National Native Title Tribunal

Registration test decision

Application name	Wangan and Jagalingou People
Name of applicant	Adrian Burragubba, Patrick Malone, Irene White
NNTT file no.	QC2004/006
Federal Court of Australia file no.	QUD85/2004
Date application made	27 May 2004
Date application last amended	14 August 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 C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 24 October 2014

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Radhika Prasad

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

Edited Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the amended native title determination application made on behalf of the Wangan and Jagalingou People (the application) for registration pursuant to s 190A of the Act.

[2] Note: 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

[3] The application was originally made on 27 May 2004 when it was filed in the Federal Court of Australia (the Court). A delegate of the Registrar accepted the original application for registration because the application satisfied all of the conditions set out in ss 190B and 190C.

[4] On 7 August 2014, Collier J granted leave to amend the application.

[5] On 14 August 2014, the application was filed with the Court. The amendments to the application include the following:

- the persons who comprise the applicant have been altered;
- the details of the authorisation meeting have been altered in Item 2 (Authorisation), Part A of the Form 1;
- Schedule A has been changed to revise the list of apical ancestors;
- Schedules E has been altered to revise the rights and interests claimed to reflect those identified through further research and Schedule J has been updated to reflect those amended set of rights;
- the text in Schedules F and M have been deleted and both Schedules refer to Attachment F/M which has been inserted;
- Attachment G which contained a list of activities has been deleted;
- Schedules H has been amended to reflect the registration of a native title determination application;
- Schedule I has been amended to reflect the most recent notifications;
- Schedule R has been amended to refer to a new certification by Queensland South Native Title Services Limited (QSNTS) and Attachment R has been amended;
- Schedule S has been changed to reflect the most current amendments; and
- Part B has been amended to reflect changes to the applicant's address for service.

[6] On 29 August 2014, the Registrar of the Court gave a copy of this application to the Registrar 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.

Background

[7] A notice has been issued in relation to the grant of tenements (MDL516 and MDL333) in accordance with s 29 of the Act with a notification date of 25 June 2014. The amended application was filed within the three month timeframe over the area affected by the future act notice and this has required me to use my best endeavours to finish considering the claim by the end of four months after the notification day, that is 25 October 2014 — see s 190A(2).

Requirements of s 190A

[8] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C, known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A). For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s 87A by the Court; and
- subsection 190A(6A) does not apply because the effect of the amendments to the native title determination application, which includes a change to the composition of the native title claim group and certification of the application, falls outside the exceptions to undertaking a full registration test set out in subparagraphs 190A(6A)(d)(i) to (v).

[9] I must therefore apply the registration test to this amended application. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, under s 190A(6B), I must not accept the claim for registration.

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

[11] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

Information considered when making the decision

[12] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the amended application and accompanying documents;
- the information contained in the documents accompanying the original application filed on 27 May 2004;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2014/1609) prepared by the Tribunal's Geospatial Services on 2 September 2014 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

[13] 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. 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 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. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication — *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 3 September 2014, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the Extract from Schedule of Native Title Applications which shows details of the application as amended. That letter informed the State that any submission in relation to the registration of this claim should be provided by 12 September 2014 and that the delegate anticipates making the registration test decision by 24 October 2014. The State has not provided any submissions.
- The case manager, also on 3 September 2014, wrote to inform the applicant that any additional information should be provided by 12 September 2014 and that the delegate anticipates making the registration test decision by 24 October 2014. No additional information has been provided.
- On 22 September 2014, the case manager wrote to inform the State that the delegate considers it appropriate to have regard to the information contained in the affidavits that accompanied the original application.

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.

[15] 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.

[16] I note that I am considering this claim against the requirements of s 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

[17] I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2). As explained by Mansfield J in *Doepel*:

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

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

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

[20] I now turn to each of the particular parts of ss 61 and 62:

Native title claim group: s 61(1)

[21] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant at [1]. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[23] Part B of the application contains the name and address for service of the applicant's representative.

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

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

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

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

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

[27] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits are identical and contain the statements required by s 62(1)(a)(i) to (v), including stating the basis on which the applicant is authorised as mentioned in subsection (iv) — at [14] and [17] to [21].

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

Details required by s 62(1)(b)

[29] Subsection 62(2)(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)

[30] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B contains information of areas within those boundaries that are not covered by the application.

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

[31] Attachment C contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[32] Schedule D provides that no searches have been carried out in relation to the application area to determine the existence of non-native title rights and interests.

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

[33] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[34] Attachment F/M contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[35] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[36] Schedule H contains details of an application to the Federal Court.

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

[37] Schedule I contains details of notices issued under s 29 of which the applicant is aware.

Conclusion

[38] 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.

[39] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[40] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be

contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[41] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[42] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[43] The geospatial assessment identifies the Bidjara People #7 (QUD644/2012; QC2012/018) native title determination application (Bidjara People #7 application) to overlap the area covered by the current application. My search of the Register revealed that the Bidjara People #7 application was accepted for registration and added to the Register on 24 January 2013. This application has not been removed from the Register since that date.

[44] The current application was made on 27 May 2004 and was entered on the Register on 5 July 2004. As the Bidjara People #7 application was not on the Register at the time the current application was made, in my view, the Bidjara People #7 application does not meet the criterion specified under subsection (b). In my view, the Bidjara People #7 application is therefore not a previous application for the purposes of s 190C(3).

[45] As a result, I do not need to consider whether I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application for the purposes of s 190C(3).

[46] 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.

Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[47] 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.

[48] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

The nature of the task at s 190C(4)(a)

[49] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[50] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[51] Attachment R is entitled 'Certification of Native Title Determination Application — Wangan and Jagalingou' (certification). It is dated 10 July 2014 and signed by the Chief Executive Officer of QSNTS.

[52] The certificate states that QSNTS is a body funded under s 203FE(1) of the Act for the purpose of performing the functions of a representative body. The certificate also provides that the application has been certified pursuant to ss 203BE and 203FEA of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

[53] If a body is funded under s 203FE(1) to perform the functions, including the certification in s 203BE of a representative body over an area, then that body will have the power to certify an application under Part 11.

