National Native Title Tribunal

Registration test decision

Application name	Scott Franks & Anor on behalf of the Plains Clans of the Wonnarua People
Applicant	Scott McCain Franks and Robert John Lester
NNTT file no.	NC2013/006
Federal Court of Australia file no.	NSD1680/2013
Date application made	19 August 2013

I have considered the claim made in the above claimant application for registration against each of the conditions contained in sections 190B and C of the *Native Title Act 1993* (Cwlth) (the Act).[1]

For the reasons attached, I do not accept this claim for registration pursuant to s 190A of the Act. For the purposes of s 190D(3), my opinion is that the claim does not satisfy all of the conditions in s 190B.

Date of decision: 27 February 2014

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Susan Walsh

[delegate of the Native Title Registrar]

1 All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth), as in force on the day this decision is made, unless otherwise specified.

Introduction

Registration test

[1] The Registrar of the Federal Court of Australia (Federal Court) gave a copy of the NSD1680/2013 Plains Clans of the Wonnarua People native title determination application (application) to the Native Title Registrar (Registrar) on 19 August 2013 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] I have considered the claim as the Registrar's delegate under an instrument of delegation dated 30 July 2013 pursuant to s 99 of the Act. By this instrument, the Registrar delegated all of the powers given to her under ss 190, 190A, 190B, 190C, 190D and 190E to the Deputy Registrars of the Tribunal and to certain members of the staff assisting the Tribunal (including myself).

[3] Sections 190A(6), (6A)[2] and (6B) set out the decisions available to the Registrar under s190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C. I have reached the view that the claim does not satisfy the conditions in ss 190B(5), (6) and (7) and it follows that I must not accept the claim for registration.

Information considered

[4] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[5] As required by s 190A(3)(a), I have had regard to information in the application and accompanying affidavits by the two persons comprising the applicant (Scott McCain Franks and Robert John Lester). I note here that the Form 1 application refers to and provides a number of documents within a series of Attachments (B1, B2, C, F1 to F4, I, J and R) to which I have also had regard, as they form part of the application. The applicant has not provided any other documents to me (see the concluding words of s 190A(3)(a)).

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[6] I note that members of the staff assisting the Tribunal are preparing the Registrar's notification of the application pursuant to s 66(3), including notice to proprietary interest holders

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2 I note that s 190A(6A) does not apply to my consideration, as the claim is not contained in an amended application that has previously been accepted for registration.

in relation to areas where native title may still exist on the basis of current tenure information (e.g. national park or other conservation tenure). To this end, the Registrar has obtained information of proprietary interest holders from the State of New South Wales (State) to facilitate notice under s 66(3)(a)(iv). I have had regard to this information, as required by s 190A(3)(b).

[7] I note that the information received by the Registrar does not purport to identify areas where native title has been extinguished. Additionally, although the names and addresses of proprietary interest holders are found within the information, together with lot/plan and cadastral references for some of the interest holders, there has been no analysis as to the location of these areas within the outer boundaries, either by the State or by members of the staff assisting the Tribunal. In my view, this information is in a 'raw' state and is not currently adverse to the applicant under any of the other test conditions. Accordingly, I have not provided it to the applicant.

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[8] I note that there is no information before me of the kind identified in s 190A(3)(c) (information supplied by the Commonwealth or State of New South Wales).

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[9] I have also considered information from the following additional sources:

(a) an overlaps analysis and geospatial assessment by the Tribunal's Geospatial Services dated 2 September 2013

(b) searches I made for the entries of two previously registered native title claims on the Register of Native Title Claims that overlap the current application

(c) maps of the Hunter Valley region in which the application area is located, including two maps prepared by Geospatial Services in February 2014.

[10] I explain the relevance of this additional information in my reasons below for the conditions outlined in s 190B(2) (identification of area subject to native title), s 190C(3) (no previous overlapping claim groups) and s 190B(5) (factual basis for claimed native title).

[11] NTSCORP Limited (NTSCORP) and the legal representative for the Gomeroi applicant each asked for an opportunity to provide me with information in relation to the conditions of the registration test.

[12] The Gomeroi applicant wished me to consider a submission pertaining to an expert research opinion relevant to the factual basis for the claim. In my view, it is not appropriate to have regard to information pertaining to the factual basis from a competing claim group such as

the Gomeroi People. In this regard, I refer to the decision by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385 [2003] FCA 1384 (*NT v Doepel*) that:

(a) the Registrar must accept the truth of the asserted factual basis (at [17]), and

(b) it is not the Registrar's task to 'note the inconsistency of information in different documents, and so simply not be satisfied of the accuracy of the information in the application' (at [47]).

[13] NTSCORP wished me to consider information that goes to the procedural conditions of ss 190C(3) and 190C(4). I note that NTSCORP is a body funded under s 203FE to perform the functions of a representative Aboriginal/Torres Strait Islander body (RATSIB) for New South Wales. I was concerned not to add to the Registrar's workload by taking receipt of information from NTSCORP, giving the applicant an opportunity to comment and then considering what each party has to say in relation to the conditions of s 190C, when my decision is that in any event, the claim does not satisfy the merit conditions of s 190B.

[14] I have also considered that s 190A(3) does not stipulate that a competing claim group or a RATSIB is a mandatory source of information when considering a claim for registration under s 190A. In my view, the exclusion under s 190A(3) of information from these persons as a mandatory source, may indicate Parliament's intention that the registration test decision-making process is not adversarial. Nor is it the forum to raise substantive disputes about matters such as the authority of the applicant or the factual basis for the claimed native title. In other words, the merits of one claim as against another, or questions raised about authorisation, are matters for the Federal Court managing and hearing the proceedings that underlie the claim.

[15] Further, it is also relevant to the proper construction of s 190A(3) that there are other, apparently more appropriate, ways to raise these issues and have them determined.[3]

[16] For example, if a RATSIB believes an application is not properly authorised, it has a right to be joined to the proceedings during the notification period (or at anytime, in most cases) and then seek strikeout under s 84C. Alternatively, it can seek an order under s 84D(1). Members of the claim group may also seek an order under s 84D(1) if they are of the view that the applicant is not duly authorised. If there are overlapping competing claims, s 67 appears to be the avenue provided for dealing with that issue, not the registration test.

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3 With the caveats that (a) whether or not the applicant is, in fact, authorised cannot be determined by the court until it is determined that there are persons holding the particular native title claimed (see *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, [1186]- [1193], [1216], Lindgren J) and (b) some judges are of the view that even the court is not empowered to determine who is, or is not, a member of the native title claim group: *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625, [260], [267]-[268], [270]; *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455, [13], Marshall J; *A.D. (deceased) on behalf of the Mirning People State of Western Australia (No 2)* [2013] FCA 1000, [66]-[75], McKerracher J.

Procedural fairness to the applicant

[17] To avoid a perception that my communications with NTSCORP about its information and the Gomeroi information may have influenced my decision, I have not looked at the information these persons have asked me to consider. I have made my decision that the claim does not satisfy all of the conditions of the registration test on the basis solely on the information outlined above, as is set out in the reasons that follow.

[18] On 22 January 2014, a member of the staff assisting the Tribunal provided the applicant with copies of, and an opportunity to comment in relation to, correspondence[4] between me, the Tribunal and NTSCORP concerning the request that I consider submissions/information.

[19] Although I did not look at the information and submissions to which these two persons wished me to have regard, I took this step to be procedurally fair to the applicant. It seemed to me that the applicant was entitled to know that both NTSCORP and the Gomeroi applicant wished me to consider adverse information and be offered an opportunity to comment or respond before my decision. The applicant informed the Tribunal on 24 January 2014 that it did not wish to comment given that I did not propose to have regard to any such information/submissions.

Section 190B: conditions about merits of the claim

[20] Section 190B(1) provides that '[t]his section contains the conditions mentioned in subparagraph 190A(6)(b)(i).'

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

[21] The claim **satisfies** the condition of s 190B(2).

[22] Section 190B(2) provides that '[t]he Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.'

[23] The information required by s 62(2)(a) is 'information, whether by physical description or otherwise that enables the boundaries of:

(a) the area covered by the application; and

(b) any areas within those boundaries that are not covered by the application;

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4 These communications comprised my letter to NTSCORP dated 15 November 2013, the response by NTSCORP dated 12 December 2013 and an email from a senior solicitor at NTSCORP dated 21 November 2013 concerning a submission that the legal representative for the Gomeroi People wished me to consider.

to be identified.'

[24] The information required by s 62(2)(b) is 'a map showing the boundaries of the area mentioned subparagraph [62](a)(i).'

Outer boundaries: ss 62(2)(a)(i) and (b)

[25] In this case, the outer boundaries encompass a large area of land and waters in the Hunter Valley region of New South Wales (approximately 11,351 sq km). Attachment B1 of the application contains a metes and bounds description of the boundaries, which references the Hunter River catchment boundary, major roads, waterways, intersecting cadastral boundaries and the spur and ridge top lines of certain mountains or other geographic features, together with geographic coordinates along the boundary. The written description references GDA94 to six decimal places. The map in Attachment C depicts the boundaries with a bold line over a topographic background image. The map contains a Scalebar, Northpoint, coordinate grid and notes relating to source, currency and datum of data used to prepare the map.

[26] The Tribunal's Geospatial Services (Geospatial) prepared the written description and map of the outer boundaries pursuant to a request for assistance under s 78 from the applicant. Geospatial have undertaken a compliance check dated 2 September 2013 which has identified a minor error on pg 2, line 9 of Attachment B1: '...150.583610° East; then generally **easterly** along that centreline...' should read '...150.583610° East; then generally **westerly** along that centreline...'. In my view, this is clearly a typographical error. Further, a minor error of this nature does not affect the overall certainty of the information provided in relation to the outer boundaries, in light of the otherwise comprehensive materials provided in the application to identify it on the surface of the Earth. I note also that the map clarifies the error within the written description by generally showing the westerly direction along which this section of the boundary travels.

[27] I am of the view that the information within Attachments B1 and C is clear, comprehensive and detailed. The information provides the degree of reasonable certainty in relation to the outer boundaries of the area covered by the application. I have relied on the following matters to reach this view:

(a) The map provides a clear delineation of the outer boundaries, supported by a Scalebar, Northpoint, location diagram and coordinate grid with notes relating to the source, currency and datum of data used to prepare the map.

