 June 2013 |
| Name of delegate | Radhika Prasad |

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:** 28 August 2013

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Radhika Prasad

**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

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# Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) 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

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Widjabul Wia-bal claimant application to the Registrar on 25 June 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.

Given that the claimant application was made on 24 June 2013 (provided to the Registrar on 25 June 2013) and 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 ss. 190B and 190C of the Act. This is commonly referred to as the registration test.

## Registration test

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

Pursuant to ss. 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

## Information considered when making the decision

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

I 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.

I have taken into account the following material in coming to my decision to accept the claim for registration:

- the information contained in the application and accompanying documents;
- the geospatial assessment and overlap analysis (GeoTrack: 2013/1163) prepared by the Tribunal's Geospatial Services on 5 July 2013 (geospatial assessment); and
- the results of my own searches using the Tribunal's mapping database.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application.

## Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration, I am bound by the principles of administrative law, including the rules of procedural fairness. Those rules 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]. The steps that I and other officers of the Tribunal have undertaken to ensure that procedural fairness is observed are as follows:

- On 1 July 2013, the case manager for this matter sent a letter to the State of New South Wales (the State) enclosing a copy of the application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 15 July 2013 and that the delegate anticipates making the registration test decision by 23 August 2013.
- The case manager, also on 1 July 2013, wrote to inform NTSCORP Limited (NTSCORP) that the delegate proposed to make the registration test decision by 23 August 2013 and that any additional information should be provided by 15 July 2013. I note that NTSCORP is the applicant's representative for the claim and is also the representative body for the area covered by the application. NTSCORP has not provided any additional material.
- On 4 July 2013, the State requested an extension until 23 July 2013 to provide submissions in relation to the application and accompanying material. As the delegate, I agreed to the extension, but no submissions were received from the State.

# 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.

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.

In coming to this conclusion, I understand that the condition in s. 190C(2) 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). As explained by Mansfield J in *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*):

> [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material …
>
> [F]or the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — at [37] and [39]; see also [16], [35] and [36].

Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s. 190C(2).

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. I do not consider they require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires the application contain such information as is prescribed, does not need to be considered by me separately under s. 190C(2), as I already test these 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.

I now turn to each of the particular parts of ss. 61 and 62:

### Native title claim group: s. 61(1)

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

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

Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s. 190B(3). Schedule R states that the persons who jointly comprise the applicant are members of the native title claim group and were authorised to make the application — see also s. 62 affidavits of the persons jointly comprising the applicant.

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

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

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

Part B of the form 1 contains the name and address for service of the applicant.

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

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

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

I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

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

The application is accompanied by affidavits from each of the persons jointly comprising the applicant. The affidavits contain all of the statements set out in s. 62(1)(a)(i) to (v), including details of the process of decision making complied with in authorising the applicant.

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

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

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

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

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

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

Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B identifies areas within those boundaries that are not covered by the application. Both Attachment B and Schedule B also list native title determination applications which are excluded from the application area.

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

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

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

Attachment C contains a map showing the boundaries of the application area.

## Searches: s. 62(2)(c)

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

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

Schedule D states that no searches have been undertaken.

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

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

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

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

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

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

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

Attachments F and F(1) to F(8) of the application contain details and other information, which in my view meets the requirements of a general description of the factual basis for the assertions identified in this section. I note that there may also be other schedules of the application that contain details and other information relevant to the factual basis.

## Activities: s. 62(2)(f)

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

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

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

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

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

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

Schedule H of the application contains details of other applications to the Court, which have been discontinued or dismissed prior to any determination of native title being made.

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

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

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

Schedule HA provides that the applicant is not aware of any s. 24MD(6B)(c) notices that have been given and that relate to the whole or part of the application area.

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

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

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

Schedule I states that the applicant is not aware of any notifications under s. 29 that have been given and that relate to the whole or part of the application area.

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

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

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

In my view, the requirements of this provision only arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9]. I note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

The geospatial assessment indicates that there are no native title determination applications which fall within the external boundary of this application as at 1 July 2013.

I have undertaken a search of the Tribunal's mapping database and agree with the above assessment.

I am satisfied, therefore, that there is no previous application to which ss. 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s. 190C(3) further.

# *Subsection 190C(4)*
# *Authorisation/certification*

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
>
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
>
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

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.

Schedule R provides that the application has not been certified. I must therefore consider whether the requirements of s. 190C(4)(b) are met.

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(b) are met.

**The application must contain the information specified in s. 190C(5)**

Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s. 190C(4)(b). Section 190C(5) provides that:

> [i]f the application has not been certified as mentioned in [s. 190C 4(a)], the Registrar cannot be satisfied that the condition in [s. 190C(4)] has been satisfied unless the application:
>
> (a) includes a statement to the effect that the requirement set out in [s. 190C(4)(b)] has been met; and
>
> (b) briefly sets out the grounds on which the Registrar should consider that [the requirement in s. 190C(4)(b)] has been met.

I note that the following statement is made in Schedule R of the application:

> (a) The individuals who jointly comprise the applicant are members of the Native Title Claim Group and were authorised to make the application and to deal with all matters arising in relation to it at a meeting of the Widjabul Wia-bal Native Title Claim Group held on 11 and 12 June 2013 at Goonellabah.

Accordingly, in my view, the above constitutes a statement to the effect that the requirement in s. 190C(4)(b) has been met.

As to the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met, Schedule R provides the following information:

> (i) The meeting held on 11 and 12 June 2013 at Goonellabah followed a process of consultation with members of the Native Title Claim Group by officers of NTSCORP Limited and by Native Title Claim Group members themselves.
>
> (ii) Notice of the meeting held on 11 and 12 June 2013 at Goonellabah was provided to members of the Native Title Claim Group by correspondence, fax and telephone contact by officers of NTSCORP Limited and communicated between claim group members [a copy of the notice is annexed to the affidavit of NTSCORP solicitor affirmed 24 June 2013 at SH2]. Public notice was also given through advertisements placed by NTSCORP in the Koori Mail, as well as in the

Northern Star, a local regional newspaper [a copy of the advertisements are annexed to the affidavit of NTSCORP solicitor at SH1].

