National Native Title Tribunal

Registration test decision

Application name	Warrwa People (Combined)
Name of applicant	Stephen Dwayne Comeagain, Patricia Juboy, Gail Maria Williams, Debra Ann Maher, Elaine Ellen Laraia and Thomas Peter Williams
NNTT file no.	WC2014/004
Federal Court of Australia file no.	WAD258/2012
Date application made	3 October 2012
Date application last amended	4 July 2014

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

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

Date of decision: 26 November 2014

Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 8 August 2014 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

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

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Warrwa People (Combined) claimant application to the Registrar on 25 September 2014 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] The amended application is a combination of Warrwa People (WC10/12;WAD262/2010) and Warrwa People #2 (WC12/9;WAD258/2012).

[5] I am satisfied that neither ss 190A(1A) or 190A(6A) apply to this decision. That is because the application was not amended because of an order made under s 87 by the Court (as would be required for s 190A(1A) to apply). Section 190A(6A) does not apply as the effect of the amendments to the application do not fall within s 190A(6A)(d).

[6] Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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

[8] Pursuant to ss 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

Information considered when making the decision

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

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

[11] I have considered the information provided in the Form 1 and additional information provided by the applicant, including the Warrwa anthropological report (18 pages), affidavit of (Deponent 1) dated 17 April 2014, affidavit of (Deponent 2) dated 15 September 2010 and affidavit of (Deponent 3) dated 15 September 2010. I have also, in parts, considered information referred to in the registration reasons for decisions in relation to the pre-combined applications of Warrwa People (WC10/12;WAD262/2010) and Warrwa People #2 (WC12/9;WAD258/2012).

[12] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

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

Procedural fairness steps

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

[15] On 25 September 2014, the case manager wrote to the applicant and State and informed them of receipt of the amended application. This letter provided a date by which further information could be provided or submissions made. The letter also provided details of the decision timeframe. In addition, the letter to the State provided details of information that I would have regard to when considering the claim, being information that was not in the form 1. The letter set out my understanding that the State had copies of this information.

Procedural and other conditions: s 190C

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

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

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

[17] In reaching my decision for the condition in s 190C(2), I understand that this condition is essentially procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (Doepel), 119/[16] and also 123/[35] to 125/[39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s 61(1)

[20] The application must name the person or persons authorised to make the application and the persons on whose behalf the application is made, being the native title claim group.

The requirements of s 61(1) for the purpose of s 190C(2)

[21] Section 61(1) does not involve the Registrar going beyond the application, nor does it require any form of merit assessment of the material to determine whether 'in reality' the native title claim group described is the correct native title group— *Doepel*, 124/[37] and 125/[39].

[22] Section 190C(2) is framed in a way that 'directs attention to the contents of the application' and its purpose is to ensure that the application contains all the details and information required by ss 61 and 62. If, however, those contents are found to be lacking, this necessarily signifies problems. Thus, at the outset it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group'—*Doepel*, 123/[35].

Are the requirements of s 61(1) met?

[23] The application names six (6) persons as together comprising the applicant and states that they are authorised to make this application.

[24] Schedule A contains a description of the native title claim group that, in my view, appears to meet the requirements of s 61(1).

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

Name and address for service: s 61(3)

[26] The application must contain the name and address for service of the person who is, or persons who are, the applicant — s 61(3).

[27] Part B contains these details.

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

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

[29] Section 61(4) requires that the persons in the native title claim group be either named (s 61(4)(a)) or described sufficiently clearly (s 61(4)(b)) in the application. The nature of the task at s 61(4) is similarly confined by the parameters of the task at s 190C(2). The task at s 190C(2) is discussed above.

[30] I consider that the task here is different to that at s 190B(3), where I consider whether the description is such that I can be satisfied that 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

[31] As stated above, Schedule A contains a description of the claim group. This, in my view, meets the requirements of s 61(4)(b). I am satisfied that within the application at Schedule A there

is a description of the persons in the native title group which meets the requirements of s 61(4) for the purpose of s 190C(2).

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

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

[33] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form. This requires the inclusion of prescribed statements in the affidavit/s.

[34] In *Doolan v Native Title Registrar* (2007) 158 FCR 56 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The 'applicant' in s 62(1), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at 69/[67].

[35] Thus, this requirement is met by the filing of affidavits from each of the individual persons who together comprise the applicant.

[36] The application is accompanied by affidavits of the six (6) persons who are named as comprising the applicant.

[37] Each of the affidavits contains the statements that are required by s 62(1)(a)(i)-(iii). In addition, the affidavits contain the following statement for the purpose of s 62(1)(a)(iv) and (v):

> I am authorised by all the persons in the Warrwa native title claim group to make the application for a determination of native title and to deal with matters arising in relation to it.
>
> I was authorised at a meeting of the Warrwa Native Title Claim Group on 16 October 2013, held in Derby in the State of Western Australia. At this meeting, resolutions attached and marked "DAM1" were passed.
>
> At that meeting the Warrwa native title claim group authorised me in accordance with an agreed and adopted decision making process being majority decision by show of hands.

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

Details required by s 62(1)(b)

[39] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[40] The application must contain details and other information which describe the boundaries of the application area referred to in s 62(2)(a)(i) and (ii). These are the areas covered by the

application (s 62(2)(a)(i)) and any areas within those boundaries that are not covered (s 62(2)(a)(ii)).

[41] Schedule B states that the boundaries of the area covered by the application are described in Attachment B.

[42] Attachment B of the application is titled 'Warrwa No 2' and contains a metes and bounds description, which references native title determination application boundaries, deposited plans and coordinate points (shown to six decimal places).

[43] Those areas not covered by the application are described in Schedule B.

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

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

[45] Section 62(2)(b) requires the application to contain a map of the application area.

[46] Attachment C contains a map of the application area, showing its external boundaries.

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

Searches: s *62(2)(c)*

[48] Section 62(2)(c) requires details and results of any searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the application area.

[49] Schedule D contains the statement that 'no searches have been carried out by or on behalf of the native title claim group other than those detailed at Schedule H, HA and I'.

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

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

[51] Section 62(2)(d) requires that the application contain a description of the native title rights and interests claimed. This description must not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

[52] Schedule E contains a description of the native title rights and interests claimed and this does not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

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

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

[54] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii).

[55] Schedule F contains a description of the factual basis on which it is asserted that the native title rights and interests are said to exist. It includes information that relates to each of the assertions in s 62(2)(e)(i), (ii) and (iii).

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

Activities: s *62(2)(f)*

[57] The application must contain details relating to any activities carried out by the native title claim group in relation to the land or waters.

[58] Schedule G contains a statement that relates to activities carried out by the native title claim group on the application area.

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

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

[60] The application must contain details in relation to any other applications, of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application.

[61] Schedule H states that there are no other applications of this kind.

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

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

[63] Section 62(2)(ga) requires details of any notifications under s 24MD(6B)(c), which relate to the whole or part of the application area and which the applicant is aware of.

[64] Schedule HA contains a table setting out the details of notices under s 24MD(6B)(c) of the Act.

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

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

[66] Section 62(2)(h) requires details of any notifications under s 29 (or under a corresponding law), which relate to the application area and which the applicant is aware.

[67] Schedule I contains a table setting out the details of notices under s 29 of the Act.

Conclusion

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

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

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

[69] The requirement here is that the Registrar 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. This requirement, however, is only triggered if the previous application meets all of the criteria in s 190C — see *Western Australia v Strickland* (2000) 99 FCR 33 (*Strickland FC*), 38/[9].