(b) The written description uses a comprehensive mix of clearly described data, such as metes and bounds, identification of major roads, waterways, coupled with geographic coordinates, cadastral boundaries and topographic features to locate the outer boundaries on the earth's surface.

(c) The map clearly depicts the features used in Attachment B1 to describe the outer boundaries and is supported by a coordinate grid. The boundary line is clearly marked on the map.

Areas within those boundaries that are not covered by the application (internal excluded areas): s 62(2)(a)(ii)

Exclusion of areas covered by previous native title determination applications

[28] I note that ss 62(2)(a) and (b), when read together, provide that the application need only contain a map of the outer boundaries and not the internal excluded areas. Having said this, it might be that a map showing the boundaries of internal excluded areas is required for the purposes of the merit condition of s 190B(2) in some cases, if such information would assist to show 'whether native title rights and interests are claimed in relation to particular land or waters'. I have reached the view that a map is not required in relation to the internal excluded areas identified in this application. (I explain this below.)

[29] Para 6 of Attachment B2 states that the areas covered by the NSD1093/2012, NSD1169/2012 and NSD788/2013 and NSD781/2013 native title determination applications are not covered by the application. (These four native title determination applications were made in response to s 29 mining notices in relation to land at Jerrys Plains and Neath respectively.) In my view, the details provided are sufficient for it to be said with reasonable certainty that native title rights and interests are not claimed in relation to these particular areas, having regard to the information contained in the application, which identifies the areas covered by the four named native title determination applications.

Exclusion by generic formula of areas affected by 'PEPAs' or where native title otherwise wholly extinguished

[30] The application contains a written description of the areas within the outer boundaries not covered by the application: see paras 2, 3(a), 4 and 5 of Attachment B2. Attachment B2 uses a generic exclusion that uses the terminology of s 23B of the Act (with one exception discussed below). Section 23B defines 'previous exclusive possession acts' (PEPAs). Attachment B2 states that the exclusion of PEPAs is subject to those parts of s 23B, which provide that certain acts are not a PEPA, and the application of the non-extinguishment principle defined in s 238, including any area to which ss 47, 47A or 47B applies.

[31] The one exception is the exclusion in para 2(g) which mistakenly refers to 'a lease dissected from a mining lease as referred to in s238(2)(vii)'. Section 23B(2)(vii) refers to leases dissected from a mining lease and to 245(3) as the provision of the Act which deals with these acts. The note at the end of Attachment B2 states that the terms therein have the same meaning as they do in the Act. I am prepared to accept that this is a typographical error which does not affect overall certainty, given that it appears clear the applicant intended to refer to the provisions of s 23B(2)(vii) and s 245(3), which in fact deals with dissected mining leases, rather than s 238.

[32] Para 3(b) of Attachment B2 states that the area covered by the application excludes any area in relation to which native title rights and interests have otherwise been wholly extinguished.

[33] In my view, it would be preferable that the applicant use specific and applicable legislative provisions to define areas excluded because of extinguishment, rather than with the PEPA provisions of s 23B and the 'catch all' found in para 3(b). However, I have decided that the concept of extinguishment is well defined by the Act and the *Native Title (New South Wales) Act 1994* and it is possible, given the early stage of the proceedings, to work out what areas may be affected, particularly when the description of the internal excluded areas is read as a whole.

[34] An issue with which I have grappled is whether a generic description of the internal excluded areas is sufficient in an area such as that encompassed by the outer boundaries of this application. In this regard, my own knowledge is that this is a heavily populated and long settled part of the country. The map in Attachment C identifies many towns, major roads and public infrastructure places within the outer boundaries. The applicant's own factual basis information talks about the impact of land grants after the arrival of the settlers and the establishment of farms to service the colony and the growing population of Sydney; see the following extracts from Annexure A (a document that is annexed to Attachment F1):

> 3.3 Settlement really began in the early 1820s when the valley was opened for farming. The best agricultural land was granted in a period from 1823–1827 when approximately 25% of the land was converted to freehold title by grant (Robinson & Burley 1962). The initial pattern was for freehold estates to be established along the major tributaries of the Hunter and for the Crown Land in between to be grazed (legally or by squatting). These estates formed the basis for squatting settlement of the Liverpool Plains and New England.
>
> 3.4 The alienation of Wonnarua land began when John Howe received an occupation license from Governor Macquarie. Subsequently, Governor Brisbane opened the Hunter River for European settlement in 1822. Aboriginal dependence on the Hunter River for many staples meant that the Wonnarua suffered severely when the Europeans settled on the River and consequently the Wonnarua and other Aboriginal People immediately lost access to water and the raw materials in the river and on the banks (Le Maistre 1996: 9).
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> 3.5 By the mid 1820's, Sydney's maritime economy was sufficiently developed to provide reliable and regular shipping and communications between the Hunter and Sydney. Consequently, from the beginning of European settlement of the Hunter, Wonnarua people faced a more developed and established colonial world than their Aboriginal neighbours faced earlier in Sydney and Coal River ... Capital was available for new areas and land-based ventures supporting extensive farming activities in the Hunter (Le Maistre 1996: 62)
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> 3.6 The growing population of Sydney provided a market for produce, As a result, European settlers rapidly displaced Wonnarua people on the Hunter
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> The cords [sic] indicate that at first Aboriginal people fought literally to be able to continue some of their life habits and resorted to predatory behaviour to protect access to waters and

food, thereby disregarding Macquarie's new legal framework for the first generation (Le Maistre 1996: 62)

3.11 What impacted on the Wonnarua was what happened to their lands. Major clearing in the region occurred after the land was subdivided in the late 1870s. The Great Northern Railway reached Muswellbrook in 1869 increasing the numbers of people moving through the Hunter Valley. . .

3.13 During the 1950s and 1960s, the districts [sic] economic activities were based on, dairying, beef cattle, vegetable and fodder farming and use of the Army Base for National Service Training. The post war demand for electric power, and the development of open cut methods for mining coal resulted in the exploitation of the large deposits of steaming coal found close to the surface of the Singleton area. Construction of the Liddell Power Station commenced in 1969 and from the mid-seventies more than ten major open cut coal mines have commenced operation. Bayswater Power Station began construction in 1981 and was in full production by 1985 (HLA: Envirosciences 2007: 17).

3.14 The impact of the establishment of these estates on the environment was initially comparatively minor as there were largely grazing sheep and cattle, and cropping was found lower down the Hunter Valley on the flats near Maitland. There was, however, some impact from the construction of infrastructure such as fences, houses and farm buildings and small gardens to supply farm workers (HLA: Envirosciences 2007: 17).

[35] I note that Nicholson J in *Daniels for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniels*) was satisfied that a generic description of internal excluded areas met the provisions of s 6(2)(a). Lindgren J made a similar decision at [8] of *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5)* (2003) 197 ALR 138; [2003] FCA 218 (*Harrington-Smith No 5*). I have some concern that both cases may be capable of being distinguished here, as they were concerned with relatively unpopulated and lightly settled areas of Western Australia, when compared to the Hunter Valley region that this application occupies.

[36] I note also that both *Daniels* and *Harrington-Smith No 5* considered whether a general description of internal excluded areas met s 62(2)(a)(ii), not s 190B(2). Section 190B(2) may impose a more onerous standard of '<u>reasonable certainty</u>' so that the '<u>particular</u> land or waters where native title rights and interests are claimed' are capable of being ascertained. However, there are indications in Nicholson J's reasons that a generic exclusion could meet the test at s 190B(2), particularly where the proceedings are at an early stage and the applicant is not in possession of the facts relating to extinguishment to more particularly delineate the internal excluded areas. Nicholson J noted the interaction between:

(a) s 62(2)(a) which requires information about the boundaries and areas covered/not covered by the application to 'be approached with attention to "detail"'

(b) s 190B(2), which requires an assessment by the Registrar of whether that detail is sufficient for it to be said where the native title rights and interests are claimed within the outer boundaries

and went on to find at [32] of *Daniels*:

> These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment to an application is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be a satisfactory compliance with the statutory requirement.

[37] I note that French J agreed with the decision in *Daniels* in the context of the Registrar's assessment of a generic description of internal excluded areas against the requirements of s 190B(2): see *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52].

[38] In light of these decisions, it seems to me that <u>at some point</u> the applicant, when in possession of the relevant information, will need to provide specific and detailed information about the particular areas within the outer boundaries in fact covered by the application. It may be that this point will arise following analysis by the parties of the data that the Registrar has obtained from the State in relation to current proprietary interest holders. This is a separate requirement to that found in s 190B(2) and appears to arise under the obligation imposed that the application contain the details required by:

(a) ss 62(2)(a)(ii): information, whether by physical description or otherwise, that enables the boundaries of any areas within [the outer] boundaries not covered by the application

(b) ss 62(2)(c): 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 land or waters in the area covered by the application

(c) ss 62(2)(d): 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 have not been extinguished, at law.

[39] I have decided that the description of the internal excluded areas by way of a formula based on s 23B and a generic exclusion of any other area where native title has been wholly extinguished is sufficient at this point of the proceedings. My decision relies on the fact that the proceedings are new and the statement by the applicant in Schedule D that it has not undertaken

any searches of non-native title rights and interests. It seems that the applicant does not yet have access to tenure information, which would enable it to seek advice, and thus identify with greater detail the particular areas where native title rights and interests are in fact claimed, noting the extinguishment provisions of the Act.

190B(3) Identification of native title claim groups

[40] The claim **satisfies** the condition of s 190B(3).

[41] Section 190B(3) provides that:

> 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.

Information considered

[42] The application does not name the persons in the native title claim group; rather it provides a description in Schedule A, such that it is necessary to consider the claim against the requirements of s 109A(3)(b).

[43] The description in Schedule A states that the persons on whose behalf the application is made (the native title claim group) are the biological descendants of two apical ancestors, Emily (born approximately 1840) and Mary Shoe (born approximately 1800 in the Singleton district). The description in Schedule A provides the names of and biographical information for, a child born to each ancestor (Henry Frederick Taggart and Matilda Hughes respectively).

[44] I note that para 1 of Attachment F contains the statement that '[t]he native title claim group identifies itself as the Plains Clans of the Wonnarua People ("PCWP")'.

Consideration

[45] The statement in Attachment F may be indicative of a self-identification by a group of persons as a 'native title claim group'. I refer to the finding of O'Loughlin J at [60] of *Risk v National Native Title Tribunal* [2000] FCA 1589 that '[a] native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group.'