The process of authorisation is further described in Attachment R and in the affidavits of NTSCORP solicitor and each of the persons who comprise the applicant, which are marked as Attachments R(1) to R(11). These documents provide the following relevant information:

- On 11 and 12 June 2013, at Goonellabah NSW, an authorisation meeting was held to consider and authorise the filing of a native title determination application in the area subject to the current application (the meeting) — Attachment R(1) at [2] and [3].
- The meeting was notified in the Koori Mail and the Northern Star regional newspaper for two weeks prior to the meeting. The advertisements in both newspapers advised of the date, time, place and agenda of the meeting and contained a description and map of the area that would be subject to the proposed claim. Details on how to register for the meeting were also provided — at [4] and [5].
- On 22 May 2013, a copy of the notice of the meeting, containing the details described above, was emailed to Ngulingah Local Aboriginal Land Council and faxed to Jali Local Aboriginal Land Council and Aboriginal Health Lismore. Attached to each notice was a request that they be displayed on windows or noticeboards, and for copies to be made available to the persons who assert native title in the proposed application area. On 23 May 2013, a copy of the notice was sent by post to the Bundjalung Aboriginal Elders Council Aboriginal Corporation with a request for the notice to be distributed to those of their members who assert native title rights and interests in the application area. The organisations detailed are local Aboriginal organisations operating in the region subject to the application area — at [11].
- On 23 May 2013, NTSCORP made phone calls to persons who had previously advised NTSCORP that they assert native title rights and interests in the proposed application area. The purpose of the phone calls was to obtain contact details of persons whose addresses were not available and also the family members of those persons. The persons who were contacted, in particular the persons jointly comprising the applicant, told their immediate family and other members of the native title claim group about the meeting and discussed it with them — at [7].
- On 23 May 2013, notices of the meeting were sent by post to those persons that NTSCORP had contact details of and some of those persons were sent multiple copies of the notice with a request to distribute amongst family members and persons who they knew asserted native title rights and interests in the proposed application area. Attached to each notice was NTSCORP's standard meeting registration form — at [8].
- Over the period 23 May 2013 to 10 June 2013, NTSCORP staff made phone calls to and received calls from persons asserting native title rights and interests in the proposed application area and notices of the meeting were sent by email to inform those persons of the meeting. NTSCORP staff were advised that those persons who were unable to attend would have their point of view represented by family members in attendance — at [9] and [14].

- The meeting was convened and chaired by NTSCORP staff. A senior anthropologist, research anthropologist, senior historian and a research historian from NTSCORP also attended — at [19] to [23].
- The meeting was attended by about 50 persons who assert native title rights and interests in the proposed application area — at [18].
- The members of the native title claim group present at the meeting, after discussion, resolved that there was no particular process under traditional laws and customs that must be complied with when making decisions about matters arising under the Act and agreed to and adopted the following process for the purpose of the native title claim:
  - issues will be discussed;
  - proposed decisions will be in the form of a clearly worded written motion;
  - the motion will be read out at the meeting, moved and then seconded by members before it is decided on; and
  - decisions will be made by a majority of those present at the meeting — at [28]; see also Attachments R(2) to R(11).
- In accordance with the agreed and adopted process, the claim group unanimously passed a resolution that authorised the persons who jointly comprise the applicant to make the native title determination application and to deal with matters arising in relation to it. The claim group, using the above process, passed a series of resolutions relating to the content of the native title determination application — Attachment R(1) at [28] to [32]; see also Attachments R(2) to R(11).
- A resolution was also passed that the persons who attended the meeting were sufficiently representative of all the persons who assert to hold native title rights and interests in the proposed application area and that those who attended were representative of members of their family who were unable to attend — Attachment R(1) at [24]; see also Attachments R(2) to R(11).

I am satisfied that the above information contains a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s. 190C(4)(b) are met. I consider whether the material provided addresses those requirements below.

**The application must address the requirements of s. 190C(4)(b)**

*The requirements of s. 190C(4)(b) generally*

Justice Mansfield, in *Doepel*, commented that s. 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which 'clearly … involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — at [78].

Justice Collier, in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*), noted that s. 190C(4) requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by *all* the other persons in the native title claim group — at [21], [29] and [35]; see also *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60].

In *Strickland v Native Title Registrar* [1999] FCA 1530, French J stated that the authorisation condition at s. 190C(4)(b) is not 'to be met by formulaic statements in or in support of applications' — at [57].

Section 251B provides, for the purposes of s. 190C(4)(b), two alternative means of authorisation:

- authorisation in accordance with a process required under the traditional laws and customs of the native title claim group — s. 251B(a); or
- authorisation in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group — s. 251B(b).

In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*), Lindgren J made the following comments in relation to s. 251B:

> What it means for all the persons in a native title claim group to authorise a person or persons to make a native title determination application is laid down in s 251B of the [Act]. For convenience, I will refer to the processes of decision-making identified in paras (a) and (b) of s 251B as 'traditional' and 'non-traditional' respectively.
>
> A native title claim group is not given a choice between traditional and non-traditional processes of decision-making. Consistently with the [Act]'s recognition of traditional laws and customs as the source of native title, s 251B recognises traditional laws and customs as the primary source of the decision-making process. It is only if there is no traditional process of decision-making in relation to authorising things of the 'application for a determination of native title' kind, that para (b) applies — at [1229] and [1230].

Accordingly, I understand that a claim group is not permitted to choose between the two processes described in s. 251B. If there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group — see also *Evans v Native Title Registrar* [2004] FCA 1070 at [7].

*Consideration*

I note that the first limb of s. 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group through descent from one or more of the apical ancestors named in Schedule A — see Attachments R(1) to R(11). I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

In respect of the second limb of s. 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified — *Doepel* at [78]; *Wiri People* at [21], [29] and [35]; *Risk* at [60]. The authorisation material makes it clear that the claim group does not have a decision making process that is traditionally mandated and accordingly, an agreed and adopted process was used during the authorisation meeting. Given this information, I have considered the applicant's material in light of the requirements of s. 251B(b).

The requirements of s. 251B(b), in light of s. 190C(4)(b), was discussed by Stone J in *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 (*Lawson*) where her Honour observed that the 'effect of the section is to give the word "all" [in s. 190C(4)(b)] a more limited meaning than it might otherwise have' — at [25]. Her Honour held that:

> the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process — at [25].

Justice Stone cited with approval the decision of *Ward v Northern Territory* [2002] FCA 171 (*Ward*), where O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance, were required to be addressed:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? — *Ward* at [24], cited in *Lawson* at [26].

O'Loughlin J noted that it was not necessary that these questions be answered in any formal way but held that 'the substance of those questions must be addressed' — at [25].

In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meeting and who it was convened by. It indicates that all reasonable steps had been taken to advise members of the native title claim group of the authorisation meeting, which included phone calls to members, notices posted by mail and by public advertisements. The notices attached to the affidavit of NTSCORP solicitor indicate that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was participative and inclusive allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion. The meeting is said to have been well-attended (attendance of 50 persons were recorded) and a resolution was passed by the members present that there was sufficient representation of the native title claim group at the meeting and that each person attending is representative of members of their family who were unable to attend.

The meeting recognised a general consensus of views among the claim group, which resulted in the resolutions being passed unanimously, including the authorisation of the persons jointly

comprising the applicant and to make a native title determination application and deal with matters arising in relation to it.

In my view, the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that, I am satisfied that the condition of s. 190C(4)(b) is met.

# Merit conditions: s. 190B

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

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

The application **satisfies** the condition of s. 190B(2).

Attachment B contains a written description prepared by the Tribunal's Geospatial Services on 31 May 2013 describing the application area by metes and bounds referencing roads, river banks, catchment boundaries, cadastral parcels, and coordinate points.

Schedule B lists general exclusions to the application area.