[54] The geospatial assessment identifies QSNTS to be the only representative body for the area covered by the application.

[55] Having regard to the above information, I am satisfied that QSNTS was the relevant s 203FE funded body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

[56] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

[57] Accordingly, I must consider whether the certification meets the requirements of s 203BE, the relevant subsection being (4).

Subsection 203BE(4)(a)

[58] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[59] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[60] The certification contains the statement required by s 203BE(4)(a) — at [2] and [3].

Subsection 203BE(4)(b)

[61] Pursuant to s 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s 203BE(4)(a).

[62] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- The authorisation meeting was extensively advertised with notices placed in the Gladstone Observer and the Courier Mail on 7 June 2014, and the Koori Mail on 18 June 2014.
- Letters were sent to, and QSNTS staff contacted via telephone, members of the Wangan and Jagalingou People whose contact details are held by QSNTS.
- The public notice was also placed on QSNTS' website.
- The authorisation meeting held in Carseldine on 29 June 2014 was well attended. Attendance records, meeting procedures and outcomes were taken and kept by QSNTS staff who attended the meeting.
- QSNTS is of the opinion that through the holding of the authorisation meeting all necessary steps and processes have been followed in accordance with the requirements of the Act and the instructions of the native title claim group.
- QSNTS is satisfied that all persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group — at [4].

[63] I am of the opinion that the certificate meets the requirement of s 203BE(4)(b).

Subsection 203BE(4)(c)

[64] This subsection applies where the application area is covered by an overlapping application for determination of native title. Subsection 203BE(3) sets out the steps that a representative body must take if there are overlapping applications. In short, a representative body must use reasonable efforts to achieve agreement between competing claimants and minimise the number of applications being made. That subsection further provides that a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[65] As indicated earlier in my reasons, the Bidjara People #7 application overlaps the current application. Accordingly, ss 203BE(3) and 203BE(4)(c) are applicable.

[66] The certificate states that QSNTS 'has done nothing to meet and has not met' the requirements of s 203BE(3) of the Act — at [5].

[67] I note that the certificate must address the requirements of s 203BE(3). QSNTS' statement that it has done nothing to meet these requirements, in my view, constitutes failure to address this subsection in the certification. However, in my view, failure by QSNTS to comply with this subsection does not render the certification invalid.

[68] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and accordingly find that the criteria under s 190C(4)(a) have been met. Having been so satisfied, I am not required to address the remaining conditions of s 190C(4).

[69] The application **satisfies** the condition of s 190C(4).

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.

[70] Attachment B is a written description prepared by the Tribunal's geospatial services on 22 December 2003 and contains a metes and bounds description of the external boundaries of the application area, referencing representative body boundaries, native title determination applications, cadastral boundaries, topographical features and geographic coordinates. Schedule B lists general exclusions.

[71] Attachment C is a colour copy of a map titled 'Wangan & Jagalingou People' prepared by the Tribunal's geospatial services on 22 December 2003. The map includes:

- the application area depicted by a bold outline;
- adjacent native title determination applications colour coded and labelled;
- topographic background;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[72] The geospatial assessment states that the area covered by the application has not been amended and concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

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

[74] 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.

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

The native title claim group is made up of families whose members identify as Wangan and Jagalingou, in accordance with traditional laws acknowledged and traditional customs observed by them. Wangan and Jagalingou are tribal names for groups traditionally associated with the lands centered around the town of Clermont in Central Queensland.

Membership of the native title group must be in accordance with traditional laws acknowledged and traditional customs observed by them and is based on the principle of cognatic descent (i.e. descent traced through either mother or father). Including by adoption. Case of [adoption] do not significantly alter the status of the claimant's descent rights neither do they comprise the identification of the group into which the child is adopted.

Claimants who identify with the name Wangan and Jagalingou are descendants of the following persons:

1. Billy and Lucy (parents of Jimmy Tarpot, Mary Ann Alboro and Mary Ellen)
2. Daisy Collins
3. Nellie Digaby
4. Dan Dunrobin (also known as Dunrobin, Christopher Dunrobin and Dan Robin)
5. Frank Fisher (Snr) of Clermont
6. Annie Flourbag
7. Jimmy Flourbag
8. Katy of Clermont
9. Charlie McAvoy of Logan Downs
10. Liz McEvcoy of Alpha
11. Maggie of Clermont (also known as Maggie Miller and Nandroo)
12. The Mother of Jack (Girrabah) Malone and Jim (Conee) Malone
13. Mary of Clermont (also known as Mary Johnson)
14. Momitja

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

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

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

[78] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such

an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

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

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

[80] Although Schedule A states that the native title claim group is made up of families whose members identify as Wangan and Jagalingou in accordance with the traditional laws and customs, I understand that descent from the named ancestors, including by adoption, provides the fundamental basis for membership to the Wangan and Jagalingou People native title claim group. This in my view is supported by the statement that membership must be in accordance with traditional laws and customs and *is based on the principle of cognatic descent*, including by adoption. In my view, identification as a Wangan and Jagalingou person is a qualifier to membership by descent or by adoption.

[81] Although there are a number of elements to the claim group description, I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[82] I will discuss each criteria below before deciding whether I am 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.

[83] I note that in reaching my view about this condition, I have been informed by the applicant's factual basis material contained in Attachment F/M of the application.

Descent

[84] I understand the first criterion to include those persons who are the biological descendants of the apical ancestors identified at 1 to 14. Describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

[85] I consider that requiring a member to show biological descent from an ancestor identified in Schedule A provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[86] In my view, as indicated by the factual basis contained in Attachment F/M, descent from a named ancestor provides the fundamental basis for membership to the Wangan and Jagalingou People native title claim group — see Attachment F/M at [13] and [14]. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

Adoption

[87] In respect of membership by adoption, I note that in *WA v NTR*, Carr J accepted the approach of identifying members of the native title claim group by biological descendants, *including by adoption*, of named people. His Honour accepted the description without any qualification indicating whether the method of adoption of persons was according to traditional laws and customs — at [67].