[46] However, the law has now been clarified so that, in my view, it is not a relevant consideration under s 190B(3) that the application correctly describes the native title claim group. Its focus is 'upon the adequacy of the description so that the members of any particular person in the identified native title claim group can be ascertained'. It does not 'require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group': see Mansfield J at [37] of *NT v Doepel*. I refer also to the finding by Dowsett J in *Gudjala*

People # 2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*) that the condition of s 190B(3) only requires that the members of the claim group be identified or described sufficiently. It does not require that there be a 'cogent explanation of the basis upon which they qualify for such identification'—*Gudjala 2007* at [33].

[47] Having regard to *NT v Doepel* and *Gudjala* 2007, it is my view that s 190B(3) is not the place to examine the correctness of the description of the persons in the native title claim group; all that is required is that the description provides the clarity required by s 190B(3). In my view, a description which relies on biological descent from named ancestors is an acceptable mechanism and provides the requisite clarity—see Carr J at [63] to [69] of *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591.

190B(4) Native title rights and interests identifiable

[48] The claim **satisfies** the condition of s 190B(4).

[49] Section 190B(4) provides that '[t]he 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.'

[50] Section 62(2)(d) provides that the application contain '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' (underlining added).

Information considered

[51] The application provides a description of the claimed native title rights and interests in Schedule E. The applicant claims the 'right to possess occupy, use and enjoy the land and waters of the application area against the whole world, pursuant to the traditional laws and customs of the claim group' over areas where such a claim can be recognised, namely, where there has been no extinguishment of native title or where ss 47, 47A and 47B apply.

[52] Over areas where the exclusive rights cannot be recognised, the applicant claims a series of 'non-exclusive' rights (such as rights of access, to camp, to erect shelters, to live there and to hunt and fish). Schedule E states that the rights are subject to the laws of the States of New South Wales and the Commonwealth of Australia, rights conferred pursuant to those laws and the traditional laws acknowledged and the traditional customs observed by the native title claim group.

Consideration

[53] I am of the view that s 190B(4) requires a clear and easily understood description of the native title rights and interests: see *NT v Doepel* at [91] to [92], [95], [98] to [101] and [123]. In my

view, the description in this case of the claimed rights and interests is clear, understandable and sufficient to allow the native title rights and interests claimed to be readily identified.

190B(5) Factual basis for claimed native title

[54] The claim **does not satisfy** the condition of s 190B(5).

[55] Section 190B(5) provides that:

> 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.

Information considered

[56] I have considered the following information contained in the application:

(a) *Attachment F*: this document contains a summary of the general description of the factual basis for the assertions of s 190B(5) (Attachment F). Attachment F refers to a number of other attachments, now listed.

(b) *Attachment F1*: this is a copy of an affidavit by Scott McCain Franks[5] dated 13 May 2013 (Attachment F1), which was contained in an earlier Plains Clans of the Wonnarua People native title determination application, NSD788/2013, over land at Neath, in response to a s 29 mining notice (Neath claim). Neath is located within the outer or perimeter boundary, close to a point along the south-eastern boundary.

(c) *Annexure A to Mr Franks' Attachment F1 affidavit*: this is a description of the factual basis for two earlier claims by the native title claim group (Annexure A). Annexure A was contained in the native title determination application for the Neath claim and also contained in another claim by the claim group in response to a s 29 mining notice, found in native title determination application NSD1093/2012, over land at Jerrys Plains (Jerrys Plains claim). Jerrys Plains is located within the outer or perimeter boundary, along a southern bank of the Hunter River, between Singleton and Denman. I note that Annexure A is extensively referenced in the description of the factual basis for this new claim within Attachment F and would appear to be part of that general description.

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5 One of the two persons, with Robert John Lester, who comprises the applicant.

(d) *Annexure B to Mr Franks' Attachment F1 affidavit*: this is a statement by Mr Franks dated 24 August 2012 (Annexure B). This statement was contained in both the Jerry Plains and Neath claims. Mr Franks is a member of the claim group via descent from the first apical ancestor named in Schedule A, Mary Shoe.

(e) *Annexure C to Mr Franks' Attachment F1 affidavit*: a statement by ***Claimant1*** dated 12 September 2012 (Annexure C). This statement was contained in was contained in the applications for the Jerry Plains and Neath claims. ***Claimant1*** is a member of the claim group via descent from Mary Shoe.

(f) *Annexure D to Mr Franks' Attachment F1 affidavit*: a statement by ***Claimant2*** dated 12 September 2012 (Annexure D). This statement was contained in the applications for the Jerry Plains and Neath claims. ***Claimant2*** is a member of the claim group via descent from the second apical ancestor named in Schedule A, Emily.

(g) *Annexure E to Mr Franks' Attachment F1 affidavit*: this is a drawing showing the Neath area relative to the asserted eastern boundary of the claim group. This document was contained in the application for the Neath claim.

(h) *Attachment F2*: this is a second affidavit by Mr Franks dated 13 May 2013 (Attachment F2 affidavit), which was contained in the application for the Neath claim.

(i) *Attachment F3*: this is a third affidavit by Mr Franks dated 21 May 2013 (Attachment F3 affidavit), which was provided separately to the Registrar to support the factual basis for the Neath claim

(j) *Attachment F4*: this is a new affidavit by Mr Franks dated 14 August 2013 (Attachment F4 affidavit) which addresses the asserted factual basis for areas not covered by the Neath and Jerrys Plains claims. In the Attachment F4 affidavit, Mr Franks attests to the relevance of the information within Attachments F1 to F3 and Annexures A to E listed above to the factual basis for this new claim 'over the broader area of country where the PCWP assert primary rights and interests under our traditional laws and customs.'[6] (I note that although the areas covered by the Neath and Jerrys Plains claims lie within the outer boundaries, they have been specifically excluded from the area covered by the application: see para 6 of Attachment B2.)

[57] I have also considered the information contained in the application as to the:

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6 See paras 3 to 5 of the Attachment F4 affidavit by Mr Franks.

(a) description of the persons in the native title claim group: see Schedule A and my reasons above for the condition of s 190B(3)

(b) areas covered and not covered by the application: see Attachments B1, B2 and C and my reasons above for the condition of s 190B(2)

(c) description of the claimed native title rights and interests: see Schedule E and my reasons above for the condition of s 190B(4)

(d) description of current activities in relation to the area (Schedule G)

[58] To assist me to locate places and features discussed in the factual basis materials, but not readily identifiable from the map in Attachment C, I have looked at and considered at maps that show places in and around the Hunter Valley, including two maps prepared by the Tribunal's geospatial services (Geospatial) in February 2014. The first Geospatial map replicates the map in Attachment C, but provides more precise labels for some places discussed in the material, namely:

(a) the Liverpool Range, which extends along the northern outer boundary

(b) the Hunter River from its source in the Barrington Tops to its mouth at Newcastle

(c) Barrington Tops, which adjoins the outer boundary in the northeast

(d) the location of the Hunter River catchment boundary (referenced in Attachment B1 and also in Attachment F, as the outer boundary of the territory with which the Wonnarua People are associated in the early historical records)

(e) Wollombi Brook

(f) the approximate location of Patricks Plains, as sourced from Geoscience Australia's place name database (feature no. NSW79564).

[59] The second Geospatial map shows the location of certain national parks which lie within the outer boundaries of the area covered by the application.

Legal principles governing my consideration of s 190B(5)

[60] Mansfield J held at [17] of *NT v Doepel* that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other

> words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.

[61] This was approved by a Full Court of the Federal Court (French, Moore and Lindgren JJ) in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317 [2008] FCAFC 157 at [83] to [85] (*Gudjala FC*).

[62] In considering what was required to meet the condition of s 190B(5), the Full Court in *Gudjala FC* looked at the interaction between ss 62 and 190A, the former mandating the requirements for commencing an application and the latter establishing the registration test. The Full Court held that:

> ... the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit—at [90].

[63] The Full Court then dealt with the nature and quality of the information required by s 62, and in particular the details required by s 62(2)(e)[7] and said:

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92].

[64] The Full Court concluded that it would be wrong to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim'—*Gudjala FC* at [93].

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7 I note that the matters referred to in s 62(2)(e)(i), (ii) and (iii) are worded almost identically to s 190B(5).

[65] Following *NT v Doepel* and *Gudjala FC*, I do not evaluate the applicant's asserted factual basis as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the factual basis materials, apart from its sufficiency overall to address the relevant matters in s 190B(5). My assessment of the material is limited to whether the asserted facts can support the assertions set out in s 190B(5). I am also of the view, given the relatively narrow scope of this condition, as explained by Mansfield J in *NT v Doepel* and their Honours in *Gudjala FC*, that it would be wrong for me to have regard to unsolicited information from the Gomeroi People,[8] which seeks to impugn the asserted factual basis. I refer to my introductory comments setting out my reasons for not looking at information from a competing claimant such as the Gomeroi People.

[66] Finally in relation to the relevant legal principles, in *NT v Doepel*, Mansfield J approved the Registrar's approach to s 190B(5) which analysed 'the information available to address, and make findings about, the particular matters to which s 190B(5) refers'—at [130] of *NT v Doepel*. Mansfield J concluded at [132] that it is correct for the Registrar to focus primarily upon the particular requirements of ss 190B(5)(a) to (c), as 'this is the way in which the NTA directs [her] attention.' His Honour found that, '[i]f any of the particular requirements were not met, then the general requirement would not be met'.

[67] Having regard to this, I focus on the particular requirements of ss 190B(5)(a)-(c) in coming to a decision that I am not 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.

Section 190B(5)(a): relevant legal principles

[68] The factual basis must be sufficient to support an assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area.'

[69] In *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*), French J agreed with the delegate's assessment that the factual basis was not sufficient for the assertion in s 190B(5)(a), in relation to current association by the native title claim group with the area, because:

(a) although there was a factual basis for an association with particular areas concentrated around the centre of the claim area,

(b) the factual basis did not disclose more than brief references to some of the outlying areas covered by the claim and contained no information regarding association with some coastal areas and with the northern and eastern parts of the claim—*Martin* at [24].

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8 The Gomeroi People have a registered native title claim which overlaps the area covered by this application in its north western reaches.

[70] Justice French held the delegate did not err in his approach to s 190B(5)(a) as he:

> ... looked to the positive material put before him asserting a factual basis for association and found that it disclosed association only with particular areas. If it be the fact that that material disclosed only physical association, that does not mean that he has wrongly construed the nature of the association that may be sufficient for the purpose of the recognition of native title. There was simply a lack of material to support an association, physical or spiritual, with the entire area claimed. He was not obliged to accept the very broad statements contained in Schedule F which have no geographical particularity—at [26] (underlining added).