I note that Attachment B and Schedule B specifically exclude Byron Bay Bundjalung People #3 (NSD6020/2001; NC2001/008), Bandjalung People #2 (NSD6107/1998; NC1998/019) and The Githabul Peoples (NSD6019/1998; NC1995/011) native title determination applications.

Attachment C contains a colour copy of a map, which was prepared by the Tribunal's Geospatial Services on 31 May 2013. The map identifies:

- the application area;
- a locality diagram;
- a commencement point;
- topographic background image;
- scalebar, north point, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

*Consideration*

The geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I have reviewed the Tribunal's mapping database and agree with this assessment.

I note that Schedule B contains some general exclusions to categories of land and waters, which in my view provide a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] to [38].

In light of the above information, I am satisfied that the description and the map of the application area, as required by ss. 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

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

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

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

> The Widjabul Wia-bal are the native title claim group on whose behalf the Applicant makes this application. The native title claim group comprises all the descendants of the following apical ancestors:
>
> Bob de Bobbin (also known as Bob Deruhbin), died 1912 at Lismore
>
> Topsy Brown (also known as Topsy Larken), born 1849, died 1919 at Dunoon
>
> Johnny Bob (also known as Bob Roberts), born circa 1820
>
> William 'Billy' King, born 1878 at Lismore
>
> George Williams, born 1870
>
> Kitty Barry, born 1841, died 1911 at Blakebrook
>
> John 'Jack' Kapeen (also known as John 'Jack' Capeen), born circa 1860

It follows from the description above that the conditions of s. 190B(3)(b) are applicable to my consideration. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can ascertained whether any particular person is in that group.

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

When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour also confirmed that s. 190B(3) requires the Registrar to address only the content of the application — at [30].

In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in Schedule A has a sufficiently clear description of the native title claim group:

> [i]t 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. It is more likely to result from the effects of the

passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

**Consideration**

The Widjabul Wia-bal native title claim group is said to comprise those persons who are the biological descendants of the apical ancestors listed in Schedule A. This method of identifying claim group membership requires some factual inquiry.

I note that describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b) — *WA v NTR* at [67].

I consider that the apical ancestor model provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

In my view, the description of the native title claim group contained in the application is sufficiently clear so that it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s. 190B(3)(b).

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

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

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

The task at s. 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.

I note that the description referred to in s. 190B(4), and as required by s. 62(2)(d) to be contained in the application, is:

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

I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s. 223, when considering the claim under s. 190B(6) of the Act. For the purposes of s. 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

Attachment E of the application provides the following description of the claimed native title rights and interests:

1. Where exclusive native title can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the Widjabul Wia-bal as defined in Schedule A of this application, claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.
2. Where exclusive native title cannot be recognised, the Widjabul Wia-bal … claim the following non-exclusive rights and interests including the right to conduct activities necessary to give effect to them:
    (a) the right to access the application area;
    (b) the right to use and enjoy the application area;
    (c) the right to move about the application area;
    (d) the right to camp on the application area;
    (e) the right to erect shelters and other structures on the application area;
    (f) the right to live being to enter and remain on the application area;
    (g) the right to hold meetings on the application area;
    (h) the right to hunt on the application area;
    (i) the right to fish in the application area;
    (j) the right to have access to and use the natural water resources of the application area;
    (k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);
    (l) the right to manage natural resources of the application area;
    (m) the right to share and exchange resources derived from the land and waters within the application area;
    (n) the right to participate in cultural and spiritual activities on the application area;
    (o) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
    (p) the right to conduct ceremonies and rituals on the application area;
    (q) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;
    (r) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;
    (s) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
    (t) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

3. The native title rights and interests referred to in paragraph 2 do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.
4. The native title rights and interests are subject to and exercisable in accordance with:
    (a) the laws of the State of New South Wales and the Commonwealth of Australia including the common law;
    (b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales; and
    (c) the traditional laws and customs of the Widjabul Wia-bal for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

**Consideration**

For the purposes of s. 190B(4), I am satisfied that the rights and interests described above are understandable and have meaning.

Although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision — *Strickland* at [60].

I find that the description of the native title rights and interests claimed is sufficient to allow those rights and interests to be readily identified and that therefore the application satisfies the condition 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.

The application **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), as set out in my reasons below.

## The requirements of s. 190B(5) generally

Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the claimed native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57] and [83].

Although only a general description of the factual basis is required, the Full Court in *Gudjala FC* noted that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar … and be something more than assertions at a high level of generality' — at [92].

Accordingly, although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material. Further, I note that where the applicant's material contains assertions that 'merely restate the claim' or 'is really only an alternative way of expressing the claim or some part thereof' that material 'does not assist in building the factual basis necessary for assessing the application' — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*) at [43] and [48].

I am therefore of the opinion that the test at s. 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s. 190B(5).

The factual basis material is contained in Attachment F and eight (8) affidavits marked Attachments F(1) to F(8). I proceed with my assessment of the sufficiency of this material by addressing each assertion below.

**Relevant society**

The identification of a pre-sovereign society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertions at s. 190B(5). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the current native title claim group. I consider the following facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society.

Attachment F contains the following general assertions:

1. Prior to 26 January 1788 the ancestors of the Widjabul Wia-bal ('Native Title Claim Group') were in occupation of an area which includes the land and waters subject to this application ('Application Area').
2. The ancestors of the Native Title Claim Group exercised a system of traditional law and custom inextricably connected to the topographic, ecological, cultural and religious values vested in the Application Area.
3. Prior to 26 January 1788, the ancestors of the Widjabul Wia-bal had rights and interests in relation to an area which includes the Application Area.

   …

11. The Native Title Claim Group maintains a system of law and custom which has existed from prior to 26 January 1788 until the present day even though those laws and customs have undergone some change since non-indigenous settlement of the Application Area.

    …

13. Those laws and customs are based on the traditional laws and customs of the Widjabul Wia-bal who were present on and connected to the land and waters of the Application Area by those laws and customs at the time when British sovereignty was proclaimed.

14. Widjabul Wia-bal laws and customs have been transmitted and continue to be transmitted to members of the Native Title Claim Group by the intergenerational transfer of knowledge.

15. The Native Title Claimant Group is bound by a normative system of traditional laws and customs. This system includes common principles of kinship and observance of laws relating to land tenure and traditional usage of land and waters.

The affidavits contain relevant information in support of the above assertions. The claim group members state that they identify as being Widjabul Wia-bal, however, some also assert to being Bundjalung or indicate that Widjabul Wia-bal country is within a wider country, namely the Bundjalung nation. [Text deleted].

My understanding of the factual basis material is that Bundjalung nation is said to encompass a wide area of land which is held at a localised level by [Text deleted], including the Widjabul Wia-bal. I understand that these landholding tribes are similar but distinct. [Text deleted]. Some members of a tribe may have ties to other tribal countries through intermarriage and may identify with more than one tribe to which they have cognatic ties.