[70] The requirements or criteria are that the previous application covered the whole or part of the area covered by the current application (s 190C(3)(a)), that there is an entry on the Register of Native Title Claims for the previous application when the current application is made (s 190C(3)(b)) and that the entry was made (or not removed) as a result of consideration of the previous application under s 190A (s 190C(3)(c)).

[71] The Geospatial assessment and overlap analysis dated 8 October 2014 (geospatial assessment) states that there are two overlapping applications with this application that are on the Register of Native Title Claims (Register). These applications are Warrwa (WC2010/012;WAD262/2010) and Warrwa #2 (WC2012/009;WAD258/2012). These applications are the pre-combined applications that now make up this combined application.

[72] In my view, it would be illogical to treat these applications, which are currently on the Register, as previous applications for the purpose of s 190C(3) given that they now together form this application. If this application meets all of the conditions of registration and is entered onto the Register, these two overlapping applications will be removed from the Register at a concurrent time. The alternative view would prevent the registration of such combined applications.

[73] Upon my understanding, the intention of s 190C(3) is to prevent the registration of multiple applications with overlapping members being on the Register at the same time. This will not occur here as the two pre-combined applications will be removed from the Register at the time this application becomes registered.

[74] The application satisfies the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

Under s 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

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

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

Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

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

[76] The application is not certified. Section 190C(4)(b) contains the relevant requirements, which must be satisfied.

Does the application contain the information required by s 190C(5)

[77] The information that is required by s 190C(5) is a statement that the requirements set out in s 190C(4)(b) have been met (s 190C(5)(a)) and the brief grounds on which the Registrar should be satisfied that it has been met (s 190C(5)(b)). The information must be contained in the application.

[78] Attachment R of the application contains the statement that 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. Attachment R also contains brief grounds on which the Registrar should be satisfied that the requirement in s 190C(4)(b) has been met.

[79] I am satisfied that the application contains the information required by s 190C(5).

The applicant's authorisation information

Affidavit of applicant persons

[80] The affidavit of each of the persons who comprise the applicant speaks to their authorisation at a meeting on 16 October 2013 held in Derby in Western Australia. The affidavits state that the persons comprising the applicant were authorised in accordance with an agreed and adopted decision making process, being by majority show of hands.

Authorisation meeting resolutions record

[81] Attached to each of the affidavits is a document titled 'record of all resolutions passed.'

[82] This document records that the second resolution passed at the meeting related to the decision making process. The resolution passed unanimously is recorded as confirmation that there is no process under the traditional laws and customs that must be complied with in relation to authorising decisions of this kind and that the agreed to process would be to make decisions by majority, which would be effected by show of hands.

[83] Resolution four and resolution five relate to the authorisation of the applicant in respect to the individual claims for Warrwa #1 and Warrwa #2. Resolution four, which is specific to Warrwa #1, refers to the following persons being named to act as the applicant for Warrwa #1: 'Stephen Comeagain, (Person 1), (Person 2), Gail Marie Williams, Patricia Juboy, Elaine Larai, Debra Maher and Thomas Williams, or such of them as are eligible to act as an applicant, and who remain willing and able to do so.' Resolution five, which relates to Warrwa #2, resolves that 'the applicant authorised on 23 August 2012 to make, and to deal with matters arising in relation to native title determination application WAD 258 of 2012 in the Federal Court of Australia, is authorised to make, and to deal with matters arising in relation to, that application, in accordance

with the terms of the resolutions passed at the meeting of the native title claim group for the application.'

[84] Resolution six, which was also passed unanimously, is recorded as the combination of Warrwa #1 and Warrwa #2 application. The resolution in the records appears as:

> This meeting authorises and directs the applicants authorised today in relation to the Warrwa #2 claim and the Warrwa #2 claim WAD 258 of 2012 to apply to the Federal Court of Australia to amend those claims by combining them into a single claim, once they are in a position to do so, with the authorisation of the applicant for the combined claim to be on the same terms as for the replacement applicant for the Warrwa #1 claim authorised today.

Affidavit of (Deponent 1)

[85] An affidavit of (Deponent 1) (the solicitor on record for the applicant) dated 17 April 2014 was provided to the Registrar. The affidavit provides details relevant to the applicant's authorisation at the meeting on 16 October 2013.

[86] (Deponent 1) refers to the notice given for the meeting, explaining that the notice, included (among other things), details of who was invited to the meeting (i.e. members of the Warrwa #1 and Warrwa #2 applications), the date and place of the intended meeting, the business of the meeting and a map of the claim area. A copy of the notice is attached to the affidavit.

[87] The affidavit also provides information about the conduct of the meeting. For instance, (Deponent 1) sets out at [13] to [20]:

> On 16 October 2013, I attended the Authorisation Meeting and was present throughout the meeting.
>
> The employees of the KLC in attendance were (Person 3)(senior legal officer), (Person 4), (Person 5), (Anthropologist 1) (consultant anthropologist), (Person 6), (Person 7), (Person 8), (Person 9), (Person 10), (Person 11)and (Person 12)(from the Kununurra office).
>
> The KLC ran the registration process for the meeting, which I observed. This process was as follows:
>
> (a) the KLC was set up at the door of the meeting room. Each person who entered the meeting room identified whether the person descended from one of the apical ancestors of the claim group description (that is, those people listed in the Warrwa #2 Claim column in paragraph 7 above);
>
> (b) those people who were Warrwa people who descended from an apical ancestor were given a yellow wristbands to wear. People with yellow wristbands could vote and participate in the meeting;
>
> (c) other people at the meeting were given green wristbands. These people were either guests or spouses of claim group members, or people who claimed to be Warrwa people and considered themselves part of the group, but who are not descendants of a current apical ancestor. These people could attend the meeting but could not vote.

> The Authorisation Meeting was not conducted on a 'closed' basis, by which I mean that non-members of the Warrwa people claim group were permitted to attend the meeting. However, as described above, those people wore different coloured wristbands and were not permitted to vote.
>
> According to the KLC minutes of meeting, which were provided to me by (Person 3) on 11 December 2013 on a confidential basis, 93 Warrwa people registered their attendance at the authorisation meeting. A copy of the attendance register for the authorisation meeting is attached and marked "JCF-03" (only the first two pages of the meeting minutes are included and some information has been deliberately redacted as the meeting minutes are confidential).
>
> The numbers present at any one time during the meeting varied throughout the day.
>
> (Person 3) and I facilitated the Authorisation Meeting. Throughout the meeting, we advised the Warrwa people present, gave presentations on relevant topics, explained the proposed resolutions and discussed relevant matters including calling for and answering questions.
>
> Each proposed resolution was put to the group for consideration, discussion and decision and was displayed on a projector screen. A copy of the KLC record of all resolutions passed at the Authorisation Meeting, which was provided to me by (Person 3) on 28 October 2013, is attached and marked "JCF-04". The key resolutions for the purpose of this Application are discussed below.

[88] The affidavit then sets out details of the resolutions passed.

[89] Following this, (Deponent 1) provides information about events subsequent to the authorisation meeting, such as the decision of (Person 1) to 'resign' as an applicant and the passing of one of the named persons who was authorised to comprise the applicant. The name of that person is withheld from the affidavit.