[71] In *Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*), Siopis J held that the Tribunal (on reconsideration of a claim under s 190E) did not err under s 190B(5)(a). Siopis J found 'the appropriate test was whether the material provided demonstrated a factual basis sufficient to support the assertion that the native title claim group have, and their predecessors had, an association over the whole area[9] of the claim'—at [31]. Siopis J also cited *Gudjala FC* for the proposition that the condition of s 190B(5) requires the Registrar to be satisfied that the materials are in sufficient detail to permit a genuine assessment of the application and that they are something more than assertions at a high level of generality—*Corunna* at [45]. Siopis J agreed with the reconsidering Tribunal member that the material provided in relation to part of the claim area was 'at a high level of generality and, significantly, lacked geographic particularity in relation to the boundaries of the sea portion of the claim west of Rottnest Island'— *Corunna* at [45].

[72] Siopis J said at [37] of *Corunna* that [52] of *Gudjala 2007* (discussed at [75] below) dealt with 'whether all members of the claim group have, and their predecessors had, a continuing association with the claim area, or whether the claim group included some persons who did not'[10]. This, in the view of Siopis J, is a different issue to that in *Martin* and *Corunna*, which concerned 'whether the material provided a factual basis sufficient to support the asserted physical and spiritual association by the claim group with the entire area of the claim'[11]—*Corunna* at [39].

[73] Having regard to *Martin* and *Corunna*, I am of the view that the factual basis must be sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the entire area of land and waters covered by the application. Having said this, I understand that it is not appropriate to undertake a forensic analysis of the material; it is about the sufficiency of the material overall to provide the factual basis required in relation to an association by the native title claim group and the predecessors of those persons with the area covered by the application.

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9 Underlining added.

10 Underlining added.

11 Underlining added.

[74] Having regard to [52] of *Gudjala 2007*, I am of the view that s 190B(5)(a) requires a factual basis sufficient to support an assertion that there is an association:

(a) 'between the whole group and the area'

(b) 'between the predecessors of the whole group and the area over the period since sovereignty',

(c) although it is 'not necessary that all members must have such association at all times'.[12]

[75] In my view, assuming the factual basis supports the assertion of an association around the time of European contact and sustained settlement, this will allow an inference that the factual basis supports an assertion of an association back to sovereignty: see comments by the Full Court at [96] of *Gudjala FC.*

Section 19B(5)(a): Consideration

Areas covered by the application

[76] The following are some general observations I have about the area covered by the application noting that it is the area which the factual basis materials in relation to association must address.

[77] The application covers land and waters in the Hunter Valley of New South Wales. According to the information in Attachments B1 and C:

(a) the eastern outer boundary of the area generally follows the course of the Patterson River from its headwaters in the north to its intersection with the Hunter River around Maitland in the south

(b) the western outer boundary commences at an intersection of Mogo Creek and MacDonald River in the Hunter Range and Judge Dowlings Range and follows a northerly direction along that river and other waterways, including Martindale Creek, Baerimi Creek, Goulburn River and Worondi Rivulet to its headwaters in the Liverpool Range

(c) Maitland (or part of it), Cessnock, Singleton, Jerrys Plains, Denman, Sandy Hollow, Muswellbrook, Scone, Mount Olive, St Clair, Falbrook, Broke and Bulga all fall within the outer boundaries.

[78] The Hunter River traverses the area encompassed by the outer boundaries from Maitland in the southeast then west through Singleton and Jerrys Plains to Denman and then northeast,

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12 This analysis was not disapproved on review by the Full Court—see *Gudjala FC* at [69].

through Muswellbrook and Aberdeen. The outer boundaries do not encompass the headwaters of the Hunter, which lie in Barrington Tops. I have looked at another map prepared by Geospatial (13/02/14) that depicts the location of the Hunter River in relation to the outer boundaries and the proximate location of the Hunter River catchment boundary in relation to the outer boundaries (first Geospatial map). I have looked at a second Geospatial map (undated) that shows the location of national park land within the outer boundaries (second Geospatial map). I have looked at three maps derived Google maps, to show the location of Bulga relative to the Putty Road, the MacDonald River relative to Howes Valley and Bridgman relative to Singleton. I have also looked at a map from the NSW Department of Environment of the entire Hunter River catchment. I have looked at these maps to understand the location of places discussed in the factual basis materials.

[79] Although the application boundary encompasses a large area of approximately 11, 351 sq km, the application excludes areas inside the boundaries where native title has been extinguished by PEPAs (see s 23B) or is otherwise wholly extinguished. The application also excludes the areas covered by the Jerrys Plains and Neath claims.[13] I refer to my reasons above for s 190B(2) that the extent of extinguishment is likely to be substantial. Accordingly, the areas within the outer boundaries in fact covered by the application is likely to be much less than that shown on the map in Attachment C, given that the Hunter Valley is a long-settled and heavily populated area of New South Wales.

[80] The second Geospatial map, which shows national park land within the outer boundaries, indicates that these are found predominantly in the mountainous regions, which lie along the south-western and western boundaries, and also in the north. They include Yengo National Park in the southwest, Wollemi National Park in the west and Barrington Tops National Park in the northeast. It seems that, given the relative isolation of these areas from the towns and farming lands lower in the valley and their status as national parks, these are areas where native title may not have been extinguished.

[81] I note that these are general observations only and do not represent a decision or findings about extinguishment in relation to any of the area. I note that the fact of extinguishment (or otherwise) over areas within the outer boundaries is not a part of my consideration in relation to this condition.

Identity of the predecessors of the native title claim group

[82] Para 1 of Attachment F states that the native title claim group identifies itself as the Plains Clans of the Wonnarua People (PCWP). Schedule A states that the persons in the native title claim

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13 I note the statement in para 6 of Attachment B which excludes the areas covered by two other applications, NSD1169/2012 and NSD781/2013. These applications, by the Wonnarua Traditional Custodians native title claim group, were also made in response to the s 29 mining notices over the same areas as that covered by the Neath and Jerrys Plains applications.

group are the biological descendants of two apical ancestors: Emily (and her son, Henry Taggart) and Mary Shoe (and her daughter, Matilda Hughes).

[83] Para 3 of Attachment F states that 'the PCWP and their ancestors were able to stay on or close to the territory of their forebears at and around the Hunter River and the broader Singleton (Patricks Plains) region'. Para 5 of Attachment F states that these four predecessors 'have a documented association with the Hunter River catchment and the broader Singleton (Patrick Plains) region from about the mid 1800s'. Para 5 states that:

(a) 'The PCWP (the descendants of Mary Shoe and Emily) identify as the Aboriginal descendants of the Wonnarua People who occupied a tract of country that encompassed the middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains).'

(b) '[They] are the Aboriginal people who speak for that country today and have the right to use its resources'

(c) 'They inherited a wide range of laws and customs about its walking tracks, ceremonial places, stories and how to hunt and gather there, which have been continually practiced there over the generations since settlement.'

(d) 'The PCWP have continuously maintained their association with the application area since settlement and have retained a connection to this area through their acknowledgement and observance of traditional laws and customs.'

[84] In my view, these assertions about the association of the group's predecessors with the area:

(a) are at a 'high level of generality'

(b) do not provide 'sufficient detail' in relation to the entire area over which native title rights and interests are claimed

(c) do not permit a genuine assessment of the claim against the requirements of s 190B(5)(a): see [92] of *Gudjala 2008*, followed by Siopis J at [45] of *Corunna*.

[85] I note that these assertions from Attachment F refer the Registrar, in a general sense, to the information found in Attachments F1 to F4 and I have turned my mind to those attachments when considering the claim against this condition.

[86] I note also that para 2 of Attachment F provides a summary of the details contained in Attachment A about the association of the 'Wonnarua People and of local groups of Wonnarua People' with a tract of country described as 'the Hunter River Catchment and the broader Singleton (Patrick Plains) area' in the early historical record, and in ethnographic writings.

However, it is clear that it is asserted that the Wonnarua People is a wider regional Indigenous society that occupies the region within which this application area also falls: see para (b), pg 1 and paras 3, 5, 6 and 9 of Attachment F and paras 1.1 to 1.5 and paras 4.2 to 4.7 of Annexure A. In my view, the claim is that the Plains Clans of the Wonnarua People native title claim group derive the particular native title rights and interests described in this application from the acknowledgement and observance of the traditional laws and customs of a wider Wonnarua People normative system.

[87] Subject to a reservation expressed below noting that the southern boundary appears to fall outside the Hunter River catchment boundary, I might accept that the factual basis is sufficient to support an assertion that the Wonnarua People had an association with the application area at and before settlement. However, given the identification of the native title claim group as the 'Plains Clans of the Wonnarua People', it is my view that the information must be sufficient to support an assertion that the predecessors of that particular native title claim group were associated with the area.

[88] In this regard, I refer to the following passages from Dowsett J's decision in *Gudjala 2007*:

> Subsection 190B(5) of the Act refers to the factual basis upon which it is asserted that the claimed Native Title rights and interests exist. This is clearly a reference to the existence of rights vested in the claim group. Thus it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].
> The Delegate experienced difficulty in addressing this question, given his lack of satisfaction as to the adequacy of the description of the claim group. My view of the identity of the claim group relieves me of part of that difficulty. However the absence of any description of the basis upon which the apical ancestors were selected re-emerges in considering this aspect of the case. There may be many ways in which to describe a claim group, any one of which may be sufficient to satisfy the requirements of subs 190B(3). However that task is undertaken, it will eventually be necessary to address the relationship which all members claim to have in common in connection with the relevant land—at [40].
>
> In some cases it will be convenient to describe the claim group by referring to particular people, either by name or, as in this case, by reference to apical ancestors. In other cases, it may be done by describing the relevant requirements of law and custom which must be satisfied in order that a particular person share in the claimed rights and interests. Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes. The identified rights and interests must belong to the identified claim group. Subsection 190B(5) requires a description of the alleged factual basis which demonstrates that relationship. The applicant may not have been obliged to identify the relationship between the claim group and the relevant land and waters in describing the claim

group for the purposes of subs 190B(3), but that step had to be undertaken for the purposes of subs 190B(5)—at [41].[14]

[89] Although sovereignty for the area is 1788, the application says that sustained European contact between the new sovereign order and the relevant Indigenous peoples, who occupied the Hunter Valley area, began some three decades later, in the early 1820s. The facts pertaining to settlement are contained in paras 1.3, 3.1 to 3.14 and 14.1 to 14.7 of Annexure A, which discusses 'Contact history' and the 'Impact of settlement'. Thus, one of the group's predecessors, Emily, was born approximately two decades after, in approximately 1840, and the other, Mary Shoe, was alive before settlement, having been born in approximately 1800.