In my view, the factual basis identifies a relevant pre-sovereign society, namely the wider Bundjalung nation, within which Widjabul Wia-bal country is said to be situated and under which Widjabul Wia-bal traditional laws and customs are said to operate. That is, in my view, the rights and interests in land that are asserted to be held by the Widjabul Wia-bal are based on regionally held laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith* that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

The matters attested to throughout the affidavits that predominantly form the application's factual basis reveal that the laws and customs currently observed and acknowledged by the Widjabul Wia-bal are based on common principles of kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. They are traditional laws and customs, said to have originated from the Dreamtime and their ancestors, the content of which has been passed down to the members of the native title claim group through the preceding generations — see my reasons at s. 190B(5)(b) below.

I consider the factual basis supports the assertion that at least some of the apical ancestors were born into the Widjabul Wia-bal tribe of the Bundjalung nation that existed prior to European contact — see *Gudjala 2009* at [55]. Schedule A indicates that many of the identified apical ancestors were born between 1820 and 1870. [Text deleted]. In my view, it is possible to make the inference that at least some of these ancestors were amongst the generation born to those who would have been alive at the time sovereignty was declared, or at least to those who were living at the time of first European contact. In this sense, the information attested to by members of the native title claim group would appear to support the assertion that at least some of the apical ancestors were born into the Widjabul Wia-bal tribe of the Bundjalung nation that existed at and prior to European contact.

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

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

*The requirements of s. 190B(5)(a)*

In *Gudjala 2007*, Dowsett J indicated that the condition at s. 190B(5)(a) required 'evidence [of] an association between the whole group and the area', although not 'all members must have such association at all times' — at [52]. His Honour also commented that '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].

The factual material must also be sufficient to support an asserted association with the entire claim area, rather than an association with only a part of it, and must contain more than 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

*General assertions*

Attachment F provides information about the association that the predecessors had and current members of the native title claim group have with the application area, including:

1. Prior to 26 January 1788 the ancestors of the Widjabul Wia-bal ('Native Title Claim Group') were in occupation of an area which includes the land and waters subject to this application ('Application Area').
2. The ancestors of the Native Title Claim Group exercised a system of traditional law and custom inextricably connected to the topographic, ecological, cultural and religious values vested in the Application Area.
3. Prior to 26 January 1788, the ancestors of the Widjabul Wia-bal had rights and interests in relation to an area which includes the Application Area.
4. The members of the Native Title Claim Group are descendants of persons described in paragraph
5. From prior to 26 January 1788 to the present day, the Native Title Claim Group and their ancestors have continuously been present on, used and enjoyed the Application Area, in accordance with the laws acknowledged, and the customs observed, by the Widjabul Wia-bal.

   …

7. According to traditional laws and customs observed, the Widjabul Wia-bal are the owners of the land and waters in the Application Area.
8. There are many sites of significance to the Native Title Claimant Group within the Application Area.
9. Material evidence of physical association and connections with the Application Area by the ancestors of the Widjabul Wia-bal exists in the Application Area. It is illustrated by the presence of archaeological evidence of both pre-contact and post-contact Aboriginal habitation. The evidence includes artefacts, fragments, and traditional occupancy sites within the Application Area and traditional stories told about the formation of significant sites in the Application Area.

The affidavits elicit more specific information of the factual basis in support of the assertion at s. 190B(5)(a), including the previous and current association of members of the native title claim group with the application area.

*Previous Association*

Schedule A provides some dates of birth and deaths of the identified ancestors and also notes that some died within the boundaries of the application area. The affidavit material also provides information in respect of some of the identified apical ancestors:

[Text deleted].

The affidavits also elicit information about the association of the predecessors around the time of first European contact with the application area:

[Text deleted].

The claimants also speak of the association of the generations immediately preceding them, [Text deleted].

*Current association*

The claim group members display knowledge of their predecessors and the ancestors from which they are descended. [Text deleted].

The claimants learnt about their own and other Widjabul Wia-bal families through being told stories by their parents and other relatives [Text deleted]. The claimants thereby learnt about the traditional boundaries of their bloodline territory and that of the wider Widjabul Wia-bal country [Text deleted].

The claimants also speak of their own association to Widjabul Wia-bal country, for instance:

[Text deleted].

*Consideration*

In my view, the factual basis material clearly identifies the native title claim group and also identifies the boundaries of the application area. This is particularly evident in the affidavits where the claimants display their knowledge of the traditional boundaries and which locations are within Widjabul Wia-bal country. The claim group members also describe their bloodline connection to particular areas within Widjabul Wia-bal country, which in my view support their assertion that there exists a traditional landholding system that identifies family groups with particular areas.

The factual basis acknowledges the relationship Widjabul Wia-bal people have with their country, being both of a spiritual and physical nature. For instance, the affidavits reflect the claimants' knowledge of country through the presence of Dreamings, the stories of their ancestors, their responsibility to protect sacred places and the acknowledgement that bloodlines determine the part of Widjabul Wia-bal country to which one is associated.

There is also, in my view, a factual basis that goes to showing the history of the association that the members of the claim group have, and that their predecessors had, with the application area — see *Gudjala [2007]* at [51].

Within their affidavits, the claimants display their knowledge of the association their predecessors had with the application area. [Text deleted].

I note that the claimants speak of sacred places, such as initiation rings, throughout the claim area which are said to have existed prior to European contact. They also speak of camp areas that existed [Text deleted] before colonisation and the traditional pathways that were used in the 'old days'.

In my view, the affidavits provide information that is sufficient to support the assertion that the ancestors were associated with the application area prior to European contact and that this association has been continued by their descendants through to the current members of the claim group. This is clearly demonstrated by the claimants speaking of their own association as well as that of their parents and grandparents.

The affidavits also demonstrate that there is a continued occupation of the application area by the Widjabul Wia-bal since European contact. [Text deleted].

In addition, the affidavits demonstrate the intergenerational transfer of knowledge about the boundaries and key features of the Widjabul Wia-bal country that in my view reveal a continuing association with the area covered by the application. The claimants speak of being told Dreamtime stories that relate to regions and cultural landscape within Widjabul Wia-bal country with which they have ancestral bloodline connections. They speak of being told about the boundaries of Widjabul Wia-bal country and shown sacred sites within those boundaries. They are also told how to interpret their country. By being able to identify with country, they are able to have a 'realistic connection' to the land [Text deleted].

In my view, the affidavits also detail travel over Widjabul Wia-bal country and activities being carried out by members of the native title claim group and their predecessors. [Text deleted].

From the above information, I consider that the factual basis is sufficient to support the assertion of an association 'between the whole group and the area' — see *Gudjala [2007]* at [52]. In my view, the factual basis provides geographical particularity which is sufficient to support the assertion that the group has an association with the entire application area. It follows that, in my view, the factual basis material provides sufficient examples and facts to support the assertion of an association between the whole group and the whole area.

On the basis of the information before me, in particular the information in the affidavits referred to above, it is my view that the factual basis is sufficient to support the assertion at s. 190B(5)(a).