The task at s 190C(4)(b)

[90] The task at s 190C(4)(b) requires that I must be satisfied as to the 'fact of authorisation'. The Registrar's task at s 190C(4)(b) is distinct from that at s 190C(4)(a) and 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' — *Doepel*, 134/[78].

[91] As part of that inquiry through the relevant material, the Registrar must consider issues of the kind that have 'been identified judicially as relevant to an issue of authorisation'— *Evans v Native Title Registrar* [2004] FCA 1070 (*Evans*), [42].

[92] Ultimately what is required to satisfy the Registrar must be 'understood in the particular circumstances and as taking its colour from those circumstances' — *Evans*, [42].

First part of s 190C(4)(b) – applicant is a member of the native title claim group

[93] The first aspect of s 190C(4)(b) requires that I be satisfied that the applicant is a member of the native title claim group.

[94] As indicated above in my reasons, Attachment R contains a statement to this effect. The affidavits of each of the persons who comprise the applicant swear to the truth of the statements in the application.

[95] In that regard, I am of the view that I can be satisfied that the applicant is a member of the native title claim group.

Second part of s 190C(4)(b) – applicant is authorised to make the application and to deal with matters arising in relation to it by all the persons in the native title claim group.

[96] Section 190C(4)(b) is such that requires the Registrar to consider whether he or she can be satisfied that the identified native title holders authorised the applicant to make the application in accordance with s 251B — see, for instance, *Wiri People (Watson) v Native Title Registrar* (2008) 168 FCR 187, 195/[26] to 197/[36].

[97] Section 251B specifies that *all the persons* in the native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b). The identification of the appropriate decision-making process and whether it was complied with is a primary consideration—*Noble v Mundraby* [2005] FCAFC 212 (Noble), [16].

[98] The law, however, is such that the word 'all' in the context of authorisation, has 'a more limited meaning than it might otherwise have.' That is, it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'— *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*), [25].

[99] What is a reasonable opportunity, in my view, will also manifest from the particular circumstances of the matter.

[100] As indicated in the outline of material before me relating to the applicant's authorisation, the authorisation meeting was notified by Kimberly Land Council. I cannot ascertain from the information as to how the notice was publicised, however the form of the notice is such that it seems reasonable to assume that it was placed in either a regional or local publication.

[101] The notice contains the date, time and place for the meeting and also details of who was invited to attend. The notice also contains quite specific details about the business of the meeting, including that decisions about a new set of persons to comprise the applicant, including the possibility of 'removing some or all of the existing people from the applicant lists, and/or adding new people to the applicant lists' for the Warrwa #1 and Warrwa #2 applications. Importantly, the notice also foreshadowed that a decision about whether the two claims should be combined into a single claim would be considered. The notice contained a map of the areas covered by the Warrwa #1 and Warrwa #2 applications.

[102] The affidavit of (Deponent 1) contains information about attendance at the meeting, including that 93 Warrwa persons are recorded as registering their attendance.

[103] In *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 Rares J, in the context of authorisation under s 251B, emphasised the importance of the content of the notice for giving persons a reasonable opportunity to participate. In that regard, His Honour held that 'fair notice of the business' of the meeting was significant and that the notice must be such 'as will fully inform persons entitled to attend' so that the decision they make about attendance is an informed one — [40] to [41].

[104] In my view, the notice is quite clear and detailed about the business of the meeting. Thus, it appears to give the relevant persons a fair view of what was to be decided. It is unclear from the material as to what proportion of the native title claim group was in attendance. However, 93 persons is not an insignificant number and thus, in my view, suggests that the notice reached the relevant persons.

[105] The actual conduct at the authorisation meeting is also significant in deciding whether I can be satisfied that persons were given a reasonable opportunity to participate in the decisions that were made.

[106] The material elicits that persons who attended and who were descended from a relevant Warrwa ancestor[1], were given a yellow wristband to signify that they could participate in the meeting. The meeting was facilitated and each resolution was put to the persons present for consideration, discussion and decision.

[107] The first resolution related to the relevant decision making process under s 251B. This resolution was passed and its effect was that, there being no decision making process under the traditional laws and customs, a decision making process was agreed to. This contemplated that decisions would be made by majority. The meeting records evidence that this resolution was passed unanimously.

[108] Resolution four (4) relates to the naming of the persons to comprise the applicant. In addition, the meeting records evidence that the authorisation of these named persons to make the combined Warrwa claim was also passed unanimously adopting the process that was agreed to (Resolution six (6)).

[109] The meeting records detail the nature of the authority given to the named persons, including that even where one or more of those persons became unwilling or unable to act then the authority of the remaining persons would continue. Thus, even though two of the named persons authorised on 16 October 2013 subsequently became either unwilling or unable to act prior to making the amended Warrwa combined application, I am satisfied that the nature of the

[1] I note that the affidavit of Jonathan Fulcher refers to the list of ancestors for the Warrwa #2 claim. The ancestors for Warrwa #1 and Warrwa #2 are consistent.

authority was that the other persons were given the authority by the native title claim group to make the application and to deal with matters arising in relation to it.

[110] For the reasons set out above, I am satisfied that 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 persons in the native title claim group.

Merit conditions: s 190B

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

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

[111] This condition of registration requires that the Registrar be satisfied that the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

[112] This requires the Registrar to undertake a consideration of the description and map of the application area, and to be satisfied that the boundaries of the area covered, and those areas not included, can be sufficiently identified.

[113] Attachment B of the application contains a metes and bounds written description of the application area with coordinate points. Attachment C is a colour map of the external boundaries of the application area. It includes the application depicted in bold outline with a hachured infill.

[114] I have reviewed and considered the geospatial assessment, which states that the description and map of the external boundaries are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[115] Schedule B contains a list of general exclusions of areas within the boundary, described in Attachment B and shown in the map at Attachment C, that are not covered by the application. Upon my understanding, the general formulaic approach is one that is typically used in native title determination applications and is an approach that reflects that such issues are often not settled until the final stages of a matter.

[116] Having considered the information in the application and the geospatial assessment I am of the view that both the written description and the map of the application area are clear and identify the area covered with reasonable certainty. Thus, it is my view that 'the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular land or waters.'

[117] The application satisfies the condition of s 190B(2).

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

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

[118] Schedule A contains the following description of the native title claim group:

> The native title claim group consists of people known as the Warrwa people, being those Aboriginal people whose traditional land and waters are situated generally in the district of Derby in the State of Western Australia.
>
> The individuals who comprise the Warrwa people's native title claim group are the descendants of the following Apical Ancestors:
>
> a. Gudayi
> b. Bobby Ahchoo
> c. Milngangurru
> d. Djabilangurul
> e. Cararangudu
> f. Rimarrangudu
> g. Binjangudu
> h. Lanjangudu
> i. Walgananudu
> j. Warlayakudang
> k. Galera
> l. Topsy Mouwudjala
>
> Descendants of the above listed Apical Ancestors includes people adopted in accordance with Warrwa traditional law and custom, that is, a person is adopted if they are 'grown up' by a person who is or was a descendant of one of the Apical Ancestors and was under 2 years of age when they started being 'grown up' by that person.

[119] The nature of the task at s 190B(3)(b) is to consider 'whether the application enables the reliable identification of persons in the native title claim group' — *Doepel*, 128/[51].

[120] That is, the description in the application must operate to effectively describe the claim group such that members of the claim group can be identified — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*), [33].