[90] There is little to no specific information about the association of Emily and Mary Shoe with the area, apart from general assertions to this effect. However, the application does contain information from the living descendants of each ancestor which tends, in my view, to support an inference that Emily and Mary Shoe were Aboriginal persons:

(a) who were either born in the Hunter Valley or spent their lives there and who were part of an indigenous group or community

(b) who were in turn descended from those Aboriginal people understood to have belonged to the Hunter River area, north of the mountains from Windsor traversed by the Howe expeditions of 1819 and 1820,[15] namely, the Wonnarua People.

[91] The information I have reviewed is to the effect that, in the generations following Emily and Mary Shoe, there has been a passing down of an understanding of their Wonnarua identity to current members of the native title claim group. The information shows that this understanding has been productive of an association in the generations following Emily and Mary Shoe, which has a physical and spiritual dimension, with some of the places encompassed by the application. It appears that the association by those in the generations after Emily and Mary Shoe was facilitated by living or spending time along or proximate to the Hunter River, particularly around Singleton and tributaries to the north and south thereof.

[92] Indeed, para 5 of Attachment F makes it clear, in my view, that the asserted association by the group's predecessors in the period after European settlement relates to the 'middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains)'. There is also this from para 14.5 of Annexure A: '[t]he apical ancestors of the claim group and their descendants continued to live in and around the Singleton area and continue to do so today.'

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14 I note that this analysis was not disapproved on review by the Full Court—see *Gudjala FC* at [68].

15 The footnote at the end of pg 1 of Attachment F identifies that this was probably the point of first contact between the exploring settlers and the Indigenous peoples of the Hunter River around the present day sites of Jerrys Plains and Singleton.

[93] I have formed the view that the factual basis is not sufficient to support an assertion that either Emily or Mary Shoe, or their children named in Schedule A (Emily's son Henry Taggart and Mary Shoe's daughter, Matilda Hughes), had an association with the entire area covered by the application. As I will endeavour to illustrate, it is my view that the factual basis only supports that the predecessors had an association with some of the area covered by the application.

Emily

[94] ***Claimant2*** statement dated 12 September 2012 in Annexure D and para 3.10 of Annexure A contains information pertaining to Emily and her son Henry Taggart.

[95] Schedule A indicates that Emily was born in approximately 1840 and her son Henry was born in 1859 in Howes Valley, Broke. Para 3.10 of Annexure A states that:

(a) Emily is the Aboriginal progenitor of the Taggart family and working as a domestic servant when she conceived Henry Taggart

(b) in 1853[16] Mr Cobcroft took Henry in as a baby because Emily could not keep her job and her baby.

[96] ***Claimant2*** was ***age*** when she made her statement dated 12 September 2012. She states in para 1 that she has lived in Singleton all her life, the eldest daughter of ***parents***. ***Claimant2*** has ***children*** and ***grandchildren***.

[97] ***Claimant2*** states in para 2 that she is a 'proud Wonnarua woman and claim my Aboriginal heritage through my maternal family line Taggart'. In support, ***Claimant2*** has provided a genealogical chart in attachment A to her statement, which shows that ***Claimant2's mother***, was born in Howes Valley, Broke in ***year*** to ***Claimant2's grandfather***, who was born in 1896 at Harrowly farm, near Singleton. ***Claimant2*** states in para 9 that she has been active in the community for more than 20 years trying to ensure that her cultural heritage is preserved and her people and other Aboriginal people who had come to live in her Country were given a fair go. She states in para 9 that '[c]aring for my country, the people within and my heritage is something I have always been taught and tried to do'.

[98] ***Claimant2*** states in para 2 that her ***grandfather*** was the eldest son of Henry Taggart, a Wonnarua man, from Henry's marriage to Mary Lawrence in Singleton in 1891. There were six children born to Henry and Mary. ***Claimant2's mother*** is the eldest child and as such, she is the recognised Elder of the ***family line***. ***Claimant2's mother*** has handed the responsibility to speak for family and country, in the traditional way, to ***Claimant2***.

16 I infer that this is a typographical error noting Henry's stated birth year of 1859.

[99] According to ***Claimant2*** (see para 3) Henry was born in 1859 or 1860 and his death certificate shows him as having been born at Howes Valley near Wollombi. The genealogical chart annexed to ***Claimant2's*** statement indicates that Henry was born at Howes Valley, Broke, as does Schedule A. (I note from the first Geospatial map that Wollombi is a town on Wollombi Brook, south of Broke. This is a tributary of the Hunter that runs south of Singleton to its headwaters at a point outside the south-eastern outer boundary. Broke is a town lying on Wollombi Brook, to the south of Singleton. Howes Valley lies some distance from Broke, Wollombi and Wollombi Brook, on a point outside the outer south-western boundary.)

[100] ***Claimant2*** states in para 3 that 'as my family knows it, Henry's mother was Emily (or possibly Polly) a Wonnarua woman born about 1840 who lived in the Sandy Hollow area'. (***Claimant2*** says that Sandy Hollow is in the central part of Wonnarua territory. I have noted from the map in Attachment C that it lies near the outer western boundary. I have inferred that this is a reference then by ***Claimant2*** to the overall bounds of the wider Wonnarua territory.) Emily worked there as a domestic servant for the Chapman family. According to ***Claimant2***, the Chapman property adjoined the Hungerford's property Baerami, the first parcel of land granted in the Sandy Hollow district in about 1828.

[101] ***Claimant2*** states in para 3 and 4 that Emily met up with John Taggart at a 'shindig' held at the Chapman property, the result of which was Emily's pregnancy and the threatened loss of her employment by the Chapman family if she did not find someone to care for the baby. Henry was given into the care of Mr Cobcroft, whose family resided in the Putty and Broke areas: see para 4 of ***Claimant2's*** statement. (The map in Attachment C shows that the town of Putty lies outside the south-western outer boundary.)

[102] ***Claimant2*** states in para 5 that '[i]t is also true that Emily was of the Plains Clan of the Wonnarua and I believe that she remained in the Sandy Hollow district for much of her life.' ***Claimant2*** goes on to say in para 5 that Emily's son Henry was able to keep in contact with Emily through regular horseback trips up to Sandy Hollow.

[103] ***Claimant2*** states in para 5 that she was told by her ***grandfather*** (Henry Taggart's son) of ***grandfather's*** trips with Henry as a kid to visit his Grandmother Emily 'following well known tracks from Broke back through Jerrys Plains, Denman and on to Sandy Hollow. ***Grandfather*** told ***Claimant2*** of his impatience on these long trips because his Dad 'would always stop to have a "chin wag" with people he knew to be from his mob'. They would sometimes come back via Muswellbrook (east of Sandy Hollow), Ravensworth and on to Mt Olive and Singleton and then on to Broke to catch up with the extended Franks, Smith and Lester families. ***Claimant2*** says in para 5 of her statement, that it was 'well known to me that the Franks were part of our local clan though not immediately blood related'. ***Claimant2*** tells of the Franks boys coming to town with fish for her family and how '[w]e always acknowledged, respected and had a genuine affection for them as part of our extended clan family'.

[104] ***Claimant2*** states in para 6 that her 'great-grandfather Henry was able to learn, practice and teach the Wonnarua lores and customs to his sons and daughters because although he was raised away from his mother he was fortunate to be brought up in the Broke-Bulga-Putty-Jerrys Plains area where many of the important gathering sites and ceremonial tracks of the Plains Clan occur'. ***Claimant2*** goes on to say that Henry was 'a young boy down in that area for example just ten or so years after 1852 when the last inter-tribal ceremony was reportedly held at the Bulga bora ground'.

[105] ***Claimant2*** states in para 6 that Henry 'spent a lot of time in and around the special places of the wider PCWP clan group at Warkworth, Broke, Jerry's Plains and Bulga.' ***Claimant2*** states that Henry would take her ***grandfather*** and his brothers out into the scrub down that way and teach them how to survive on the tucker found there. ***Claimant2*** states in para 7 that her ***Uncle***, the first child of ***grandfather's eldest sister***, (another child of Henry's) was brought up by Henry and practiced the traditional ways taught him by Henry throughout his life. ***Claimant2*** provides a copy of a newspaper article in Attachment F from 1975 about ***Uncle*** titled 'A living symbol of an ancient past' by PA Haslam. (I note that apart from the title, the copy of article in Annexure F is illegible.) ***Claimant2*** states in para 7 that although the article suggests that '***Uncle*** was the "last of our mob" it does show how my family continued to maintain and practice the traditional ways until the present.' ***Claimant2's*** father would go out bush without food to hunt. ***Claimant2's*** mother also told her about her granddad hunting the grass parrots and rosellas that would gather during the corn harvest, when her mum lived out at Broke with her parents.

[106] The information provided in relation to Emily shows, in my view, a sufficient factual basis for an association with some parts of the application area, around Singleton, Broke, Bulga and Warkworth. This association would also appear to encompass the tracks between Broke and Jerrys Plains then up to Sandy Hollow, in the west. There is also information from ***Claimant2*** that her family visited with members of the claim group, particularly the Franks' family, who lived at Mt Olive, north of Singleton.

[107] It is not clear how far south the association by Henry and Emily extended. It is said that Henry was born in Howes Valley, Broke (see Schedule A and the genealogical chart found in ***Claimant2's*** statement) and given into the care of the Cobcroft family, who lived in the Putty and Broke areas. ***Claimant2*** says that Henry's death certificate places his birth at 'Howes Valley near Wollombi'. Wollombi lies on Wollombi Brook south of Broke, to the north of the south-western reaches along the outer boundary. There is a reference also to Henry's association with 'the Broke and Putty areas', where he was raised by Mr Cobcroft. It is apparent from the map in Attachment C that Howes Valley and Putty are in the mountainous regions of the Hunter Range beyond the plains of the Hunter River.