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

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

*The requirements of s. 190B(5)(b)*

Section 190B(5)(b) is similarly worded to s. 223(1)(a) and, accordingly, I consider that it is necessary to apply s. 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' found in s. 223(1)(a).

In *Gudjala 2007*, Dowsett J observed that to satisfy s. 190B(5)(b):

> [t]here must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the Native Title claim. That factual basis must be capable of demonstrating that:
>
> - there are traditional laws and customs;
> - acknowledged or observed by the Native Title claim group; and
> - giving rise to the group's claim to Native Title rights and interests — at [62].

His Honour was of the view that to be satisfied that there is a sufficient factual basis for this assertion, the facts must support the assertion of a traditional connection as explained by the High Court in *Yorta Yorta* — at [26].

In light of *Yorta Yorta*, there must be a sufficient factual basis:

- to identify the pre-sovereignty society from which the claim group is descended;
- to support the assertion that the laws acknowledged and customs observed by the claim group derive from the pre-sovereignty society's normative system; and
- that those laws and customs have been passed down from generation to generation, without substantial interruption — at [37], [38], [42] to [50], [53], [54], [56] and [87].

Dowsett J further commented that although 'apical ancestors are used only to define the claim group', the applicant 'at some point … must explain the link between the claim group and the claim area' and '[t]hat process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty' — *Gudjala 2007* at [66].

*General assertions*

Attachment F contains general assertions in relation to the traditional laws and customs that give rise to the claimed native title, including:

> 11. The Native Title Claim Group maintains a system of law and custom which has existed from prior to 26 January 1788 until the present day even though those laws and customs have undergone some change since non-indigenous settlement of the Application Area.
> 12. The native title claim group members acknowledge and observe traditional laws and customs;
> 13. Those laws and customs are based on the traditional laws and customs of the Widjabul Wia-bal who were present on and connected to the land and waters of the Application Area by those laws and customs at the time when British sovereignty was proclaimed.
> 14. Widjabul Wia-bal laws and customs have been transmitted and continue to be transmitted to members of the Native Title Claim Group by the intergenerational transfer of knowledge.
> 15. The Native Title Claimant Group is bound by a normative system of traditional laws and customs. This system includes common principles of kinship and observance of laws relating to land tenure and traditional usage of land and waters.
> 16. The kinship system includes:
>
> a) recognition of ancestors;
>
> b) common and interdependent familial ties which determine traditional rights and customs regarding land and waters;

c) recognition and acceptance of patterns of descent;

d) recognition of individual or group connection to land and waters; and

e) affiliation, on a group and individual basis, with totemic beings which relate to land/waters and law.

17. Such laws and customs include those relating to:

a) Marriage;

b) Burial;

c) Communication and transmission of information including transmission of traditional knowledge from one generation to the next.

d) Religious and spiritual beliefs;

e) The maintenance of religious and spiritual connections manifested in the Application Area for the wellbeing of the Native Title Claim Group;

f) The maintenance of resources and ceremonies;

g) Recognition of sanctions and prohibitions relating to access to land and waters, and their custodianship;

h) Recognition of group and individual responsibilities towards land and waters; and

i) Development of the social and political life of the group.

18. Traditional laws and customs acknowledged and observed by the native title claim group relating to tenure in the land and waters include:

a) Fulfilment of spiritual obligations with regard to the land and waters;

b) The observation of restrictions imposed by gender, age and ritual experience;

c) The observation of restrictions imposed by the presence of sites of significance on the land and waters;

d) The observation of restrictions imposed by the presence of Dreamings on the land and waters;

e) The observation of restrictions imposed by the need to conserve natural resources;

19. Those laws and customs are demonstrated on a daily basis in the lives, activities, ceremonies, rituals and practices of members of the Native Title Claim Group …

Further facts that support the assertion that there existed a pre-contact society from which the laws and customs of the native title claim group are derived can be found in the affidavits — see also my consideration of the relevant society above. The claimants speak to the laws and customs that they have knowledge of, and which they claim are the laws and customs of the society that existed pre-contact. The claimants provide details of being taught those laws and customs from their immediate predecessors and how those laws and customs give rise to the native title rights and interests in the application area. The following are examples of the laws and customs that are acknowledged and observed by the claim group members.

*Traditional laws and customs regarding rights to country*

The factual basis shows that there is a continued observance and acknowledgement, by the Widjabul Wia-bal and other Aboriginal people, of a pre-sovereign system of landholding within

the boundaries of Widjabul Wia-bal country. Widjabul Wia-bal family groups are identified with particular parcels of land on the basis of their ancestors' affiliation with that area. [Text deleted].

These bloodline territories are acknowledged by other Widjabul Wia-bal family groups and by other Aboriginal people. [Text deleted].

*Traditional laws and customs regarding social relationships and cultural knowledge*

The affidavit material displays intergenerational transmission of knowledge to members of the native title claim group. Claim group members are told stories about the Dreamtime and their ancestors, they are told about the boundaries of country and their ancestral bloodline territory. They are told about their obligations to their ancestral landholding and to sites of significance. They are also shown traditional practices. [Text deleted].

The claim group members also speak of the Widjabul Wia-bal system of kinship. For instance, they all speak of the ancestors from which they are descended. [Text deleted].

The claim group members also speak of their family totems that warn of danger or symbolise restrictions on behaviour. [Text deleted].

*Other traditional laws and customs*

The claim group members discuss various activities including fishing, hunting and gathering practices. They speak of burial rites and the importance of being buried on country [Text deleted].

[Text deleted]. They also speak of the spiritual belief in the Dreamtime, [Text deleted].

I note that the information extracted in my reasons for s. 190B(5)(a) are also relevant to my consideration of the assertions made under subsection (b).

*Consideration*

In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include factual details of:

- the connection between the pre-sovereignty society and the existing claim group;
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group; and
- assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

I consider, as mentioned above, the factual basis supports the assertion that at least some of the apical ancestors were born into the Widjabul Wia-bal tribe of the Bundjalung society that existed prior to European contact — see *Gudjala 2009* at [55]. Schedule A provides that the identified apical ancestors were born between 1820 and 1870. I infer, from the factual basis material, that at least some of the apical ancestors were born into the Widjabul Wia-bal tribe of the Bundjalung society that existed at and prior to European contact.

In my view, the factual basis is also sufficient to support the assertion of a connection between a pre-sovereign society and the current native title claim group. The affidavit material points to a continued associated by the claim group with the application area as generations of Widjabul

Wia-bal, including many of the apical ancestors, have been born on country, live on country and are buried on country — see also my reasons for s. 190B(5)(a) above. [Text deleted].