[121] In, *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v NTR*) Carr J considered a description of a native title claim group where members were described using three criteria or rules, including descent (biological) and adoption. His Honour infers that the necessity to engage in some factual inquiry regarding the criteria 'does not mean that the group has not been described sufficiently.' Nor is it fatal that the application of the rule may prove difficult — 109/[67].

[122] Here, the description essentially includes one criterion, which is descent from a named apical ancestor. The description also includes persons who are considered descendants of those persons via adoption. The description includes information on what is considered to be 'adoption' consistent with the traditional laws and customs. Whilst some factual inquiry into who those descendants are will be necessary, the description in my view includes objective criterion from which it will be possible to ascertain whether any particular person is in that group.

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

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

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

[124] For the purpose of s 190B(4) the Registrar must be satisfied that the description of the native title rights and interests claimed 'is sufficient to allow the native title rights and interests claimed to be readily identified.'

[125] Whilst it is open to me to find at s 190B(4), with reference to s 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests, I am of the view that a consideration of the rights and interests in reference to s 223 should be the task at s 190B(6) — *Doepel,* 144/[123].

[126] Schedule E contains a description of the native title rights and interests claimed. The native title rights and interests claimed include both exclusive and non-exclusive rights and interests. In my view, these rights and interests are clear and appear to have meaning as native title rights and interests.

[127] The application satisfies the condition of s 190B(4).

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

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

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

Combined reasons for s 190B(5)

[129] The applicant must describe the basis upon which the claimed native title rights and interests are alleged to exist. This means that the factual basis must be sufficient to support the assertion that rights are vested in the claim group and further it is 'necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) **[**hold] the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007],* [39].

[130] The Registrar must consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that regard, the law provides specific content to each of the elements of the test at s 190B(5)(a) to (c) — see, for instance, *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*).[2]

[131] Whilst the Registrar must assume that the facts asserted are true and only consider whether they are capable of supporting the claimed rights and interests, there must be adequate specificity of particular and relevant facts within the claimant's factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5) — *Gudjala FC, 340*/[92]; *Doepel,* 120[17].

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

[132] For the purpose of s 190B(5)(a), the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007],* [52].

[133] I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but I am not obliged to accept broad statements which are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16, [26] and *Corunna v Native Title Registrar* [2013] FCA 372, [39].

The factual basis in support of this assertion

[2] Also note that the Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*, including His Honour's assessment of what was required within the factual basis to support each of the assertions at s 190B(5)— See *Gudjala FC* [90]–[96]. His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

[134] In terms of the factual basis in support of an association dating back to pre-sovereign times, the facts asserted include that:

- In 1886 Gibney records coming across various Aboriginal groups in the Dampierland Peninsula which may have included Warrwa people in the area of Goodenough Bay (to the North West of the application area). Gibney referred to the 'Stokes Bay tribe' which was likely to be the group that Tindale later referred to as the 'Big Warrwa' — Schedule F;

- Tindale (1953) found that Big Warrwa's traditional country lay between Derby and Meda and would therefore include the Stokes Bay area — Schedule F;

- Tindale refers to the Warrwa as being divided into two groups, 'the little Warrwa to the south of the river and the Big Warrwa between Purula (Derby) and Meda Station' — Schedule F;

- Tindale (1947) summarises the ethnographic picture of Warrwa traditional lands as being located on the south western side of King Soung, stretching around to the eastern side of the Sound to Stokes Bay and extending inland over Meda Station — Schedule F.

- Tindale, in his 1953 genealogies, notes that Warrwa people were at Derby and Meda Station and information in these genealogies suggests that, at that time, groups of Warrwa people were moving between Meda Station and Derby. Information by current Warrwa claimants indicates that Meda Station has been a key area for Warrwa people since the turn of the century — Schedule F.

[135] The Warrwa anthropological report also records other historical accounts of the Warrwa in the vicinity of the claim area and its surrounds — see Warrwa anthropological report, pages 2 -7.

[136] In summary, the Warrwa anthropological report states that 'the overall ethnographic picture of Warrwa traditional lands is that they are located on the south-western side of King Sound stretching around to the eastern side of the Sound to Stokes Bay and then extending inland over Meda Station' — Warrwa anthropological report, page 4.

[137] More specific accounts of the native title claim group's historical association are provided in affidavit material, where the deponents set out their knowledge of how their ancestors (including some of the apical ancestors listed in Schedule A) were associated with the claim area (or its near surrounds).

[138] In the affidavit of(Person 2), dated 15 September 2010, who was born in the claim area in 1951, he recalls his ancestors association with the claim area, including:

> I'm Warrwa through my mother's side. I can trace this back to Warlawheygudang, my gumbali (name sake) and Galera, his wife [both Warlayakudang and Galera are apical ancestors listed in Schedule A] — [12].
>
> My great grandmother Galera was named after that place called blue holes which is on Warrwa country between Point Torment and Meda — [13].
>
> My Grandfather on my father's side was called (Person 13)[a named ancestor in Schedule A]. He was born in Derby near the Boab Inn. There use to be an old well there. His father was a Malay/Chinese working as a cook and his mother was Garaii — [14].

[139] I note that I have had regard to the delegate's reasons for decision in Warrwa #2 (WC2012/009;WAD258/2012) as that application area now forms part of this combined application. In the reasons for decision, the delegate refers to an affidavit of (Person 22) dated 9 December 2010, where he speaks to the association of his ancestors. This includes references to his father and his father's mother, a Warrwa woman named Gudayi [an apical ancestor in Schedule A], whose country was near Point Torment area. The delegate also refers to information in his affidavit, which refers to the special places on Warrwa country 'like Gowarlgowari, Mirlala (on the May River near Meda Station), Bindjangurru (near Point Torment lighthouse) and Lungunbagurdany (Brandy Bore)' — delegate's reasons for decision dated 9 November 2012, p 25-26.

[140] A factual basis supporting the continuity of association, is demonstrated within the affidavit material. For instance, in the affidavit of (Deponent 3) she speaks to her own association and that of her parents and grandparents:

> I was born in Derby native hospital in 1953. I was raised on Meda Station, which is on Warrwa traditional country. I have three bush names. I have one called(Deponent 3). My mum gave me this name it is a Warrwa name from an old girl from the Warrwa tribe. She's buried near Jalbi Point which is on the mud flats near Derby. Now I have given that name to my granddaughter (my brother's daughter's daughter). When I pass on she will have something to remember me by — [1].
>
> My mother is (Person 14)she is Warrwa and her name is (Person 14) from the old Warrwa people. Although she has three bush names she likes to be called(Person 14). My mother's mother was Fanny Marker her Warrwa name is Jilegnung. Fanny's mother was also Warrwa and her name was Topsy Mouwudjalla, this last name is a Warrwa name, her Aboriginal names were Gulluahlung and Galera. My younger sister (Person 15) has that same bush name as my mother's grandmother — [4].
>
> My father went through Warrwa law on Meda station at the old camp on the other side of the billabong. There are men's sites on Meda that I know I cannot go. When I used to go out looking for Koonkuberry and I would get close to a place where I was not supposed to go, the old people would call out to me *don't go there that is no good place* — [8].
>
> My father was a stockman, he used to work the cattle along the May River near Emmanuel yard and Poulton's pool. He used to camp along the River. When I was a child on Meda I used

> to go with (Person 16), my uncle, and the station manager(Person 17), to check the bores and check up on the stock camps. They used to take us kids along for the ride. We use to go to Sundown then Lloyd Bore then Suprise Bore. From there we would go onto Norman Creek and onto Number 6 Bore and then follow the old Blina road back to the highway. We know that country really well as we used to travel all through there — [13] to [14].
>
> We hunt right through the Application area through Blina and Kimberly Downs — [15].