[108] Maps of the area indicate that the Putty Road runs in the vicinity of Broke (through Bulga), so it may be that Henry's association does not extend as far south as the town of Putty, which in

any event lies outside the south-western boundary of the claimed area. I note also that Howes Valley lies south of the MacDonald River (the southern outer boundary) and thus outside of the outer boundaries. The first Geospatial map, which depicts the Hunter River catchment boundary, shows that this is inside the outer boundary. In other words, the southern outer boundary, which is beyond the catchment boundary, is beyond the reaches of the overall Wonnarua association referenced in para 2 of Attachment F.

[109] In light of this, I am not satisfied that the factual basis is sufficient to support an assertion that the predecessors of the native title claim group had and that group currently has an association with the country that lies beyond the Hunter River catchment boundary. I say this because land south of the catchment boundary is beyond both the asserted territory of the overall Wonnarua People society and the smaller Plains Clans of the Wonnarua People group.

[110] Further, the information from ***Claimant2*** and other members of the claim group does not talk to an association either past or present with these southern and south-western areas, beyond some vague and generalised information that Henry may have been born or spent some of his childhood being raised by Mr Cobcroft.

[111] Given that this is the area occupied by Mt Yengo, the Macdonald River and the Yengo National Park (see second Geospatial map), I think that some specific information is necessary for me to be satisfied that there is a sufficient factual basis relating to an association, past and present, with these places by the predecessors of the native title claim group. I note that Mt Yengo does feature in the Biami creation story, however, this appears to relate to Biami stepping down onto 'Big Yango' as the protector of the wider Wonnarua People and creator of their lands: see the recount of the story in paras 7.1 to 7.5 in Annexure A under the heading 'Spiritual connection'.

[112] Although there is limited information about Emily herself, it is not too much of a stretch to infer that the association of the Taggart family and their predecessors, goes back to Emily's date of birth, some two decades after settlement. I am mindful that it is not necessary to show that all members have an association at all times (*Gudjala 2007* at [52]). Emily's birth in the two decades after settlement, coupled with an association with the particular places I have discussed from the times of her son Henry, may be supportive of an inference that the Taggart family's association via their descent from Emily stretches back to the times of settlement. In this regard also, I note my findings below that the factual basis supports an assertion that Mary Shoe had, and her descendants also have, an association with some parts of the application area that dates back to Mary's birth before settlement. There is also the information from ***Claimant2*** discussing her family's ties with those of the claim group who lived north of the river and Singleton, including the Franks family from Mt Olive.

[113] In my view, the material does not provide a sufficient factual basis to support an assertion of an association between Emily and her descendants beyond the places I have discussed. As can

be seen from the maps, the area with which Emily's descendants are associated encompasses a relatively small part of the overall area within the outer boundaries, between Singleton, Broke and Bulga in the east and Sandy Hollow in the west. I also find that the factual basis supports an assertion that Emily's descendants had an association that extends north of the river around Singleton where ***Claimant2's grandfather*** visited with the extended clan families of the Franks, Smith and Lester, as is discussed in ***Claimant2's*** statement. These areas north of Singleton are located relatively centrally within the outer boundaries, but this is still proportionally smaller than the overall area encompassed by the outer boundaries shown on the map in Attachment C.

Mary Shoe

[114] The facts in relation to Mary Shoe's association with the area are found in Schedule A of the application, paras 12.1 to 12.9 of Annexure A and in the following statements:

(a) Scott McCain Franks dated 24 August 2012 in Annexure B.

(b) ***Claimant1*** dated 12 September 2012 in Annexure C.

[115] Mary Shoe was an Aboriginal woman born in approximately 1800 in the Singleton district. The result of a union with an Englishman, Joseph Hughes, was a child, Matilda Hughes. Matilda was born at Sydenham (near Singleton) in 1832. Sydenham was the name given to the 800 acres of land on the west side of Falbrook granted to an early settler in 1824. Falbrook is the name of town on a northern tributary of the Hunter. (I note that alternative spellings used in the material for Falbrook are 'Fallbrook' and 'Fal Brook').

[116] Matilda Hughes married James Arthur Smith at Falbrook and her two children, Mary Anne Smith and William "Billy" Smith were born, respectively, at Glennies Creek or Bridgman near Singleton in 1857 and at Sydenham near Singleton in 1858. I can see that Glennies Creek/Bridgman is approximately 10kms to the north of Singleton. Falbrook is a similar distance to the north of Singleton.

[117] Mr Franks is a descendant of Mary Shoe, via William 'Billy' Smith. Mr Franks describes his own association and that of his family with the country around Mt Olive and St Clair where he grew up, dating back to his ***paternal grandmother. Paternal grandmother*** was born in the latter years of the 19th century in Singleton, the daughter of William Billy Smith, and is the great-grandchild of the ancestor Mary Shoe. Mr Franks states at para 1 that '[m]y Aboriginality derives from the line of my ***paternal grandmother*** … a Wonnarua woman born at Falbrook near the village of Camberwell, in 1894.'

[118] The information provided by Mr Franks in Annexure B shows an extensive association with both a physical and spiritual dimension in the central parts of the application to the north of Singleton along the tributaries of the Hunter up to Mt Olive and St Clair. It also extends south of the river between Singleton and Jerrys Plains to Bulga and Broke along Wollombi Brook. The

association by Mr Franks' was aided by a very close relationship with his ***Uncle*** and ***Cousin1***, who took him out bush, taught him to hunt, to trap fish and showed him traditional walking tracks and ceremonial places, particularly around Bulga and Jerrys Plains. Mr Franks grew up on a farm at Mt Olive first started by his ***grandfather***, who married Mr Franks Aboriginal ***grandmother***.

[119] The factual basis supports an assertion that Mr Franks' association extends to the times of his Aboriginal great-grandfather, William Billy Smith, who was born in 1858, on a ceremonial site near Singleton (at Sydenham) and who was 'a lore man and Wonnarua "Chief"'.[17] Genealogical and historical data shows that William was the grandson and son respectively of apical ancestor Mary Shoe and her daughter Matilda Hughes (who died in 1913). There is limited information in relation to Mary Shoe and Matilda Hughes, the two persons at the apex of the Franks' family tree alive at and shortly after European settlement. However, in my view, it is not too much of a stretch to infer that the factual basis supports an assertion that the association of the Franks family goes back to the birth of Mary Shoe in approximately 1800 and thus extends back before settlement.

[120] Another descendant of Mary Shoe (***Claimant1***) says in para 7 of her statement in Annexure C that 'my family has always identified as Wonnarua of the Plains Clan with specific ancestral links to our clan lands about Ravensworth, Camberwell, Bridgman, Singleton, Glendon, Carrowbrook, Mt Royal and Goorangoola'. These places are located within an area that stretches a short distance north of Singleton to Mt Royal, which lies along the north-eastern outer boundary.

[121] ***Claimant1*** states in para 1 that '[m]y Aboriginality derives from the ancestral line of my ***mother*** … born in Singleton in 1937, the daughter of ***Claimant1's grandparents*** who, in turn, were both descendants of Matilda Hughes'. ***Claimant1's*** grandparents were born in the early years of the 20th century at Goorangoola and Mt Olive (north of Singleton).

[122] ***Claimant1's*** genealogical chart[18] shows that her ***grandfather*** was the son of James 'Jim' Smith, another child of Matilda Hughes. The chart shows that ***grandmother*** was also descended from Mary Shoe via another child of Matilda Hughes. This, then, is part of the extended family network that includes the Franks family who are also the descendants of a child of Matilda Hughes.

[123] ***Claimant1*** describes learning about her country from her ***grandmother***, including creation stories, fish trapping and bush food sources. ***Claimant1*** would go out with her Grandmother to collect food, berries and other wild bush tucker along the banks of the Hunter River, when

17 See para 1 of the statement in Annexure B.

18 See Attachment A of her statement.

visiting her Gran as a young girl. ***Claimant1's grandmother***, although taken as a child of 10 to Sydney, returned to Singleton when she was 18 years old.

[124] ***Claimant1's grandfather*** also identified as Wonnarua. ***Grandfather*** would take ***Claimant1's dad and sibling*** up to Mt Royal on horseback, where he taught them many things about Wonnarua country, including the ways of the old people and men's business. ***Claimant1's*** family visited the Franks family at Mt Olive, who were part of her extended family. ***Claimant1's grandfather*** and ***Mr Franks' grandmother*** were first cousins. They would go out fishing with the Franks' family using cicadas as bait and a three-pronged spear her Grandfather made from she-oak trees. ***Claimant1's*** family would visit their cousins out at Jerrys Plains. ***Claimant1's*** mother would reinforce the importance of the Jerrys Plains area, including the closeness of ceremonial tracks, birthing sites and important gathering grounds, such as around Warkworth.

Conclusions regarding predecessors' association

[125] In my view, the factual basis is supportive of an association by Mary Shoe and Emily with part of the area covered by the application. The association encompasses the Hunter River between Singleton in the east and Jerrys Plains in the west. The association appears to extend to areas along the tributaries of the Hunter up to Carrowbrook and Mt Royal in the north and south to Bulga, Broke and the Wollombi Brook Valley and west to Emily's place of residence at Sandy Hollow.

[126] In my view, what is missing is an explanation as to how two Aboriginal women, one of whom was alive when the area was settled, the other who was born approximately two decades later, and from whom current members of the native title claim group descend, had an association with areas beyond the regions I have discussed. All of the material provided points to an association only with those middle reaches of the Hunter River, which traverse the area relatively centrally east to west from Maitland, Singleton and Denman and onto Sandy Hollow and the tributaries of the river north to Mt Royal and south to Bulga, Broke and along the Wollombi Brook.

Current association with the area by the native title claim group

[127] In my view, the factual basis does not support an assertion that the native title claim group have an association that covers the entire area. In this regard, I have noted that Mr Franks has provided further affidavits, in Attachments F2, F3 and F4, which speak to current association with other places to that discussed in the earlier statements provided in Annexures B to D.

[128] The affidavit in Attachment F2 speaks to an association with the area around Bulga (where Mr Franks has undertaken a cultural heritage study for Xstrata Bulga Coal of the Aboriginal ecological resources of the Hunter plains) and Neath (proximate to Maitland in the south-east of the area). In this affidavit Mr Franks tells of a song line that runs back into the Broke area around Lizard Mountain. In para 11, Mr Franks recounts this story of Biami and his son Little Biami: 'I

was told that as he stood at the bottom of Wollombi looking north towards our country, Biami told his son to stay behind and protect his people, the Wonnarua'. Mr Franks tells how Little Biami laid a giant lizard to sleep on the mountain range between Broke and Cessnock, the traditional name for which is *wirramin kooran* and means Lizard Mountain.