[88] Having regard to Carr J's acceptance of the approach of identifying membership by adoption without any qualification in *WA v NTR*, I am of the view that the description of this criterion is sufficient to ascertain, after some factual inquiry, the persons who are the adopted descendants of the apical ancestors.

Identification

[89] As noted above, I am of the view that the description of the native title claim group is to be read as a discrete whole and identification as a Wangan and Jagalingou person is not meant to be stand alone criteria. Rather, it is a qualifier to membership by descent or by adoption. I discuss below my reasons for coming to this view, including the relevant case law that have considered identification as a criterion of itself.

[90] I note that a description of membership containing qualifiers of self-identification is not one with an external and objective point of reference from which to commence an inquiry.

[91] While not addressing the requirements of s 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*) considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among other things, a request to change the native title claim group description to include a criterion of descent from another apical ancestor not identified in the application, stated that:

> … for the purposes of the [Act], it is the claim group which must determine its own composition … The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs — at [256].

[92] Dowsett J referred to the decision of the *High Court in Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; (2202) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J stated that identification as a member involved an internal perspective of the group. The decision of French J was appealed and the Full Court stated that:

> A relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by Yorta Yorta means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v State of Western Australia* [2010] FCAFC 26 at [45].

[93] Dowsett J noted that '[t]hese cases clearly demonstrate that membership must be based on group acceptance' — at [260].

[94] Having regard to the information contained in the factual basis and as aforementioned, it is my view that descent from the named ancestors provides the fundamental basis for membership to the Wangan and Jagalingou People native title claim group. I understand that the members of the claim group are united by a shared ancestry, connection to country and by their acknowledgement and observance of a body of laws and customs, which they consider their own and which they express as a set of traditional rights and interests exercised exclusively by themselves on their traditional country — Attachment F/M at [8], [9], [10], [13], [14] and [18]. The factual basis indicates that certain Wangan and Jagalingou families are associated with a specific place or area of their ancestors and therefore the application area is defined 'by the aggregation of the territorial domains of all families and descent groups who identify as Wangan and Jagalingou and are in turn affirmed as such by other members of the claim group' — at [15] and [21]. The members of the claim group continue to hold native title rights in the area in accordance with their traditional laws and customs, including those that confer the right for families or descent groups to speak for and care for country in their specific localised subsection or territorial domain of the application area — at [21].

[95] Having regard to the preceding information, it is my view that identity as a Wangan and Jagalingou person is linked to their connection to the land. I understand that a person may be connected to the application area if their ancestors were associated with that area. It follows that, in my view, identity is inherently linked to the identity and recognition of one's biological descent from a named ancestor. It is through this connection that individuals identify themselves as being a member of the claim group.

Conclusion

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

[97] 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.

[98] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

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

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

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

[101] Schedule E provides the following description of the claimed native title rights and interests:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238, ss 47, 47A or 47B apply), the Wangan and Jagalingou People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group
2. Over areas where a claim to exclusive possession cannot be recognised the Wangan and Jagalingou claim the following rights and interests:
   (a) To access, be present on, move about on and travel over the area
   (b) To camp on the area and for that purpose, erect temporary shelters on the area
   (c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes
   (d) To hunt, fish and gather on the land or waters of the area for commercial purposes
   (e) To trade on the area for personal, domestic and non-commercial communal purposes
   (f) To trade on the area for commercial purposes
   (g) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes
   (h) To hold meetings in the application area
   (i) To conduct ceremonies in the area
   (j) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places
   (k) Teach on the area the physical and spiritual attributes of the area
   (l) To be buried or bury native title holders on the area
   (m) To live on the application area
   (n) To move about the application area

(o) To speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws & customs

(p) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders

(q) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

3. The native title rights are subject to and exercisable in accordance with:

a) The valid laws of the State of Queensland and the Commonwealth of Australia;

b) The traditional laws acknowledged and the traditional customs observed by native title holders.

Consideration

[102] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[103] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s 190B(4).

[104] 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.

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

The requirements of s 190B(5) generally

[106] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[107] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the

particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

[108] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

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

[110] The factual basis material is contained in Attachment F/M. I consider that the affidavits of [Claimant 1 name deleted] of 13 April 2004 and [Claimant 2 name deleted] of 24 March 2004 that were filed with the original application on 27 May 2004 are also relevant to the factual basis.

[111] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

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

[112] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- that the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- that there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

Information provided in support of the assertion at s 190B(5)(a)

[113] The factual basis contains the following relevant information about the predecessors' association with the application area:

- The application area is situated between the Drummond Range on the Great Dividing Range, Jangga People's native title determination application, Logan Downs Station and Peak Downs in Queensland — Attachment F/M at [10]. The application area is defined by the natural geographic features which inform the native title claim group's spiritual understanding of the land.
- The first explorers arrived in the application area around 1845 to 1846. Sustained European settlement in the region occurred around the 1860s — at [2] to [4].
- Early ethnographic and linguistic literature and European accounts refer to a body of people, or landholding group, in the lands and waters of the application area at the time

of sovereignty — at [5] and [11]. The group was variously described as Wangan, Jagalingou, Mian, Miyan, Wiri and Widi — at [6] and [11].