[141] (Person 2) also provides information about the continuing association of the Warrwa people in his affidavit dated 15 September 2012, including that he grew up in Meda until he was seven and then went to live in Derby to attend school. His father and him hunted all around Meda. When his mother was a young girl, she travelled around Meda on foot following the May River for Law business. He says that he knows the application area well as he is a traditional owner of the country and that:

> That place called Bilarn, the old police camp near Mundamah (Poulton's Pool) on the May River, is good for goanna, turkey and emu. The place along the May River, the crossing point to the old peoples' camp at Poulton's Yard, is also a good place for hunting. I helped the hold people build the yard there as a kid during my holidays from the mission. I camped and hunted with old (Person 18)(my mum's older brother) and (Person 16) all around that place when I was a child — [29].
>
> When my mother was a young girl she travelled on foot from Meda, following the May River all the way to Bulmaningada for ceremony, Law Business. They would follow the traditional route to the Law ground, talking to family spirits and camping at named places along the way. This was during the build up to the wet season. All the groups Unggumi, Ngarinyin, Bunuba and Nyikina would gather there — [30].
>
> I know the Application Area really well because I am a traditional owner for that country. We hunt inside that area all year around [sic]. I learnt hunting there as a child with my father(Person 19), (Person 16)and(Person 18). I take my children hunting there and we get mangaidia (bush turkey) during the winter season when they are fat. Number 6 is a good place because it has a billabong there and the mangaldia (bush turkey) go there to drink during the dry. The Gwania (goannas) are there during the wet season when they come out of hibernation to eat and breed. There is also another billabong in there where we get Jibilyu (whistling duck) and Goodilyu (black duck) — [31].

Consideration

[142] In considering the sufficiency of the claimant's factual basis material to support the assertion at s 190B(5)(a) I have had regard to the map of the claim area provided with the application. I have also been able to search places and place names using the Tribunal's Ispatial mapping to identify their location and proximity to the claim area.

[143] The historical references that are contained in the Warrwa Anthropological Report provide facts that support the association of the predecessors dating back to at least contact.

[144] Within the material there are facts relating to the association of the immediate forebears of the claim group, including references to parents and grandparents and their association with the claim area. The affidavits also contain references to some of the named ancestors in Schedule A, who are used to define the claim group. For instance, in the affidavit of (Person 2) he refers to his great grandmother, Topsy Mouwudjalla and her association with the claim area. He also refers to his own association and that of his children and grandchildren. This kind of information shows the continuity of association, dating back to a period in the late 1800s and enduring to today.

[145] The affidavit material also speaks to the current association of the native title claim group with the application area.

[146] I have also considered whether the factual basis is sufficient to support the assertion of an association with the whole group and the area. In my view the factual basis material overall provides adequate examples of how claim group members are associated with the whole area and how their predecessors were similarly associated.

[147] The factual basis is sufficient to support the assertion at s 190B(5)(a).

Section 190B(5)(b) - that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

[148] In requiring that the factual basis describe the basis of the native title claim group's entitlement to the claimed rights and interests, the focus of s 190B(5)(b) is upon the existence of traditional laws and customs acknowledged and observed and that give rise to the claimed native title rights and interests.

[149] The phrase 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s 223 of the Act and, thus, the meaning to be afforded to the term 'traditional' in s 190B(5)(b) can be derived from cases that explore s 223—see *Gudjala [2007]*— [26] and [62]–[66] (citing the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422 (*Yorta Yorta*)).[3]

[150] In *Gudjala [2007]*, Dowsett J observed that '[t]here can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived', with the starting point for any consideration being whether the facts identify an indigenous society at the time of sovereignty — [66].

[151] In the context of the registration test (and explicitly the task at s 190B(5)(b)), it is clear that the facts asserted, assuming that they are true, must be capable of supporting the assertion that there are 'traditional' laws and customs, acknowledged and observed by the native title claim

[3] This aspect of the judgment was not criticised by the Full Court, and see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*)—at [19]–[22].

group and that give rise to the claimed native title rights and interests—*Gudjala [2007],* [62] and [63].

The factual basis in support of this assertion

[152] Schedule F asserts that the Warrwa People acknowledge and observe traditional laws and customs that give rise to the claimed native title rights and interests. This includes laws and customs that give rise to rights and interests in the land and waters, rights and interests which vest in members of the claim group on the basis of ancestral connection to the area, traditional religious knowledge and responsibility to the area, traditional knowledge of the geography and resources of the area and traditional knowledge of ceremony — Schedule F.

[153] Schedule F identifies Warrwa as the name of a language group located in the vicinity of the township of Derby. The ethnographic record refers to various named groups within the region, which were culturally and linguistically related. Although the Warrwa is linguistically related to other groups, it is identified as a separate language group.

[154] The social organisation of the relevant society is of a four class or section system and land ownership is vested in local estate groups. The Warrwa anthropological report records the following in relation to social organisation and local groups:

> In the genealogies Tindale records kinship terms that are being used by the people living at Meda Station at this time. This shows that kinship terms were used by people in the early 1950's [sic] in and around the current claim area, which indicates that the warrwa were a vibrant society of native title holders. Tindale also records on his Meda genealogies a statement which simply reads: 'I follow Warrwa law'. He does not state who the informant was but we can infer that at least one person at Meda during the 1950's [sic] was practicing Warrwa Law and customs.
>
> In terms of Warrwa landownership(Antrhopologist 2) &(Anthropologist 3) say that:
>
> *The principles of land ownership for the proposed development area [in Warrwa country]...rests with localised groups that are presumptively patrilineal. It is possible that long term residence, location of graves of relatives, and possibly conception and quickening may have an influence on ownership.*
>
> On the basis of the available literature, it would seem that representatives from two remaining Warrwa estate groups remain: (Person 14) estate group (she is generally identified with Meda Station where she was born) and the 'Emma Gnuda' [Imamangurra] estate group ((Person 2)'s father,(Person 14)'s husband, is reported as being from this group, as is(Person 16)'s father) identified with the Derby – Point Torment area. It is not clear whether these two groups covered the entirety of the area associated with Warrwa on the eastern side of the King Sound, but it appears as though they may do. According to(Person 20), and as reported by ethnomusicologist(Anthropolgist 4), 'Nyul Nyul people used to travel to Warrwa territory on the lower Fitzroy River for initiation ceremony ((Anthropologist 4)1990, p269).

[155] The Warrwa anthropological report sets out historical references to the Warrwa people in the claim area. For instance:

In 1901 Bates produced a hand-drawn map where she locates Warrwa on the southern side of the King Sound (an approximate copy of the map is attached as the map was unable to be copied). There is no date on the map but Bates was living in and actively gathering information about the Kimberly circa 1901. The map is located in Folder 1 of the Daisy Bates Special Map Collection at the National Library of Australia. She also observes:

The Nyul Nyul (species of snake) were north of Waddiabbulu and Warrwai and occupied the Beagle Bay and Disaster Bay (King Sound) districts. The Nyul-nyul were also called Kunian and Waddiabburlu, by the Warrwai and Kularrabulu people...