In addition, I consider that, overall, there does seem to be some information contained within the factual basis material from which the current laws and customs, acknowledged and observed, can be compared with those that are asserted to have existed prior to European contact. Of particular importance is the continued observance of a pre-sovereign system of landholding which delineates a boundary of country on the basis that members are descendants of the Widjabul Wia-bal. In my view, these ancestral landholdings identify particular family groups that have cognatic ties to those areas within Widjabul Wia-bal country. [Text deleted].The factual basis material, in my view, shows that the descendants continue to acknowledge the cognatic landholdings derived from their direct ancestors by remaining associated to them. In my view, this landholding system defines Widjabul Wia-bal identity and reflects the boundaries of Widjabul Wia-bal country. I am therefore of the opinion that the factual basis is sufficient to support the assertion that the boundaries of the application area are defined from a continuing society.

I also note that, in my view, the factual basis material shows that knowledge of the ancestral landholding system is held by members of the native title claim group and other Aboriginal groups, clearly acknowledging the connection and rights of specific people to certain places. [Text deleted]. In my view, the Widjabul Wia-bal observe a complex system of laws and customs that regulate access to land by not only claim group members, but also those outside the group. The factual basis material also demonstrates the conferral of rights and obligations on claim group members, such as to protect sacred sites.

In addition, I consider that the factual basis material demonstrates that the Widjabul Wia-bal maintain a physical and spiritual relationship with the land and waters. [Text deleted].

I understand from the factual basis material that it is asserted that knowledge of the principles of kinship and descent connections, links to ancestral landholdings, stories relating to the Dreamtime and ancestors, and to other traditional laws and customs have been transmitted and continue to be transmitted by members of the Widjabul Wia-bal intergenerationally. [Text deleted]. Knowledge is passed on through modes of oral transmissions, such as being told stories about their ancestors, the Dreamtime and places of significance, and also by being shown sacred sites and traditional practices. I infer that, given the detail of the continuity of the group's cultural traditions, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed prior to European contact of the area.

In my view, the factual basis is sufficient to support the assertion that the relevant laws and customs of the society at pre-contact, have been passed down through the generations to the current claim group, and have been acknowledged and observed by them without substantial interruption. This continuous pattern of teaching ensuring that the younger generation are equipped with the knowledge and given that the Widjabul Wia-bal consider that it is necessary to teach younger generations to continue their culture, in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs.

Given the above, it is my view that the factual basis is sufficient to support the assertion at s. 190B(5)(b).

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

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

In *Martin*, French J held that:

> [u]nder s. 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s. 190B(5) —at [29].

Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s. 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.

This condition is also concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

In addressing this aspect of the test, in *Gudjala [2009]*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

> [c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity' — at [33].

*Consideration*

Attachment F sets out the following general assertions:

> 20. From prior to 26 January 1788 to the present day, the Native Title Claim Group and their ancestors have continuously occupied, been present on, used and enjoyed the Application Area, in accordance with the laws acknowledged, and the customs observed, by the Native Title Claim Group.
>
> 21. The rights which accrue to the members of the Native Title Claim Group under the traditional laws and customs that they observe as between each other and as between other Aboriginal people include [an extract of these rights can be seen in my reasons above at s. 190B(4)].
>
> 22. The Native Title Claim Group has continued to hold the native title in accordance with those traditional laws and customs …
>
> 23. Examples of traditional usage of the land and waters in the Application Area is contained in *Schedule G*.

The affidavits also contain information that goes to explaining the transmission and continuity of the native title rights and interests held by the Widjabul Wia-bal in the application area in accordance with traditional laws and customs.

The claim group members attest to being told by the immediate predecessors the history of Widjabul Wia-bal country, including stories relating to the Dreamtime, their ancestors,

boundaries of their country and about bloodlines stories relating to their ancestral land. They are told places they can and cannot go and the correct way to behave. They are shown sacred and important places, including burial sites, ceremonial sites and where men's and women's rituals occur. The claim group members also speak of being taught their language and other practices such as traditional hunting, fishing and gathering of bush food and medicine. They speak of telling these stories and showing the sacred sites and traditional practices to their own and other children and grandchildren [Text deleted].

The factual basis material demonstrates that the Widjabul Wia-bal system of laws and customs originate from the Dreamtime and their ancestors and that by passing on stories ensures continuity in the acknowledgement and observance of those laws and customs.

In forming my decision in relation to this requirement, I have also considered my reasons above in relation to s. 190B(5)(b), and in particular that:

- the relevant pre-contact society has been identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Widjabul Wia-bal in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

I am satisfied that the factual basis is sufficient to support the assertion at s. 190B(5)(c).

# *Subsection 190B(6)*
# *Prima facie case*

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

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

**The nature of the task at s. 190B(6)**

The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, '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]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

**Native title rights and interests generally**

In *Gudjala 2007*, Dowsett J noted that the requirements of s. 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s. 223(1) — at [85]. His Honour further notes the observations of the High Court in *Yorta Yorta* that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. His Honour also noted that the phrase 'in relation to' is 'obviously very broad'. The Full Federal Court also considered '[t]hat the words 'in relation to 'are of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) at [93].

Having examined the native title rights and interests set out in Attachment E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> [n]ative title *owes its existence and incidents to traditional laws and customs*, not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection *depends on native title not having been extinguished* and its not having incidents that are repugnant to the common law. Thus … s 223(1)(c) "requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom" [emphasis added] — at [110].

Further, whilst the exercise of native title rights and interests 'may constitute powerful evidence' of both the existence and content of those rights and interests, the statutory scheme (including s. 223(1)(a)) is directed towards their possession, not their exercise, pursuant to the traditional laws and customs. The 'continuity of the chain of possession' may also be relevant — *Yorta Yorta* at [84] to [85].

It should be noted that the way in which the applicant has framed the native title rights and interests claimed in relation to the application area (see Schedule B and Attachment E) sufficiently addresses any issue of extinguishment, for the purpose of the test at s. 190B(6).

Before I consider the rights and interests claimed, I note that my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

**Native title rights and interests claimed**

*Where exclusive native title can be recognised, the Widjabul Wia-bal claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others*

The majority of the High Court in *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]' — at [89]. The High Court further noted that expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*), the Full Court, whilst exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

> the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added] — at [71].

I also note the Full Court's observations in relation to control of access to country that:

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

*Consideration*

The above paragraphs point to the nature of this right in land and waters. In examining whether the claimants' material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

I note that the factual basis material is sufficient to support the assertions that:

- there has been a continuous existence, acknowledgement and observance of laws and customs of the relevant society of the ownership of country and its resources;
- current members of the Widjabul Wia-bal maintain an extensive knowledge of their country and entitlements; and
- the Widjabul Wia-bal, in relation to their territory, have an entitlement to exclude and impose sanctions for wrongful presence or use of land and waters.

The factual basis, as contained in the affidavits, is such that it is asserted that at the time of sovereignty or European contact there existed an association between the Widjabul Wia-bal and its land and waters.

In their affidavits, the members of the claim group also speak of a need to protect their land:

[Text deleted].