- Early accounts indicate that the predecessors extracted a range of resources from their country for food and conduct of daily and ceremonial life — at [38]. In particular, the predecessors were observed, in 1887, utilising a wide range of natural resources in the application area to fashion tools, boomerangs and possum skin rugs as well as harvesting foods such as water lilies and native grass seeds — at [39].
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - Apical ancestor Dan Dunrobin was born around 1888 at Clermont (within the mid-eastern region of the application area). He was married in 1908 at Clermont and both of his sons were born there. He died in 1938 at the age of 50 at Cherbourg (outside and south-east of the application area). His granddaughter currently lives in Clermont and was told that the application area was her country and that her father worked at Kilcummin Station (within the north-eastern region of application area) near Clermont. This descent group is asserted to have a strong association with Clermont and the mid-western region of the application area around Dunrobin and Albro Stations — at [15]. For instance, one claim group member speaks of how her ancestors worked on Dunrobin station from its early days and says that there is an unmarked grave there — see affidavit of [Claimant 2 name deleted] at [7].
  - Frank Fisher (Snr) was born at Clermont between 1879 and 1886. Genealogical records describe him as belonging to the 'Mian' tribe and 'of Clermont on the Belyando River' (I understand the Belyando River flows in a northerly direction from the south-east region of the application area, through the central region, towards the north-west region). He was recorded as having been tribally married. In 1911, he and his family were removed from Ayr (outside and north of the application area) to Barambah (outside and south-east of the application area). He married his second wife in 1914 and his third wife in 1917. A majority of his descendants were born in a region outside and south-east of the application area but regularly returned to the application area. One descendant became engaged in station work throughout the Belyando country since he was a teenager — Attachment F/M at [15].
  - Jimmy Flourbag was born around 1854 and has a biographical association to the Clermont area. His wife apical ancestor Annie Flourbag was born around 1865 and is associated with Alpha (located within the southern region). Jimmy was removed to Durundur (I understand this to be located outside and south-east of the application area) in 1902. Annie had a daughter who was born in 1899 at Alpha. Her daughter was married at St George (outside and south-east of the application area) in 1921 and was removed, together with her seven children, to Cherbourg in 1935 — at [15].
  - Maggie of Clermont was born around 1878 at a camp on Sandy Creek, Clermont. Her two daughters were born at Clermont in 1893 and 1894. In 1904, her family was sent to Durundur. One of her daughters was married in 1916 at Barambah and taught her granddaughter about the application area and her country around Clermont — at [15].

Her descendants regularly visit the application area and her great grandchildren have returned to live and work around her country — at [37].

- In a 1902 Durundur list, Jack Malone is reported as being aged 33 and a 'Native of Alpha' and Jim Malone as being aged 40 and a 'Native of Alpha'. Jack Malone was married in 1905 at Woodford (outside and south-east of the application area), had six children and died prior to 1944. Some of his descendants have remained on or near country. One of his great-grandchildren returned to Clermont at age 16 and worked at stations in the application area including Grosvenor Downs (which I understand to be located outside but proximate to the north-eastern boundary) and Moray Downs (located on the north-western boundary of the application area) — at [15].
- Mary of Clermont had a son who was married in 1938 at Cherbourg and had four children. Her great-grandchildren take regular trips back to the application area. Her daughter married the son of apical ancestor Liz McEvoy in 1913 and they had five children who identify with the [Family name deleted] descent group — at [15].
- Charlie McAvoy (also spelt McEvoy) of Logan Downs had a strong association with the Clermont area, especially around Logan Downs (which I understand to be proximate to or along the north-eastern boundary). His mother was living on Logan Creek (which I understand flows through the north-eastern region of the application area) in the 1860s as a child. He was married twice and had two daughters with his first wife who were born around 1906 and 1907 at Clermont. He also had a son with his second wife, apical ancestor Liz McEvoy, who married the daughter of apical ancestor Mary of Clermont — at [15].
- Liz McEvoy was identified in ethnographic records of Cherbourg as a 'full blood of Alpha'. She is recorded as working as a domestic at Logan Downs Station with Charlie McEvoy. Her son was born at Logan Downs Station around 1892 and married the daughter of Mary of Clermont in 1913 at Avon Downs on Logan Creek (outside but proximate to the mid-northern boundary). He moved with his family to Backridge camp, north of Clermont. From there he circulated through relative's camps across the application area including Langton (within mid-eastern region of the application area), Albro and Avon Downs stations. After 1913, he and his brother left Clermont and worked on stations toward Alpha. He had several children, one of whom is recorded in the 1960s as speaking the Clermont Wirdi dialect — at [15].
- In early genealogical records, apical ancestor Momitja is identified as a 'full blood of Alpha'. His wife is recorded as a 'full blood' and they had two daughters. Momitja and his family were removed to Woorabinda (outside and south-east of the application area) but he was granted an exemption soon after allowing them to return to the application area. His descendants have an unbroken residence history in the area around Alpha and/or Clermont — at [15] and [37] and affidavit of [Claimant 1 name deleted] at [2], [3] and [27]. One of his descendants, in particular, lives outside but proximate to the south-eastern boundary — Attachment F/M at [37].
- Billy and Lucy had one son and two daughters. One of their daughters was born around 1873 on Albro Station. Their grandson is reported in genealogical records as a

man of 'Alpha' and their great-granddaughter was married 'at Clermont (Huntley Stn)' — at [15].

- Daisy Collins was born at Clermont in the mid to late 1890s. She was removed from Clermont to Cherbourg but later returned to Clermont to visit family. Her descendants assert that she was a traditional owner of the Clermont area — at [15].
- Nellie Digaby was born in 1863 on Avon Downs station. Her mother survived the Mistake Creek massacre of 1857 'which occurred in the close vicinity' of the application area. Nellie and her children are documented as residing in the Clermont and Avon Downs districts and having traditional landholding links to the claim area — at [15] and [37].

[114] The factual basis contains the following relevant information about the current association with the application area:

- Knowledge about traditional laws and customs, which give rise to the group's claim to hold rights, responsibilities and interests in relation to the application area, have been passed down the generations by traditional teaching to the current members of the claim group — at [20]. The claim group members speak of being taught about culture, family life, traditions, myths, rituals and traditional practices such as how to make boomerangs, by their parents and grandparents, which they have passed down to their own children — see affidavits of [Claimant 1 name deleted] at [6], [7] and [29] and [Claimant 2 name deleted] at [8], [9], [13] and [16].
- Claim group members continue to follow a landholding system whereby certain families are associated with and inherit a specific place or area of their ancestors and therefore are responsible for speaking for and caring for that country such as protecting particular tracks of country — Attachment F/M at [17], [21], [26] and [34]. The claimants who were born and raised on missions outside the application area, learned about and maintained their connection to the claim area by camping together in family groups allowing them to continue their connection to the organised socio-territorial units that linked them to their ancestral lands through a shared recognition of the group's laws and customs of inheritance of rights in country through filiative descent from recognised ancestors — at [18] and [36].
- Some claimants grew up and lived on or in close proximity to the application area their whole lives — at [18]. For instance, descendants of Momitja were born, raised and currently live in and around Clermont and/or Alpha (such as areas outside but proximate to the south-eastern boundary) or have lived in the area around Alpha and the great-grandchildren of Maggie Miller live and work around Clermont — at [37]; see also affidavit of [Claimant 1 name deleted] at [3] and [27].
- Many claim members regularly visit the application area to visit family and for traditional purposes, sometimes travelling considerable distances, and therefore speak to and confirm their continued spiritual, cultural and physical ties to the application area — Attachment F/M at [19]. For instance, claimants are regularly engaged in heritage protection and work area clearance which has involved walking across the claim area to map archaeological sites — at [51]. Another claim member says that her father told her

that it was important to visit the land to continue to affirm custodianship of their country and she, other members of her family, her brothers and sisters and elders have been regularly walking on the country, including the application area, for at least the past 30 to 40 years — affidavit of [Claimant 2 name deleted] at [12] to [14].