At Cape Boileau the Waddeeabbuloo or Koonean (both names meaning "north") come in and run northward round Carnot Bay towards Ord Springs. Eastward of the Koolarrabuloo and Waddeeabbuloo are the Waiungaree and Warrwai, who are found in Derby and northwards Disaster Bay, King Sound.

Bates also says:
North of the Waiungarri were the Warr-wai, who, with the Waiungarri, were to be found in the Derby district and along the western shore of the King Sound....

The people inhabiting Sunday Island call themselves Tchau-i. Their western neighbours were the Barada, Nyul nyul, and Warrwai, with whom they intermarried, crossing the intervening waters in the mangrove log rafts or canoes. (Bates, 1985).

[156] The deponents in their affidavits speak to the laws and customs that they and their parents and grandparents have acknowledged and observed. In his affidavit (Person 2) records that:

My Mimi (grandmother) was also Warrwa. Her name was Fanny. Her Aboriginal names was Galaung. Her mother's name, was Topsy Mouwudjalia, she was also Warrwa — [9].

Topsy was marred to Paddy Widdi Widdi. He was a Lardingua man (Worora). Those old men like Paddy married Warrwa women and lived at Meda and followed Warrwa law — [10].

They were taught Warrwa law by Waluwaygudang. Paddy became a man in his own country but because he married into Warrwa and lived on Warrwa country he followed Warrwa law. I was told this by my Mum and by my other father (father's brother),(Person 16). He knew this because he grew up on Manje mission, In Dambimanangari country before he went to Meda. The Dambimanangari elders taught him the importance of Paddy. When he went back there as an adult they showed him where Paddy had been buried in a gundading (tree top burial) – a burial for bosses — [11].

I'm Warrwa through my mother's side. I can trace this back to Warlawheygudang, my gumbali (name sake) and Galera, his wife — [12].

My great grandmother Galera was named after that place called blue holes which is on Warrwa country between Point Torment and Meda — [13].

When I was ten years old I went with my oldest cousin and father to Sunday Island and my father then went through Bardi Law to respect both sides. But my father followed Warrwa Law because he then lived at Meda where he was initiated first — [20].

I was taught to hunt by my father with a spear. I was shown how to make spears and womeras by my uncle, (Person 21)— [24].

> My father and I hunted Bardgooo (kangaroos), Gudabuloo (wallaby) all around Meda. We would make the spear from bamboo and wongain (wattle tree) and use resin from spinifex. The spear head was made from Quartz or old bottles. We used to trade the jarangard (boomerang tree – beefwood tree) in our country with the Quartz from Worora country. When other groups visit they would bring something from their country for trade. When you make that spear you use the bamboo as the main shaft. The wattle is the strong bit where the spear head is inserted and that is where the Spinifex resin is applied to the head — [25].

[157] In her affidavit, (Deponent 3) records that:

> My mother told me that my skin name is (Deponent 3)— [5].
>
> My father (Person 19) was raised by Warrwa old people on Meda Station. He followed Warrwa law and was taught Warrwa stories, these stories were passed on to us — [7].
>
> My Rai is from the May River from Millarla, I know that place. My Rai was a saltwater crocodile, my crocodile was a funny crocodile and had crooked jaws and the Barramundi were not scared of him, my mother and father saw him, but after I was born they never saw that crocodile anymore — [22].
>
> All my nieces and the young people in the family have their Rai — [25].

Consideration

[158] In considering the sufficiency of a factual basis for the purpose of s 190B(5)(b) it is clear that the starting point is that it must identify the relevant pre-sovereignty society. That is, there must be some basis for my inferring that the factual basis elicits details of a pre-sovereignty society 'which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'. The facts set out must, in turn, sufficiently support the assertion that those laws and customs give rise to the claimed native title rights and interests of the native title claim group—*Gudjala [2007],* [62], [66] and [81].

[159] There are also other matters that are relevant to the sufficiency of a factual basis for this requirement. For instance, if descent from named ancestors is the basis of claim group membership, the factual basis must demonstrate some relationship between those named ancestors and the relevant pre-sovereignty society from which it is said that the laws and customs are derived (*Gudjala [2009], 74*/[40]). Further, to this, the factual basis must contain some explanation of how current laws and customs are said to be traditional. A sufficient explanation of such does not transpire from the mere assertion that the laws and customs are traditional nor the assertion that laws and customs are traditional because they have been handed down from generation to generation (*Gudjala [2009],* 76/[52] and 77[55].

[160] The factual basis identifies Warrwa as a language group or linguistic tribe that at sovereignty shared cultural and linguistic characteristics with other groups in the region of the

claim area. The factual basis suggests that the Warrwa formed a language subgroup of a larger community.

[161] The historical record and other material provides a link between the named ancestors of the native title claim group and the relevant pre-sovereignty society. For instance, the Warrwa anthropological report notes the research of Tindale, which traces ancestor Topsy Mawurijala who was in the area in the in the 1940s and identified as Warrwa as well as her descendants. This is obviously after contact with the area. However, at the time, the ancestor Topsy is recorded as an 'old woman' and had most likely been in the area since around the late 1800s. The following passages reflect the relevant information:

> Topsy who was married to Paddy who can clearly be traced to the current claim group. Topsy is labled Topsy Mawurjala on his genealogies and can be identified as the apical ancestor Topsy Mouwudjalla. Topsy is (Person 2)'s Mother's Mother's Mother. Current claimant (Person 2) is also named on the Meda genealogies of 1953 as being a 2 year old child, the son of (Person 14)who identified as a Warrwa woman, the daughter of Fanny again identified as a Warrwa woman, and the daughter of Topsy. This information accords with the current claimant's knowledge.
>
> ...
>
> Further Tindale also lists the name of aborigines present on Meda station on June 30th 1943. These names include(Person 14), who is almost definitely (Person 2)'s mother a Warrwa woman who is still alive. This list also includes (Person 19) who is likely to be (Person 2)'s father. Topsy is again recorded on this list as well as the genealogies as being an old woman on Meda station.

[162] The affidavit material also provides the link between some of the named ancestors and the pre-sovereignty society. For instance, (Person 2) identifies that his great grandmother Galera was named after a particular place on Warrwa country between Point Torment and Meda — [13].

[163] There is some information contained in the factual basis material that provides examples of the traditional laws and customs and some explanation of how the laws and customs followed today can be said to be those of the relevant society at sovereignty. For instance, the Warrwa anthropological report speaks to the local or family estate group as holding rights and interests in particular land and suggests that those principles of land ownership have endured to the present context.

[164] The affidavit material also provides examples of current acknowledgement of laws and customs taught to claimants by their forebears. For instance, the affidavit of (Deponent 3) (born in the claim area in(Date)) recites her knowledge of transmission of laws and customs, such as her father going through Warrwa law on Meda station and her learning how to hunt and collect food using traditional methods.

[165] In my view, the factual basis is sufficient to support the assertion at s 190B(5)(b).

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

[166] This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. Upon my understanding, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

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

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'—72/[33].

[168] As indicated above in my reasons, there is within the applicant's material facts about the relevant society at sovereignty, as well as information about the relevant laws and customs. In this instance, the factual basis provides a link between the named ancestors of the group set out in Schedule A and the relevant pre-sovereignty society. This is done via historical and expert accounts of the area that identify the boundaries of the country of the Warrwa linguistic tribe and identify that some of the named ancestors were associated with that area and identified as Warrwa. There may also be said to be sufficient facts within the factual basis that provide some explanation of how current laws and customs may be said to be those of the pre-sovereignty society. There is, for instance, information that supports the transmission of laws and customs from the period around contact.