[129] The affidavit in Attachment F3 provides information about the association of Mr Franks' ***Cousin2***, who used to live very close the area covered by the Neath claim on a property between Neath and Abermain. ***Cousin2***, now deceased, was a descendant of Mary Shoe through his ***grandmother*** and his association appears to have been around these places in the southeast of the area, including around Wollombi Brook, Cessnock and Paxton.

[130] The affidavit in Attachment F4 discusses the association that Mr Franks has with areas in the previous statements and affidavits as far north as Scone, Wingen, the Liverpool Range, Carrowbrook and Mt Royal. Mr Franks discusses the association of a man named ***Person1*** with Mt Royal (also along the north-eastern boundary) who owned a property nearby. It is not clear that ***Person1*** is a member of the native title claim group. It is said in para 16 that ***Person1's*** family came to the Valley in the early days and owned a block of land near the intersection of Carrowbrook Road and Mt Royal Road, nearby the site of a church that was once a campsite for Mr Franks people: the Smiths. Mr Franks states in para 16 that '***Person1*** grew up with them and was taught some of our ways.' Mr Franks spent time with ***Person1*** on his place in the 1980s as a teenager, when ***Person1*** was elderly: para 17. Mr Franks on one occasion headed up the mountains to 'howl up' a dingo that was taking ***Person1's*** poultry, as he had been taught to do by his ***Uncle***.

[131] Overall, the information in the Attachment F4 affidavit does speak to a current association by Mr Franks with the northern parts of the application area, east of the Hunter, which appears to have been facilitated by his family's relationship with ***Person1***.

[132] Mr Franks does talk about Scone, Burning Mountain (Wingen) and the Liverpool Range (west of the Hunter River) in his Attachment F4 affidavit. However it appears that he does so in the context of these places forming the boundary between the Wonnarua People and the Geawegel around Burning Mountain and the Kamilaroi around the Liverpool Ranges. This is consistent with the accounts in para 2 of Attachment F and paras 1.1, 4.3 and 4.4 of Annexure "A" that the northern boundary of the wider Wonnarua People is understood to have extended as far north as the Liverpool Ranges.

[133] Having considered the totality of the information, I am of the view that the factual basis supports an assertion that the native title claim group, as described in Schedule A of the application, has an association with some of the area covered by the application around:

(a) the plains and middle reaches of the Hunter River between Maitland, Singleton and Jerrys Plains, up to Denman and Sandy Hollow

(b) north along the tributaries of the Hunter around Falbrook, Mount Olive, St Clair and north to Carrowbrook and Mt Royal

(c) south and southeast of Singleton and Jerrys Plains to Bulga, Warkworth and Broke, along the Wollombi Brook.

[134] However, there is no information in my view that talks in a meaningful way to an association with the area beyond the western banks of Hunter River in the north-west of the application. Nor is there information that speaks to the southern areas, beyond the Hunter River catchment boundary. Further, there is little information discussing western areas, in the mountainous regions of Wollemi National Park.

[135] It is particularly noteworthy, in my view, that ***Claimant1*** identified in para 7 of her statement that her family have always identified as the 'Plains Clans of the Wonnarua People with specific ancestral links to our clan lands about Singleton, Glendon, Carrowbrook, Mt Royal and Goorangoola'. These places fall within the areas discussed by Mr Franks, who grew up and has spent much of his life within a similar geographic range. It accords also with the statement in para 5 of Attachment F that the native title claim group 'identify as the Aboriginal descendants of the Wonnarua peoples who occupied a tract of country that encompassed the middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains) and are the Aboriginal people who speak for that country today.'

[136] For the reasons outlined, I am **not satisfied** that the factual basis is sufficient to support an assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. As set out in detail above, my reasons for so finding relate to the lack of information about an association with areas beyond the plains and middle reaches of the Hunter River and its tributaries north and south of Singleton.

Section 190B(5)(b): Relevant legal principles

[137] The factual basis must be sufficient to support an assertion that 'there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.'

[138] The language of the assertion in s. 190B(5)(b) nearly mirrors that found in s. 223(1)(a), which is part of the definition for the term 'native title rights and interests'. In my view, the factual basis must address the assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs.

[139] My usage of inverted commas around the word 'traditional' highlights that its meaning in s. 223(1)(a) is central to an understanding of the sufficiency of the factual basis provided to support the assertion that 'there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act; hence what the High Court and other courts have decided in relation to this should inform my consideration of the sufficiency of the asserted factual basis for this particular assertion.

[140] Accordingly, in considering the sufficiency of the factual basis provided by an applicant for the purposes of s 190B(5)(b), I must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) and in subsequent decisions as to what is meant by rights and interests in relation to land and waters being possessed under 'traditional' laws and customs: see Dowsett J at [26] of *Gudjala 2007*. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC*, who noted that one question, amongst others, which needs to be addressed is whether 'there was, in 1850–1860[19], an indigenous society in the area, observing identifiable laws and customs'—at [96].

[141] The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s. 223(1)(a) that native title rights and interests in relation to land and waters must be possessed under 'traditional' laws and customs:

(a) for laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty
(b) a society is a body of people united in their acknowledgement and observance of laws and customs with normative content
(c) the acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time
(d) it is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs;
(e) change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed

[19] I note that this was the period during which the area covered by the Gudjala People's application was settled by the Europeans.

are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[20]

[142] Having regard to the case law, it is my view that a sufficient factual basis to support the assertion in s 190B(5)(b) needs to address that the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I refer to comments by Dowsett J in *Gudjala 2007* that the factual basis materials to support this assertion must address:

(a) that the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
(b) that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81];
(c) the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66].

[143] This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC*—at [71], [72] and [96].

[144] I refer also to these additional comments by Dowsett J on remittal back by the Full Court, in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) about s. 190B(5)(b):

(a) a sufficient factual basis must address the following elements:
    i. a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;
    ii. that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and
    iii. that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs—at [22];

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[20] In addition to *Yorta Yorta*, I refer to the following decisions by the Full Court, which have considered what is required under s. 223(1) in light of the principles laid down in *Yorta Yorta*: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*), *Risk v Northern Territory of Australia* (2007) 240 ALR 75; [2007] FCAFC 46 (*Risk*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*).

(b) identification of an Indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs'—at [36];
(c) there must be some link between the claim group and the claim area, including the identification of a link between the apical ancestors (if used to define the claim group) and the relevant society from which the claim group asserts that it has derived its native title rights and interests—at [40].

[145] I have also considered Dowsett J at [29] of *Gudjala 2009* that the Registrar must 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof.' It would not be sufficient for an applicant to assert that the claim group's laws and customs are traditional because they derive from a pre-sovereignty society of which they are descendant. That would merely be a restatement of the claim without any factual basis—'there must at least be an outline of the facts upon which the applicant relies'.

Section 190B(5)(b): Consideration

[146] It is my view that the starting point for an applicant seeking to address subparagraph 190B(5)(b) is to identify the relevant society operating in the region occupied by the application area at the time of sovereignty or, at the very least, the time of contact/settlement. Once identified, the factual basis must be sufficient to support the assertion that traditional laws and customs with a normative content are derived from that society/normative system and which have had a substantively uninterrupted operation since sovereignty exist in relation to the area covered by the application.

[147] Attachment F states that the relevant society at settlement in the early 1820s was the 'Wonnarua People', who are identified in the early records as being the occupiers of a broad reach of country traversed by the Hunter River and which became known as the Hunter Valley from Maitland in the east to the apex of the Liverpool Range in the north. This is also discussed under the headings 'The People' and 'Language' at paras 1.1 to 2.3 of Annexure A.

[148] Page 2 of Attachment F contains the following:

> **In Wonnarua society there exist traditional laws and customs that give rise to the native title rights and interests, including the native title rights and interests of the PCWP:**
> 4.The pre-sovereignty traditional laws and customs of the Wonnarua People conferred rights on particular groupings of people to particular areas, including rights to speak for country and to use resources of that country.
> 5.Mary Shoe and Emily, and their immediate offspring Matilda Hughes and Henry "Harry" Taggart respectively, have a documented association with the Hunter River catchment and the broader Singleton (Patricks Plains) region from about the mid 1800s. The PCWP (the

descendants of Mary Shoe and Emily) identify as the Aboriginal descendants of the Wonnarua peoples who occupied a tract of country that encompassed the middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains) and are the Aboriginal people who speak for that country today and have the right to use its resources.

6. The native title rights and interests held by the PCWP, are pursuant to and possessed under the traditional laws and customs of the Wonnarua People, including traditional laws and customs that give rise to native title rights and interests in particular land and waters on the basis of:
    (i) ancestral connection to the area;
    (ii) residence on the area;
    (iii) traditional religious knowledge of and affiliations to and responsibility for the area; and
    (iv) traditional knowledge of the resources of the area.

[149] In my view, the central question is whether the factual basis is sufficient to support the assertion of the existence now of *traditional laws acknowledged by*, and *traditional customs observed by*, the native title claim group *that give rise to the claim* to native title rights and interests.

[150] What is said for this claim is that there are traditional laws and customs, asserted to have 'conferred rights on particular groupings of people to particular areas, including rights to speak for country and to use the resources of that country' (see para 4 of Attachment F). It is said in para 5 of Attachment F that the descendants of Mary Shoe and Emily and their immediate offspring Henry Taggart and Matilda Hughes 'identify as the Aboriginal descendants of the Wonnarua peoples who occupied a tract of country that encompassed the middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains) and are the Aboriginal people who speak for that country today and have the right to use its resources.'

[151] As I have explained in my reasons above, this appears to be the tract of country with which the group has a past and present association, but it is a proportion only of the overall area encompassed by the application. I note that 'the middle reaches of the Hunter River and its tributaries around Singleton (Patricks Plains)' lies relatively centrally within the boundaries of the claimed area. It does not extend to the upper reaches of the Hunter Valley in the north-western parts of the area covered by the application. Nor does it extend to the mountainous regions in the south and south-west of the outer boundaries of the area.

[152] There are other problems with the factual basis materials provided in support of the assertion of s 190B(5)(b). How the native title claim group 'identify' under the *traditional* laws and customs of the Wonnarua People for the area overall has not, in my view, been explained. I cannot find any information or facts, which would establish a link between Mary Shoe and Emily with those parts of the area covered by the application beyond the middle Hunter River and its tributaries. In addition, there is no information to show the factual basis to support the assertion that the traditional laws acknowledged and traditional customs observed by a wider Wonnarua

society give rise to the claim that the descendants of Mary Shoe and Emily alone are entitled to claim native title rights and interests in the entire area encompassed by the outer boundaries of the claim.