- They continue to camp, hunt game, fish and collect bush food, wood, medicine on country — Attachment F/M at [41]. A current claimant describes hunting and fishing at and around Surbiton Station (within middle region of the application area) as a child with his extended family — at [40]. Another claim group member speaks of hunting possums, kangaroos, goannas and porcupines and fishing for yellow bellies, catfish, jewfish, eels and turtles — affidavit of [Claimant 1 name deleted] at [17] and [18].
- The claimants believe their country is imbued with a potent spirituality and understand that their country and specific places within it is occupied by spirits of their ancestors and by other spiritual beings, such as the creative spirits — Attachment F/M at [24]. One claimant remembers being taught by his ancestors to talk to the spirits of the old people who reside within the application area when walking on country and visiting sites of significance and another claimant says she always pays respect to the spirits of the old people when visiting the application area — at [49].
- The claim members have knowledge of traditional ceremonies and of burial sites on the application area. For instance one claimant speaks of conducting ceremonies on country, such as smoking ceremonies — at [45]. Other claimants speak of their predecessors being buried near Alpha and Dunrobin station — at [44] and affidavit of [Claimant 2 name deleted] at [7].

Consideration

[115] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Wangan and Jagalingou People have with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of traditional Wangan and Jagalingou land and waters including avoidance places, burial sites as well as ancestral lands that belong to the different Wangan and Jagalingou descent groups.

[116] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of sustained European contact, which I understand from the factual basis to have occurred around the 1860s.

For instance, the mother of apical ancestor Charlie McAvoy was living in the application area as a child when the first Europeans arrived. The asserted facts also indicate, from my recounting of the history, that apical ancestor Liz McEvoy was born around the 1860s and was reported to be a native of Alpha. The factual basis indicates that ancestors Dan Dunrobin, Frank Fisher Snr, Maggie of Clermont and Daisy Collins were born in the application area. There are also references to the descendants of the apical ancestors, including their children and grandchildren, being present on the application area and surrounding areas. Subsequent generations of Wangan and Jagalingou families all have knowledge of the boundaries of their traditional country and they have all been present on the application area at various times. For instance, Momitja, his family and his descendants have, for most of the period since contact, lived in the southern, eastern and surrounding regions of the application area.

[117] The factual basis is also sufficient to support the assertion that the Wangan and Jagalingou People have a spiritual association with the application area and is sufficient to show the history of that association. The Wangan and Jagalingou People have knowledge of the myths, creative and ancestral spirits on country, rituals and ceremonies, burial sites, and tracks on country. The asserted facts indicate that their country and specific places within it is occupied by spirits of their ancestors and by other spiritual beings. The current claimants continue to practice rituals preparing food, smoking ceremonies and speaking to the spirits on country. The claimants are taught traditional laws and customs from their immediate predecessors through traditional teaching so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Wangan and Jagalingou People have with the application area.

[118] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. In my view, the factual basis is sufficient to support the assertion that there is an ancestral system of landholding, which current members continue to acknowledge by remaining associated with it or identifying with it. The material indicates an association with Clermont (mid-eastern region of the application area); Kilcummin, Grosvenor Downs and Logan Downs (all located in or proximate to the north-eastern region); Moray Downs (north-western region); Dunrobin (mid-western region); Albro and Surbiton stations (middle region); the Belyando River (south-eastern, central and north-western regions) and Alpha (southern region). The asserted facts indicate that many of the ancestors and their descendants lived, travelled or worked around the Clermont and Alpha regions. Ancestor Dunrobin was married in the Clermont region, which is where his sons were born. One of his sons worked at Kilcummin station and his son's daughter currently lives in Clermont. Dunrobin's descendants have remained associated with Clermont as well as the Dunrobin and Albro stations. There are also references to burial sites in the middle and southern regions of the application area.

[119] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[120] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

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

[121] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

[122] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[123] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or her delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

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

- The Wangan and Jagalingou People belong to a society referred to as the Maric cultural bloc. The other groups that belong to this society include the Western Kangoulu, Bidjara, Ghungalu, Wadja, Karingbal and Jangga — Attachment F/M at [7].
- Each group has their own distinct territory, which is recognised and adhered to by them and their neighbours — at [35].
- The groups are distinct, but interact for cultural and social purposes. They also share common spiritual beliefs, religious institutions, social organisation and classificatory kinship systems and common laws and customs — at [7].
- Despite the wide-ranging cultural similarities and complex network of regional interactions, the existence and persistence of the groups demonstrates a differentiation in territories and the practice of laws and customs between groups — at [8].
- The Wangan and Jagalingou consider the laws and customs as their own and express them as a set of traditional rights and interests exercised exclusively by themselves on their traditional country — at [8].
- The rights and interests of the claim group members arise from their descent from a predecessor with rights and interests in the application area — at [17]. The claim group therefore is a distinct landholding group for the application area — at [9].

Traditional laws and customs

[125] The factual basis contains the following relevant information about the traditional laws and customs of the Wangan and Jagalingou native title claim group.

[126] The native title claim group hold rights, responsibilities and interests in relation to land within the application area communally pursuant to their traditional laws and customs — at [20] and [26]. These laws and customs have been held continuously by the claim group and have been passed down the generations through oral transmission and traditional teachings — at [20]; see also affidavit of [Claimant 1 name deleted] at [6], [7], [11], [20], [23], [25] and [26].