[169] The factual basis is sufficient to support the assertion at s 190B(5)(c).

Conclusion

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

Subsection 190B(6)
Prima facie case

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

The task at s 190B(6)

[171] A right or interest may be said to be prima facie 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel*, 146/[135].

[172] It does, however, involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Furthermore, where appropriate, 's 190B(6) may also require consideration of controverting evidence' —*Doepel*, 145/[126] to[127] and 146/[132].

[173] In *Gudjala [2007]*, Dowsett J referred, in relation to this requirement, to the decision of the High Court in *Yorta Yorta* and to the Court's consideration of s 223 and 'traditional', where it held that 'the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question'—29/[86].

[174] Native title rights and interests, as defined under s 223, are those that:

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

[175] Thus, I must consider each individual right and interest claimed in the application to determine if they can, prima facie, meet these requirements. I note that there is no information before me which suggests that the native title rights and interests over the area have been wholly extinguished.

[176] In that native title '***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law' (*Yorta Yorta,* 37/[110]) I consider that a prima facie case to establish a particular native title right or interest would be one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

[177] I now turn to consider each of the rights and interests claimed in Attachment E of the application. In some instances I will group related rights and interests together.

Consideration of the rights and interests claimed in Attachment E

Over areas where a claim to exclusive possession can be recognised, the Warrwa People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world.

[178] In *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*), the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—93/[89] and 94/[93].

[179] In *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> [T]he question whether the native title right of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—413/[71].

[180] Further, the Court in *Griffiths FC* was of the view that control of access to country could flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised. The Court also noted that the question of 'exclusivity' depended on the ability of claimants to exclude, pursuant to the traditional laws and customs, those persons who are not of their community —429/[127].

[181] I note that several pastoral leases appear to fall within the area that is covered by the application, including Pastoral Lease 3114/682 (Napier Downs), Pastoral Lease 3114/1008 (Mowanjum) and Pastoral Lease 3114/594 (Meda). The effect of these leases is such that exclusive rights and interests are extinguished. I have not ascertained whether the entire application area is covered by these pastoral leases. I also note that at Schedule B the applicant claims the benefit of certain sections of the Act to disregard extinguishment, including (but not limited to) section 47 which enables prior extinguishment to be disregarded where pastoral leases are held by native title claimants. It is for the Court to decide whether extinguishment can be disregarded. Thus, I consider that there is at least an arguable basis for asserting that these kinds of exclusive rights may be capable of recognition over the application area.

[182] The asserted facts of the claim include that, under the relevant laws and customs, members of the Warrwa language or estate group hold native title rights and interests in the application area. These local or estate groups are part of a larger tribal group. However, under the relevant laws and customs, ownership rests with the localised group.

[183] Aside from these kinds of asserted facts, there is not a significant amount of information about how, under the traditional laws and customs, the Warrwa had the right to control access to their country. There are, however, some facts that may support the existence of this right. (Person

2), in his affidavit, refers to his mother on occasion walking to other people's country for ceremonies, but only if she was invited ([30]). In the affidavit of (Deponent 3), she refers to strangers coming on to her land and to the fact that 'they like to take me because they know that I am a traditional owner' ([19]). She also provides the following example:

> Some women went to a large woman's meeting at the woman's camp at May River and they said that people were growling at them making noises and things and throwing stones at them. So they asked mum to smoke the camp with Koonkunberry. There was an old lady there apart from mum who could talk Warrwa, she spoke to the country in Warrwa and they were alright after that — [21].

[184] In that regard, I consider that a favourable inference is that the material evokes the idea of territorial control on the basis of spiritual sanctions being visited on those who transgress the boundaries of Warrwa country without permission.

[185] This right is prima facie established.

Over areas where a claim to exclusive possession cannot be recognised, the Warrwa People claim the following rights and interests:

a. the right to access the application area

b. the right to travel across the application area

c. the right to camp on the application area

d. the right to erect shelters on the application area

e. the right to live on the application area

f. the right to move about on the application area

[186] As discussed above, the factual basis elicits that pursuant to the traditional laws and customs, the Warrwa people have 'ownership' of their country. There is material that is sufficient to support the assertion that there has been continuity of association of the Warrwa people with the area dating back to sovereignty. (Person 2), for instance, recounts details of his parents, grandparents and great grandparents association with Warrwa country. He also recounts details of their living on, travelling over and moving about the application area. It is clear within the factual basis that the claimants and their forebears would have camped and erected shelters on the application area.

[187] These rights are prima facie established.

g. the right to hold meetings on the application area

m. the right to use the application area for social, religious, cultural, and spiritual customary and/or traditional purposes

n. the right to conduct ceremony on the application area

o. the right to participate in cultural activities on the application area

[188] There is information within the factual basis about ceremonial, cultural and spiritual activities occurring on the application area and some information supporting that these rights arise under the relevant laws and customs. (Person 2), in his affidavit, refers to initiation and other ceremonies, involving his forebears and also current claimants. (Deponent 3), in her affidavit, refers to her father going through the law at Meda station. She also refers to other cultural ceremonies. For instance, she says that 'I saw how to smoke babies at Meda station from the old Warrwa people. We use the Koonkunberry for smoking babies to make them strong, we rub the legs and straighten them to make the babies walk strong' ([11]).

[189] These rights are prima facie established.

h. the right to hunt on the application area

i. the right to fish on the application area

j. the right to take fauna from the application area

k. the right to use and maintain the natural water resources of the application area, including the beds and banks of watercourses

l. the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs

t the right to cultivate and harvest native flora according to traditional laws and customs

[190] There is information about these rights in the factual basis material, including information supporting that they arise in accordance with the traditional laws and customs.

[191] (Person 2), for instance, in his affidavit refers to being taught how to hunt and fish by his father and others in the traditional way. He says:

> I learnt to use flood waters to trap the game. The young men would swim across the billabong and go to the millaria (the isolated high ground) where all the animals were trapped. We know all the good billabongs and hunting grounds on Meda and Kimberly downs. Our family hunt and fish there through all different seasons. We fish all along the May River. We mainly catch barwulu (catfish) and gnidadung (barramundi) and also judmundga (brim). We also catch jaramba (fresh water prawn) — [28].

> We hunt Barni (goanna) during the wet season. That place called Bilarn, the old police camp near Mundamah (Poluton's Pool) on the May River, is good for goanna, turkey and emu. The place along the May River, the crossing point to the old peoples' camp at Poulton's Yard, is also a good place for hunting. I helped the old people build the yard there as a kid during my holidays from the mission. I camped and hunted with old (Person 18) (my mum's older brother) and (Person 16) all around that place when I was a child — [29].

[192] (Deponent 3) also speaks to how she was taught traditional ways of hunting and gathering. For instance:

> I was taught to collect Koonkuberry and Quall, you pick Koonkuberry when they are black and this means that they are sweet. Quall are picked when they are really white.
>
> We also pick other bush foods, Bungalla, bush orange and Nulawun, this last one is a green fruit that when it's ripe goes yellow and is a bit chewy. Lugin is nice and sweet, it comes from bush. We also used to collect Mardu and Mukbulla – which is bush banana. We use the Koonkuberry bush for smoking ceremonies, The Koonkuberry bush was also used for mosquitos.
>
> The old Warrwa people would take sand from the river bed and throw it into the water and talk to the old people and ask for fish. They would say *Walami Wali* which means give me fish in Warrwa. I do this now when I go fishing. My mother usually catches more fish than us, she talks to the spirits of the old people in Warrwa and she knows this country well — [17].