I am of the view that the factual basis material asserts that current members of the native title group maintain an extensive knowledge of their country. The knowledge of the laws and customs of the current members elicit that other people should seek permission to access their country. This includes making plans to develop country or even just camping on country. [Text deleted]. Such control also flows from a need to protect country from harm and country from harming others. At the more localised level the society continues to pervade symbolic ownership of particular country. This symbolic ownership includes the right to speak for country and the right to exclude.

Although the factual basis material does not illustrate how the ancestors exercised this right by excluding other Aboriginal groups at the time of sovereignty, I consider that it does demonstrate an acknowledgement by other Aboriginal people of the boundaries of Widjabul Wia-bal country and of the ancestral landholdings held by family groups with links to those areas. [Text deleted]. I consider that this knowledge has been transmitted intergenerationally and therefore is prima facie traditionally based.

**Outcome:** prima facie established.

*Where exclusive native title cannot be recognised, the Widjabul Wia-bal claim the following non-exclusive rights and interests including the right to conduct activities necessary to give effect to them:*

*(a) the right to access the application area*

*(b) the right to use and enjoy the application area*

*(c) the right to move about the application area*

The information contained in the factual basis material indicates that there is a continued presence of the Widjabul Wia-bal within the claim area. This includes the births of the ancestors, the current claimants and their predecessors within the claim area. The claimants speak of their rights to access, use, enjoy and move about the application area, [Text deleted].

The claimants provide detailed descriptions of accessing the application area to hunt, fish, gather and use the natural resources, travel, live on and visit other members of the claim group. The claimants describe moving about the application area to visit places, to hunt and fish and to teach the younger generations where places of importance are located. The claimants also speak of being told about places they were not allowed to go because that place was sacred or because rituals that were specific to men or women occurred at that location [Text deleted].

It is my view, given the factual basis material, that it prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(d) the right to camp on the application area*

The claim group members speak of camping in various locations in the application area and some also speak of their ancestors camping across the claim area [Text deleted].

I consider that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(e) the right to erect shelters and other structures on the application area*

*(f) the right to live being to enter and remain on the application area*

[Text deleted].

The claim group members all speak of living at various places within the application area and some speak of wanting to be buried there.

Accordingly, in my view, the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(g) the right to hold meetings on the application area*

The claimants speak of their right to hold meetings on the application area, [Text deleted].

I am of the view that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(h) the right to hunt on the application area*

*(i) the right to fish in the application area*

*(j) the right to have access to and use the natural water resources of the application area*

The claim group members speak of frequently hunting and fishing in the application area. [Text deleted].

The factual basis material, in my view, prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments)*

The claimants speak of their right to use the natural resources in the application area, [Text deleted].

The factual basis material, in my view, prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(l) the right to manage natural resources of the application area*

The claimants speak of the right to manage natural resources of the application area:

[Text deleted].

In my view, 'manage' indicates a degree of control which is not permissible where exclusive rights cannot be recognised — see *Sampi v Western Australia (No 3)* [2005] FCA 1716 at [4(f)], *Alyawarr* at [169] to [196] and *Masig People v State of Queensland* [2000] FCA 1067 at [3(d)]. I am therefore of the opinion that this right cannot be prima facie established.

**Outcome:** prima facie not established.

*(m) the right to share and exchange resources derived from the land and waters within the application area*

Each of the claimants speak of the right to share and exchange resources derived from the land and waters, including that:

- Sharing bush tucker obtained from gathering, hunting and fishing with each other by dividing it within families and amongst other families in the application area [Text deleted].
- Trading and sharing traditional food with neighbouring countries and with other people [Text deleted].

I consider that the factual basis establishes that the right to share and exchange resources derived from the land and waters within the application area is possessed under traditional laws and customs. The material elicits that claim group members have been taught by their elders to share and exchange resources with others, not only with other members, which they continue to do out of respect for each other and for country, and for the continued survival of their group.

**Outcome:** prima facie established.

*(n) the right to participate in cultural and spiritual activities on the application area*

*(p) the right to conduct ceremonies and rituals on the application area*

The Widjabul Wia-bal speak of their right, according to traditional laws and customs, to participate in cultural and spiritual activities and conduct ceremonies and rituals, including:

- Their knowledge of the different locations of men's initiation areas and women's birthing areas within the application area [Text deleted].
- The importance of burials and being buried on country [Text deleted].
- Belief in totems and the need to protect them [Text deleted].
- Belief in spirits and the importance of speaking to them. [Text deleted].
- The ritual of smoking themselves [Text deleted].
- The significance of initiations, [Text deleted].

I consider that the factual basis material establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

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

[Text deleted].

The factual basis material, in my view, prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established.

*(q) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area*

The claim group members speak of being told stories about their history and the application area from their parents, grandparents or other elders of the claim group. They are told about their ancestors, the boundaries of Widjabul Wia-bal country as well as their family areas, places of importance to protect including the sacred places they are not able to enter, the roles they must take within the claim group and the knowledge associated with that role. [Text deleted].

Taking account of all of the factual basis material, it is my view that it prima facie establishes that this right is possessed under the traditional laws and customs of the native title claim group.

**Outcome:** prima facie established

*(r) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs*

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 term as a right to possess, occupy, use and enjoy land to the exclusion of all others — at [88].

Justice Sundberg, in *Neowarra v State of Western Australia* [2003] FCA 1402, was of the view that 'the right to speak for country involves a claim to ownership' and can *only* be recognised in relation to areas of exclusive native title rights and interests — at [494]. I also note French J's comments in *Sampi v State of Western Australia* [2005] FCA 777, that the right to possess and occupy as against the whole world carries with it the right to speak for the land — at [1072].

I note, however, that the Full Federal Court in *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 (*Wandarang*) allowed by *consent* 'the right to speak for' but not 'the right to make decisions about use and enjoyment' in areas of non-excusive possession — at [3(b)].

I consider that the right to speak for and make non-exclusive decisions about country can only be claimed in relation to areas where exclusive native title rights and interests can be exercised. I note that the way this right has been framed does not qualify it to be against persons who are bound by the traditional laws and customs of the native title claim group. I am therefore of the view that this right is not prima facie established pursuant to the claim group's traditional laws and customs.

**Outcome:** prima facie not established.

*(s) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs*

*(t) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs*

In my view, the case law in relation to this right is very closely linked to that involving 'the right to determine use and enjoyment' of land. I note that the High Court in *Ward HC* stated that 'without a right … [as against the whole world to possession of land], it may be greatly doubted that there is any right to control access to land' — at [52].

In *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), O'Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders — at [553]. In the consent determination in *Mundraby v Queensland* [2006] FCA 436 (*Mundraby*), the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [Emphasis added]' — at [3(c)(ii)]. I also note that in another consent determination, the Full Federal Court held that:

> there is a clear distinction between a right to control access … and a right to make decisions about the use and enjoyment of land by Aboriginal people who recognise those decisions and observe them pursuant to their traditional laws and customs. The continued presence of the former is compatible with a pastoral leasee entitling the pastoral leasee to determine who has access to the land; the latter is not — *Ward v WA* [2006] FCAFC 283 at [27].