[153] Having read all of the materials, it appears to me that:

(a) The native title claim group, as described, is a subgroup of a wider group called the Wonnarua People.

(b) The wider Wonnarua People are identified in historical and ethnographical accounts and the group's own dreaming stories (i.e. the Biami creation story recounted by Mr Franks) as being associated with the whole of the Hunter Valley from Maitland in the south to the Liverpool Range in the north, at the time of European settlement.

(c) There is nothing in the material to support the assertion that the more confined group described in this application have, under the traditional laws acknowledged and traditional customs observed by them, a claim to native title rights and interests that extends over all of the area covered by the application.

[154] For these reasons, I am **not satisfied** that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

Section 190B(5)(c)

[155] The factual basis must be sufficient to support an assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'.

[156] In my view, there is a clear link between this paragraph and s 190B(5)(b). If I am not satisfied that the factual basis is sufficient to support the assertion in s 190B(5)(b), then it follows that I cannot be satisfied that of a sufficient factual basis for s 190B(5)(c) (this received support from French J at [29] of *Martin*.)

[157] *Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

(a) that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
(b) that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

[158] I understand that the reference in s 190B(5)(c) to 'those traditional laws and customs' is a reference to the traditional laws and customs asserted to have been acknowledged and observed

by the native title claim group, for which a factual basis is provided under s. 190B(5)(b). Although there is some information about the laws and customs acknowledged and observed by a Wonnarua People society before settlement, in my view the factual basis is not sufficient to support an assertion that the current laws and customs are 'traditional', in the sense that they have continued to have been acknowledged and observed in a substantially uninterrupted way, since before settlement.

[159] For these reasons, I am **not satisfied** that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with traditional laws and customs.

190B(6) Prima facie case

[160] The claim **does not satisfy** the condition of s 190B(6).

[161] Section 190B(6) provides that '[t]he Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.'

[162] In the absence of a sufficient factual basis being provided by the applicant to support the assertions set out in s 190B(5)(a)-(c), it must follow I cannot consider that, prima facie, at least some of the native title rights and interests can be established. That an application which does not satisfy the merit condition at s 190B(5) must also fail to satisfy the condition found in s. 190B(6) is supported by the decision in *Gudjala 2007* at [87], an aspect of the decision which was not affected by judgment in the appeal to the Full Court. I refer also to *Gudjala 2009* where it was noted that, if s 190B(5) is not met, then it must follow that s 190B(6) is also not met—at [84]. Most recently, Siopsis J followed a similar course and did not disturb the Tribunal's decision that a failing at s 190B(5) meant that the condition of s 190B(6) was also not met—see [26] of *Corunna*.

190B(7) Traditional physical connection

[163] The claim **does not satisfy** the condition of s 190B(7).

[164] Section 190B(7) provides that:

> 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.

[165] Dowsett J indicated in *Gudjala 2007* that to satisfy this condition there must be material to satisfy the Registrar that:

> ... the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta—at [89].

[166] Dowsett J indicated that an application which fails to satisfy the requirements of s 190B(5) will likewise fail this condition due to the requirement for material showing a 'traditional physical connection.' This aspect of the decision was not disturbed on appeal to the Full Court. I refer also to *Gudjala 2009* that:

> As to s 190B(7), much may depend upon the meaning of the term "traditional physical connection". I have not been referred to any authority on the point. It seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs. For the reasons which I have given, the requirements of that subsection are not satisfied.—at [84].

[167] In my view, the phrase 'traditional' physical connection means a physical connection in accordance with the particular traditional laws and customs relevant to the native title claim group, with 'traditional' having the meaning discussed in *Yorta Yorta*.

[168] The claim must therefore fail this condition as a result of my finding that it does not satisfy s 190B(5)(b) and (c).

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

[169] The claim **satisfies** the condition of s 190B(8).

[170] Section 190B(8) provides that '[t]he application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of section 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(1)

[171] 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. There are no determination of native title in relation to the area covered by the application: see Geospatial report dated 2 September 2013

Section 61A(2)

[172] 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. Although it appears that much of the area, which is in a heavily settled part of New South

Wales, will be covered by such acts, Attachment B contains a description of the internal excluded areas which references the PEPA provisions of the Act. I note that the description does not reference the relevant PEPA provisions of the *Native Title (New South Wales) Act* 1994 in relation to acts attributable to the State. However the 'catch-all' exclusion of areas where native title otherwise wholly extinguished would appear to clarify that areas covered by such acts are not covered by the application.

Section 61A(3)

[173] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. The description of the native title rights and interests claimed (see schedule E) identifies that exclusive rights are only claimed where there has been no extinguishment or the non-extinguishment principle applies.

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

[174] The claim **satisfies** the condition of s 190B(9).

[175] Section 190B(9) provides that:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:
>
> (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in the right of the Commonwealth, a State or a Territory, wholly owns the minerals, petroleum or gas;
>
> (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; or
>
> (c) in any case—the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).

Section 190B(9)(a): claims to ownership of minerals petroleum or gas wholly owned by the Crown

[176] The claim satisfies s. 190B(9)(a) as Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b): Offshore places

[177] The claim satisfies s. 190B(9)(b) as it does not extend to any offshore places.

Section 190B(9)(c): Other extinguishment

[178] The claim satisfies s. 190B(9)(c) as the application does not disclose, nor is there any information before me to indicate, that the claimed native title rights and interests have been otherwise extinguished.

190C Registration: conditions about procedural and other matters

[179] Section 190C(1) provides that '[t]his section contains the conditions mentioned in subparagraph 190A(6)(b)(ii).'

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

[180] The claim **satisfies** the condition of s 190C(2).

[181] Section 190C(2) provides that '[t]he Registrar must be satisfied that the application contains all details and other documents, and is accompanied by any affidavit or other document, required by sections 61 and 62.'

[182] In my view the application contain all of the details and other information and documents required by ss 61 and 62, as set out in the ***Table*** below. In reaching my decision, I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the things identified in s 190C(2). It does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)—*NT v Doepel* at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

[183] *NT v Doepel* is authority, in my view, that I must not look beyond the application, nor must I undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application (see ss 61(1) and (4)) is the correct native title claim group—at [35] to [37], [39] and [47]. That said, in seeking to verify that an application contains all the details and information required by ss 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s 61(1)—*NT v Doepel* at [35] to [37].

Table: *Identifying location of details/information/accompanying documents required by ss 61 and 62*

What is required under ss 61 & 62	**Location within Form 1 or other document**
s61(1) Persons who may make application	Form 1, Part A, 2
s61(3) Name and address for service	Form 1, Part B
s61(4) Native title claim group named/described	Schedule A
s62(1)(a) Affidavits in prescribed form	Affidavits by Scott McCain Franks and Robert John Lester filed on 19/8/2013

s62(2)(a) Information about the boundaries of the area	Schedule B (see Attachments B1 and B2)
s62(2)(b) Map of external boundaries of the area	Schedule C (see Attachment C)
s62(2)(c) Searches	Schedule D
s62(2)(d) Description of native title rights and interests	Schedule E
s62(2)(e) Description of factual basis	Schedule F (See Attachments F, F1–F4)
s62(2)(f) Activities	Schedule G
s62(2)(g) Other applications	Schedule H
s62(2)(ga) Section 24MD(6B)(c) notices	Schedule HA
s62(2)(h) Section 29 notices	Schedule I

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

[184] The claim **satisfies** the condition of s 190C(3).

[185] Section 190C(3) provides that:

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

[186] There are two previously registered native title determination applications which overlap the application are:

(a) the Gomeroi application (NSD2308/2011)

(b) the Awabakal and Guringai People application (NSD780/2013)

[187] I have considered the descriptions of the persons in the native title claim groups for these two claims and compared these with the native title claim group in the current application. I can find no common members between the two groups. There is nothing on the face of the

information in the current application to indicate that there are members in common. I am therefore satisfied that there are no members in common between the Plains Clans of the Wonnarua People claim group and the claim groups in the above two applications.

190C(4) Identity of claimed native title holders (authorisation)

[188] The claim **satisfies** the condition of s 190C(4).

[189] Section 190C(4) provides that:

> The Registrar must be satisfied that either of the following is the case:
>
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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 (original emphasis).

[190] The application is not certified under subsection 190C(4)(a). Section 190C(5) provides that if the application has not been certified, the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application includes a statement to that effect and 'briefly sets out the grounds on which the Registrar should consider that it has been met.'

[191] Scott McCain Franks and Robert John Lester are jointly the applicant and have each made an affidavit that accompanies the application. They each state that they are a member of the native title claim group via descent from an apical ancestor named in Schedule A of the application. On this basis, I am satisfied that the applicant is a member of the native title claim group. The application also contains the statements and a brief setting out of the grounds in Attachment R.

[192] Section 251B provides the meaning of the word 'authorise':

> 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.

[193] Authorisation in this case is asserted to have taken place pursuant to a mandated traditional decision making process, as described in s 251A(a) of the Act. Attachment R of the application and each of the affidavits accompanying the application by Scott McCain Franks and Robert John Lester sets out the details of the decision making process employed by the native title claim group to authorise the applicant to make and deal with the application.

[194] In this case, the applicant states that the traditional decision making process which must be followed has these features:

(a) a decision requires the agreement of each family group within the native title claim group
(b) the persons in each family group who make decisions for that family are the persons accepted by the other family members as their Elders
(c) the Elders determine with home and how they will consult before making a decision and each family group may appoint a representative authorised to speak for their family, who must report back to the Elders and follow instructions from the Elders.

[195] The applicant states that this process was followed:

(a) On 18 February 2012 when the Elders and other members of the claim group met in Singleton, and confirmed that decisions were to be made by the Heads of Family, by discussion and agreement between them. The recognised family heads at this time were ***Family Head1***, ***Claimant2***, ***Family Head2*** and Robert Lester. ***Claimant1*** has succeeded ***Family Head1***, who passed away recently.
(b) On 5 May 2013, when the family heads met at Mt Olive and authorised the two persons comprising the applicant to make the application and to do all things arising in relation to it.

[196] On the basis of the information in Attachment R and the affidavits by the applicant, I am satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group.

[end of statement]