[127] The claim members continue to follow a landholding system which defines a boundary for country within Wangan and Jagalingou land where country is transmitted and inherited through group membership rules, namely on the basis of cognatic descent — Attachment F/M at [18] and [21], see also Schedule A. For instance, the descendants of apical ancestor Dan Dunrobin have an association with Clermont and Dunrobin and Albro stations and the asserted facts indicate that ancestor Daisy Collins was a traditional owner of the Clermont area — Attachment F/M at [15]. The claimants have a spiritual connection to their ancestral landholding. For instance, one claimant says that they are spiritually drawn to Clermont and that 'we've always said that this was our land' — affidavit of [Claimant 2 name deleted] at [10].

[128] Particular families or descent groups, within their ancestral landholding or territorial domain, hold primary responsibility to speak for and protect particular tracts of country — Attachment F/M at [26]. The authority to speak for country is gained through the possession of geographic and cultural knowledge transmitted to them from their predecessors originating in the pre-sovereignty society — at [31]. The right to protect and care for country and sites is derived from the claim group's obligation under their laws and custom to ensure the well-being of the land — at [47]. For instance, the younger generation are taught to only take what they need from the country when gathering resources, fishing or hunting, by rule of law — at [50].

[129] The claimants who were born and raised on missions outside the application area, learned about and maintained their connection to the claim area by camping together in family groups allowing them to continue their connection to the organised socio-territorial units that linked them to their ancestral lands through a shared recognition of the group's laws and customs of inheritance of rights in country by filiative descent from recognised ancestors — at [18] and [36].

[130] In accordance with their normative laws and customs relating to land, the native title claim group have the right to live on and access their country which they have inherited 'from their predecessors, legitimised in the transmission of knowledge, laws and customs associated with the responsibility to care for and use of Wangan and Jagalingou country' — at [33] and [34]. Some current claimants lived and/or worked on or in close proximity to the application area their whole lives, such as the descendants of Momitja and Maggie Miller — at [18] and [37]; see also affidavit of [Claimant 1 name deleted] at [3], [4], [25] and [27]. The claimants continue to access the application area to visit family and for other traditional purposes, such as hunting and fishing — Attachment F/M at [19] and [40].

[131] Claim members believe their country is imbued with a potent spirituality and senior claimants are familiar with these forces which manifest as place and spiritual phenomena — at [23]. The claimants are inculcated into their spiritual lives and are told by their predecessors about myths around the campfire — affidavit of [Claimant 1 name deleted] at [10]. They understand that their country, and specific places within it, is occupied by their ancestors' spirits and by other spiritual beings. For instance, they are told about the water serpent present at a creek within the application area and that they could not swim in that waterhole after dark — at [11]. The claimants consider it as an essential part of their law and custom to respect these spiritual forces and their sense of responsibility for the land is strengthened by a sense of responsibility to the creative and ancestral spirits — Attachment F/M at [24]. The claimants express this respect by acknowledging the sentient nature of the country and its spirits, including the spirits of their predecessors — at [48]. For instance, one claimant remembers being taught by his ancestors to talk to spirits of the old people who reside within the application area when walking on country and visiting sites of significance and another claimant says she always pays respect to the spirits of the old people when visiting the application area — at [49].

[132] Rights to country are exercised within the context of a powerful and at times dangerous spirituality, management of which requires adherence to customary rules that mandate social behaviour — at [22]. Such rules include avoidance of places, a prohibition on the removal of objects from country and an ability to speak with the spirits of the country so that they might be mollified or placated — at [25]. One claim member says that she had collected stones from the country and was firmly instructed by the elders to return them — affidavit of [Claimant 2 name

deleted] at [9]. The claimants continue to speak to the spirits whilst on country — Attachment F/M at [49].

[133] The claim members are taught about their totems. For instance, a claimant was told that the emu was their totem, which they must protect and not eat — affidavit of [Claimant 1 name deleted] at [21]. The claim members are told why certain people should not eat blue tongue lizards — at [21].

[134] The claim members maintain they have the right to use the land, waters and other resources of their country in accordance with their traditional laws and customs. Early accounts indicate that the predecessors extracted a range of food and other resources from their country for food and conduct of daily and ceremonial life — Attachment F/M at [38]. The predecessors were observed, in 1887, utilising a wide range of natural resources of the application area to fashion tools, boomerangs and possum skin rugs as well as harvesting foods such as water lilies and native grass seeds — at [39]. After sustained settlement, the claimants continue to hunt, fish, collect bush foods, wood and medicines and go camping on country — at [40] and [41. One claim members says they hunt for possums, kangaroos, goannas and porcupine, they fish for yellow bellies, catfish, eels and turtles, and they collect lily bulbs which they dry and mulch like wheat to make bread — affidavit of [Claimant 1 name deleted] at [17], [18] and [20]. They also collect timber to make artefacts. For instance, a claim member says that her dad showed them how to make boomerangs — affidavit of [Claimant 2 name deleted] at [8].

[135] Members of the claim group are given three different names at birth. One name is known as the *yamba* name which signifies 'homeland or country', 'camp', 'old tribal home', or 'spirit home' and indicates the 'spirit home of that person, and that upon death, the spirit of that person will return to this place' — Attachment F/M at [43]. In the 1930s, the 'old people' who were taken from their country and living in settlements 'grieved to get back to their own tribal territory before they died in order to ensure their spirit's safe return home' — at [43]. Current claim members are still given traditional names — affidavit of [Claimant 2 name deleted] at [7].

[136] The claimants have knowledge of and continue to practice traditional ceremonies and rituals in relation to marriage, passing on of family members, in the preparation of feed, and other aspects of life that they have learnt from their predecessors — affidavit of [Claimant 1 name deleted] at [12]. Smoking ceremonies are practiced in connection with death as a cleansing ritual to ward off bad spirits and for healing — Attachment F/M at [45]. Current claimants continue to practice these ceremonies and remember them taking place after a death at missions — at [46]. Other claim members speak of preparing 'food in a ritual way' and have taught their children to do this — affidavit of [Claimant 1 name deleted] at [12].