I consider that the right to speak authoritatively about the application area also exerts a degree of control. In *Wandarang*, the Full Federal Court did not allow the 'right to make decisions about use and enjoyment' in areas of non-exclusive possession — at [3(b)].

The rights that are being claimed here are, in my view, expressed as against *other Aboriginal people* who are not bound by the traditional laws and customs of the claim group. I am therefore of the opinion that these rights are not prima facie established pursuant to the traditional laws and customs of the claim group.

**Outcome:** prima facie not 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.

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

The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s. 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. Whilst interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

I consider that for the purposes of s. 190B(7), I must be satisfied of a particular fact or facts, from the evidentiary material provided, that at least one member of the claim group has or previously had the necessary traditional *physical* association with the application area — *Doepel* at [18].

Schedule M of the application provides that Attachment M and the accompanying affidavits contain the relevant details of the traditional physical connection. Attachment M states the following:

> Members of the native title claim group have a traditional physical connection to the land and waters covered by the application. The affidavits … attached and marked F(1) [to] F(8) for the purposes of Schedule … M include details of some of the current traditional physical connection of the applicant and other members of the native title claim group with the land and waters covered by the application describing *inter alia:*
>
> - Accessing and moving about;
> - Physical occupation and residence;
> - Visitation and maintenance of places of importance and sites of significance by the Applicant, Elders and other members of the Widjabul Wia-bal;
> - Camping;
> - Hunting and fishing;
> - Collecting bush foods;
> - Fossicking;
> - Collecting natural resources and materials including woods and ochre;
> - Collecting wood and other natural resources to make artwork, tools and musical instruments;
> - Collecting mineral, vegetable and animal resources for medicinal use;
> - Cultural heritage work to maintain sites of significance;
> - Education of younger members of the native title group in ways of the Widjabul Wia-bal;
> - Transmitting cultural knowledge and teaching Widjabul Wia-bal law and custom to Widjabul Wia-bal adults and children whilst on lands and waters within the application area;
> - Conducting traditional cultural, spiritual, ritual and ceremonial practice;

- Conducting burials;
- Naming of sites and places;
- Holding meetings;
- Telling stories of and singing songs in relation to sites and places;
- Telling stories of own, parents' and grandparents' activities in the area throughout their lifetimes;
- Negotiations with various interests and stake holders in relation to activities on the claim area; and
- Activities relating to exercising the native title rights and interests particularised in Attachment E in accordance with the Widjabul Wia-bal system of traditional laws and customs that pre-date European settlement of their lands.

I also refer to the information above in relation to s. 190B(5)(b) of these reasons, which provide a sufficient factual basis supporting the assertion that the Widjabul Wia-bal people acknowledge and observe the traditional laws and customs of the pre-sovereign society.

In addition, as noted in Schedule M, I consider that the affidavits at Attachments F(1) to F(8) also contain some facts that describe a traditional physical association of the Widjabul Wia-bal with the application area. [Text deleted].

Given the above, and considering all of the information provided with the application, 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 land or waters within the application area.

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

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

### Reasons for s. 61A(1)

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

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

The geospatial assessment states that no determinations of native title fall within the external boundary of this application area. My search of the Tribunal's mapping database also did not identify overlaps with any native title determination. Given this information, it follows that the application is not made in relation to an area for which there is an approved determination of native title.

### Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Schedule B refers to areas that are not covered by the application, including any area in relation to which a previous exclusive possession act was done and the act was attributable to the Commonwealth or the State.

### Reasons for s. 61A(3)

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

In my view, the application **does** offend the provisions of s. 61A(3).

I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has

been, subject of a previous non-exclusive possession act, except to the extent that sections 47, 47A or 47B of the Act may apply — see Schedules B and L.

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

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

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

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

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

Schedule Q provides that the application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

Schedule P provides that the application does not make any claim to exclusive possession of any offshore place.

### Reasons for s. 190B(9)(c)

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

Schedule L provides that:

> The following are areas … over which extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded:
>
> - There is land held by the following Local Aboriginal Land Councils within the area: Casino-Boolangle Local Aboriginal Land Council, Gugin Gudduba Local Aboriginal Land Council, Jali Local Aboriginal Land Council, Ngulingah Local Aboriginal Land Council, and Tweed/Byron Local Aboriginal Land Council.

The application does not otherwise disclose, nor is there any other information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

*[End of reasons]*

# Attachment A
# Summary of registration test result

| | |
|---|---|
| **Application name** | **Widjabul Wia-bal** |
| **NNTT file no.** | **NC2013/005** |
| **Federal Court of Australia file no.** | **NSD1174/2013** |
| **Date of registration test decision** | **28 August 2013** |

**Section 190C conditions**

| **Test condition** | **Subcondition/requirement** | | **Result** |
|---|---|---|---|
| **s. 190C(2)** | | | **Aggregate result:** **met** |
| | **re s. 61(1)** | | **met** |
| | **re s. 61(3)** | | **met** |
| | **re s. 61(4)** | | **met** |
| | **re s. 62(1)(a)** | | **met** |
| | **re s. 62(1)(b)** | | **Aggregate result:** **met** |
| | | **s. 62(2)(a)** | **met** |
| | | **s. 62(2)(b)** | **met** |
| | | **s. 62(2)(c)** | **met** |
| | | **s. 62(2)(d)** | **met** |
| | | **s. 62(2)(e)** | **met** |
| | | **s. 62(2)(f)** | **met** |
| | | **s. 62(2)(g)** | **met** |
| | | **s. 62(2)(ga)** | **met** |

| Test condition | Subcondition/requirement | | Result |
|---|---|---|---|
| | | s. 62(2)(h) | met |
| s. 190C(3) | | | met |
| s. 190C(4) | | | Overall result:<br>met |
| | s. 190C(4)(a) | | N/A |
| | s. 190C(4)(b) | | met |

**Section 190B conditions**

| Test condition | Subcondition/requirement | Result |
|---|---|---|
| s. 190B(2) | | met |
| s. 190B(3) | | Overall result:<br>met |
| | s. 190B(3)(a) | N/A |
| | s. 190B(3)(b) | met |
| s. 190B(4) | | met |
| s. 190B(5) | | Aggregate result:<br>met |
| | re s. 190B(5)(a) | met |
| | re s. 190B(5)(b) | met |
| | re s. 190B(5)(c) | met |
| s. 190B(6) | | met |
| s. 190B(7)(a) or (b) | | met |
| s. 190B(8) | | Aggregate result:<br>met |
| | re s. 61A(1) | met |
| | re ss. 61A(2) and (4) | met |

| Test condition | Subcondition/requirement | Result |
|---|---|---|
| | **re ss. 61A(3) and (4)** | **met** |
| **s. 190B(9)** | | **Aggregate result:**<br>**met** |
| | **re s. 190B(9)(a)** | **met** |
| | **re s. 190B(9)(b)** | **met** |
| | **re s. 190B(9)(c)** | **met** |

*[End of document]*