[193] Having regard to the above and to the claimant's factual basis, I consider that there is sufficient material to infer that these rights arise under the traditional laws and customs.

[194] These rights are prima facie established.

p. the right to maintain places of importance under traditional laws, customs and practices in the application area

q. the right to protect places of importance under traditional laws, customs and practices in the application area

[195] There are some references in the affidavit material before me, being the affidavits of (Person 2) and (Deponent 3), about significant places in the application area that are of cultural importance. However, the affidavits do not speak specifically to maintaining and protecting these significant places. Nonetheless, I consider that a favourable inference open to me on the basis of all the material is that such rights do arise under the relevant traditional laws and customs of the native title claim group.

[196] The above rights are prima facie established.

r. the right to conduct burials on the application area

[197] In his affidavit, (Person 2) refers to a burial occurring in the application area on Meda. This reference considered with other factual basis material provides an arguable basis that the right arises under the traditional laws and customs of the Warrwa people.

[198] The above right is prima facie established.

s. the right to speak for and make non-exclusive decisions about the application area

[199] I don't consider that this right can be recognised as a non-exclusive right. As discussed above in relation to the exclusive rights claimed, it is the expression of possession, occupation, use and enjoyment, which to some extent encapsulates what is meant by the right to 'speak for country' (*Ward HC*, [89]). This notion conveys that the native title holders have the right to control access to that country, which is inconsistent with it being a non-exclusive right. In some instances the Court has recognised in consent determinations a qualified framing of this right to speak for country, such as the right to speak for country and make decisions about Aboriginal persons who are bound by the relevant traditional laws and customs.[4] However, the expression of this right is not similarly qualified.

[200] This right is not prima facie established.

u. the right to cook and light fires for that purpose, on the application area

v. the right to light fires for domestic purposes but not for the clearance of vegetation

[201] There are some references within the factual basis material to cooking various flora and fauna in the application area. These references are scant. However, when considered with other factual basis material, I consider that there is sufficient material to provide an arguable basis for the existence of this right.

[202] This right is prima facie established.

w. the right to uphold, regulate, monitor and enforce customary law

y. the right to regulate amount [sic] and resolve disputes among the native title holders of the application area

[203] I don't consider that these rights are capable of recognition. Primarily, that is because I don't understand them to be rights in relation to land and waters.

[204] In *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*), Sundberg J held that a similarly framed right to 'uphold and enforce the traditional laws and customs' was not a right in relation

[4] See, for instance, *De Rose v State of South Australia* [2013] FCA 687.

to land or waters, but rather was a right in relation to people. His Honour also held that were this finding wrong, this right was also inconsistent with it being a non-exclusive right. That is because his understanding of the right as framed is that it would enable control over how other persons (not Aboriginal persons bound by the traditional laws and customs) exercised their rights in the area — [488].

[205] Similarly in *Neowarra,* it was held that a right in relation to resolving disputes among native title holders was in relation to people rather than land or waters — [490].

[206] The above rights are not prima facie established.

x. the right to maintain and transmit cultural knowledge of the application area

[207] In *Ward HC,* the majority noted the 'imprecision' of the term cultural knowledge and its apparent intangible nature. Further, that the content of the right went beyond that which was contemplated by s 223(1)(b) because it was not in relation to land or waters — 84/[58]-[59].

[208] Similarly, this point is made in *Neowarra* by Sundberg J — [485]-[487].

[209] However, there is a point of distinction that I consider is significant. The wording of the right claimed in relation to cultural knowledge was fairly different in those instances because it was framed around the ability to 'protect' and 'prevent' the use or misuse of such cultural knowledge. This elevated the right to something beyond that which is contemplated by s 223(1)(b).

[210] In this instance, the right is only framed in terms of maintaining and transmitting cultural knowledge. It also doesn't necessarily suffer from the same imprecision in that there are some clear examples of the transmission of knowledge about cultural practices provided in the affidavit material. These may be understood to be in relation to land and waters.

[211] This right is prima facie established.

Conclusion

[212] The application satisfies the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

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

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

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

(i) the Crown in any capacity, or
(ii) a statutory authority of the Crown in any capacity, or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[213] Based on the 'evidentiary' material the Registrar must be satisfied of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. While the focus is necessarily confined, as it is not commensurate to that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel*, 120/[18].

[214] Here, the term 'traditional' should be construed in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]*, [89].

[215] In describing the necessary physical connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—29/[86].

[216] Exploring how this understanding of 'traditional' may feature in the task of the Registrar at s 190B(7), Dowsett J in *Gudjala [2009]* observed that '[i]t 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'—83/[84].

[217] I have considered the affidavits of (Person 2) and (Deponent 3). I consider that they contain evidentiary material upon which I can be satisfied that these persons have a traditional physical connection with parts of the land or waters covered by the application.

[218] The application satisfies the condition of s 190B(7).

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
Section 61A provides:
(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If:
(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:
(i) the act was an act attributable to the Commonwealth; or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
(b) either:
(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;
a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
(4) However, subsection (2) or (3) does not apply to an application if:
(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[219] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[220] 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.

[221] There is no approved determination of native title over the application area. The geospatial assessment states that there are no determinations of native title over the area. I have also undertaken a more recent search of the Tribunal's Ispatial database and have confirmed that this remains the case — see overlap analysis dated 26 Novmeber 2014 (I note that this identifies a technical overlap with a determination, however, this overlap does not exist on the ground. In that regard, I note that the geospatial assessment does not identify any such overlap).

[222] The application does not disclose and I am not otherwise aware that there is a determination of native title over the application area.

Section 61A(2)

[223] 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.

[224] Schedule B describes areas within the external boundary that are excluded. This includes areas where a previous exclusive possession act was done, unless the circumstances described in 61A(4) apply — see Schedule B (2)(b), (d) and (3).

[225] The application does not disclose and I am not otherwise aware that the claim is made over areas covered by a previous exclusive possession act.

Section 61A(3)

[226] 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.

[227] The claim to exclusive possession in Schedule E is only made where that claim can be recognised — see Schedule E(1).

[228] The application does not disclose and I am not otherwise aware that a claim to 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.

Conclusion

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

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

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

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

Section 190B(9)(a)

[231] Schedule Q states that '[t]he Warrwa People do not claim ownership to minerals, petroleum or gas wholly owned by the Crown.'

Section 190B(9)(b)

[232] Schedule P states that '[t]he Warrwa People do not claim exclusive possession of all or part of any waters in an offshore place.'

Section 190B(9)(c)

[233] The application does not disclose and I am not otherwise aware that the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Warrwa People (Combined)
NNTT file no.	WC2014/004
Federal Court of Australia file no.	WAD258/2012

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

16 September 2010

Date application entered on Register:

26 November 2014

Applicant:

Mr Stephen Dwayne Comeagain

Ms Patricia Juboy

Ms Gail Maria Williams

Ms Debra Ann Maher

Ms Elaine Ellen Laraia

Mr Thomas Peter Williams

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule under 'Area covered by the claim (as detailed in the application)'

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per the Schedule, but with the following changes:

s. [not registered]

w. [not registered]

y. [not registered]