[137] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

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

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[139] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[140] My understanding of the factual basis material is that the pre-sovereignty society, being the Maric cultural bloc, encompasses a wide area of land which is held at a localised level by various groups, including the Wangan and Jagalingou People. I understand that these landholding groups share common spiritual beliefs, religious institutions, social organisation and classificatory kinship systems, have common laws and customs and interact for cultural and social purposes. However, the groups have distinct territorial domains, the boundaries of which are recognised by the other groups, and there is differentiation in the practice of laws and customs.

[141] In my view, the factual basis indicates that the Wangan and Jagalingou country is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the Wangan and Jagalingou are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

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

[142] The factual basis reveals that the laws and customs currently observed and acknowledged by the Wangan and Jagalingou People are based on common principles of kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.

[143] In my view, the factual basis demonstrates that at least some of these ancestors were living within Wangan and Jagalingou country, or were amongst the generation born to those who were living within Wangan and Jagalingou country, at the time of sustained European contact. In this sense, I understand that the information supports the assertion that at least some of the apical ancestors were born into the Wangan and Jagalingou claim group of the Maric cultural bloc that existed at and prior to European contact — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of these ancestors as well as those identified in Schedule A.

[144] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Wangan and Jagalingou People observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the ancestors named in Schedule A. The factual basis demonstrates that the descent groups continue to have knowledge of their ancestral country and have knowledge of avoidance places, tracks on country as well as burial grounds on country. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Wangan and Jagalingou gain rights to country on the basis of cognatic descent, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before

sustained settlement. I consider that there is a sufficient factual basis that the landholding system held by the current claimants are derived from and rooted in customary laws and practices.

[145] The factual basis contains information which speaks to the way the claim group continues to perform traditional practices such as hunting, fishing and gathering natural resources for various purposes — see also my reasons at s 190B(5)(a). This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of contact, and that they have been passed down the generations to the claimants today.

[146] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of myths and the creative spirits. They have knowledge of avoidance places on country and speak of a system of respect where respect is given to the land and its spirits, including the spirits of their predecessors, by acknowledging and speaking to the sentients of nature and the spiritual forces. There are also references to current claimants performing rituals in relation to food as well as practicing traditional ceremonies, such as smoking ceremonies to ward off bad spirits and for healing purposes. The claimants also say that they are spiritually drawn to their particular ancestral landholding or territorial domain.

[147] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and traditional teaching, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants being given traditional names, hunting and fishing in the application area with extended family, being told by their predecessors to speak to the spirits on the application area and shown how to make artefacts like boomerangs, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of sustained contact.

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

Reasons for s 190B(5)(c)

[149] This condition 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 in accordance with their traditional laws and customs.

[150] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in

> accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[151] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

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

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

Consideration

[153] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[154] The factual basis provides references to the predecessors telling stories and teaching practices to the younger generation. For instance, in her affidavit [Claimant 1 name deleted] says:

> My grandfather and my mother were concerned that I keep my culture. They used to take me and my five brothers out to country and show us how to survive off the land. …
>
> They taught us about family life, traditions, the myths and rituals, which we live by. Our religion is made up of myths and rituals and these were also imparted to me by my grandfather. We lived by that religion and I and my family still do so to this day.
>
> They told us about … [the water serpent] at Sandy creek; we couldn't swim in that water hole after dark. Wipe out our footprints in the sand before dark. We listened to the old people …
>
> We used to dive down in the creek and get the bulb from the mud from the lily in the creek. Grandad showed us how to let it dry and mulch it up like flour and make bread with it.
>
> I've always taken my children out to teach them the ways of the land, and where to pick the food and they feel it too. I have taught them what my mother's taught me.
>
> I lived and have continued to live on the claim area for the majority of my life and have maintained my knowledge of and connection with the claim area …
>
> My continued acknowledgement and observance of traditional laws and customs in relation to the claim area has been passed down to my children — at [6], [7], [11], [20], [23], [25] and [26].

[155] In addition, the factual basis indicates that a current claimant remembers being taught by her grandmother, apical ancestor Maggie of Clermont, about the application area and about her country around Clermont — Attachment F/M at [15]. The asserted facts indicate that current claimants who were born and raised on missions outside the application area, learned about their connection to country at those missions — at [18]. There is also a reference to a claim member describing hunting and fishing within the application areas as a child with his extended family —

at [40]. Current claimants have knowledge of ceremonies, rituals, burial sites and continue to hunt, fish and gather natural resources.

[156] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

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

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

[158] 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.

[159] The claimed native title rights and interests that I consider can be prima facie established is identified in my reasons below.

The requirements of s 190B(6)

[160] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[161] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

[162] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

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

[163] I also understand that the claimed native title rights and interests:

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

[164] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[165] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

[166] I also note that I consider that Schedules B, E and L of the application sufficiently address any issue of extinguishment, for the purpose of the test at s 190B(6).

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

Rights prima facie established

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238, ss 47, 47A or 47B apply), the Wangan and Jagalingou People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group

[168] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]' — at [89]. The High Court further noted that the expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

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

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

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

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

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

[172] The factual basis is such that it is asserted that at the time of European contact, there existed an association between the Wangan and Jagalingou people and its land and waters — see my reasons at s 190B(5)(a).

[173] The factual basis provides that the Wangan and Jagalingou people maintain the traditional right to exclude all others from the application area. This exclusive right is recognised by neighbouring groups who recognise and adhere to the territorial domains of neighbouring and related groups and the subsequent restrictions placed on these domains — Attachment F/M at [35].

[174] The claim group continue to follow a landholding system where country is inherited on the basis of cognatic descent — at [18] and [21], see also Schedule A. The asserted facts indicate that only members of families or descent groups are responsible for speaking for, caring for and making decisions about their ancestral landholding or territorial domain — Attachment F/M at [26]. The authority to speak for country is gained through the possession of geographic and cultural knowledge transmitted to them from their predecessors originating in the pre-sovereignty society — at [31]. The right to protect and care for country and sites is derived from the claim group's obligation under their laws and custom to ensure the well-being of the land — at [47]. Claim members have a spiritual connection to their ancestral landholding and claim to have ownership of it — affidavit of [Claimant 2 name deleted] at [10]. By continuing to acknowledge and observe this traditional system of landholding, claim group members who are descended from an ancestor or predecessor are able to demonstrate and be recognised as having ancestral connection to that country. For instance, the descendants of Dan Dunrobin have an association with Clermont and Dunrobin and Albro stations — see also my reasons at s 190B(5)(b) above.

[175] Members of the claim group believe their country is imbued with a potent spirituality and have knowledge of such forces which manifest as place and spiritual phenomena — Attachment F/M at [23]. The claimants understand that their country, and specific places within it, is occupied by their ancestors' spirits and by other spiritual beings. Rights to country are exercised within the context of a powerful and at times dangerous spirituality, management of which requires

adherence to customary rules that mandate social behaviour — at [22]. Such rules include avoidance of places, a prohibition on the removal of objects from country and an ability to speak with the spirits of the country so that they might be mollified or placated — at [25]. The claimants were taught by their predecessors to talk to the spirits when walking on country and visiting sites of significance and they continue to speak to the spirits whilst on country — at [49]. They were also told not to swim after dark in the water hole where the water serpent is present — affidavit of [Claimant 1 name deleted] at [11].

[176] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury. Particular families or descent groups have an association with and are given the primary duty to speak for and care for a particular area within their country on the basis of cognatic ties. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[177] I consider that this right is prima facie established.

2. Over areas where a claim to exclusive possession cannot be recognised the Wangan and Jagalingou claim the following rights and interests:

(a) To access, be present on, move about on and travel over the area

(b) To camp on the area and for that purpose, erect temporary shelters on the area

(m) To live on the application area

(n) To move about the application area

[178] The claim group members speak of their regular use of country, visiting family and sites, camping, and travelling over the application area for cultural purposes and for hunting and fishing within it. Some members were born, raised and currently live on or proximate to the application area.

[179] The factual basis indicates that some of the apical ancestors and other predecessors resided on country, accessed country for various traditional purposes such as taking the natural resources, and some were born at camps within the application area.

[180] There are references to claimants moving across the application area, visiting relatives' camps and camping at various locations.

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

(c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes

(g) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes

[182] The factual basis contains references to members of the claim group and their predecessors hunting and fishing in the Wangan and Jagalingou country and also utilising the natural resources of the land.

[183] Early accounts from 1887 record that the predecessors of the claim group utilised a wide range of natural resources from the area to make tools, boomerangs and possum skin rugs and harvested foods such as water lilies and native grass seeds — at [39].

[184] The claimants continue to hunt, fish and collect bush foods, wood and medicines on the application area — at [41]. For instance, one claimant says that he would hunt and fish in the application area as a child with his extended family — at [40]. Another claimant speaks of hunting for possums, kangaroos, goannas and porcupines and fishing for yellow bellies, catfish, eels and turtles — affidavit of [Claimant 1 name deleted] at [17] and [18]. They speak of using lily bulbs found in creeks to make bread and collecting timber to make artefacts such as boomerangs — at [20] and affidavit of [Claimant 2 name deleted] at [8].

[185] In my view, these rights are prima facie established under Wangan and Jagalingou traditional laws and customs.

(i) To conduct ceremonies in the area

[186] The factual basis indicates that the claim members have knowledge of the 'ceremonies and Rituals in relation to marriage; the passing on of family members; in the preparation of feed; and other aspects in life' — affidavit of [Claimant 1 name deleted] at [12]. The claimants continue to 'prepare food in a ritual way' and practice smoking ceremonies in connection with death as a cleansing ritual or for healing purposes — at [12] and Attachment F/M at [45]. The claimants also recall their predecessors practicing these ceremonies — at [46].

[187] I am of the view that this right is prima facie established pursuant to the traditional laws and customs of the native title claim group.

(j) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places

[188] The factual basis indicates that particular families or descent groups have the responsibility to maintain and protect places of importance and areas of significance in their territorial domain within the application area — at [21]. This right is inherited through group membership rules, namely on the basis of cognatic descent — at [34].

[189] I consider this right is prima facie established under Wangan and Jagalingou traditional laws and customs.

(k) Teach on the area the physical and spiritual attributes of the area

(q) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

[190] The claimants speak of their system of ancestral landholding and of being taught by their ancestors to speak to the spirits of the old people, being the spirits of their deceased ancestors and other senior people, who reside within the application area when walking on country and visiting particular sites of significance. They have knowledge of particular tracks of country, avoidance places such as where the water serpent resides, and of burial sites on country. The factual basis

indicates that possession of geographic and cultural knowledge is transmitted to them from their predecessors — at [31]; see also affidavit of [Claimant 1 name deleted] at [6], [7] and [11].

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

(l) To be buried or bury native title holders on the area

[192] The claimants have knowledge of burial sites of their predecessors on the application area — at [45]; see also affidavit of [Claimant 2 name deleted] at [6] and [11]. There are also records of the predecessors of the claim group who were taken to settlements, grieving to return to their country before they died — Attachment F/M at [43]. The factual basis also contains references to current claimants performing smoking ceremonies on country in connection with a death, from which I infer that current claimants continue to be buried or bury native title holders on country.

[193] In my view, this right is prima facie established pursuant to Wangan and Jagalingou traditional laws and customs.

(p) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders

[194] The way this right is expressed, in my view, exerts a degree of control indicating a level of exclusivity. I therefore consider that the case law in relation to this right is closely linked to that involving 'the right to determine use and enjoyment' of land. The High Court expressed concern in *Ward HC* of non-exclusive rights expressed in exclusive terms and stated that 'without a right [as against the whole world to possession of land], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put' — at [52].

[195] In *De Rose v South Australia* [2002] FCA 1342, however, O'Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders — at [553]. His Honour, however, did not make a subsequent determination of native title. In the consent determination in *Mundraby v Queensland* [2006] FCA 436, the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]' — at [3(c)(ii)]. I also note that in another consent determination, the Full Federal Court held that:

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

[196] In light of the case law cited above, I consider that there is willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who are bound by the laws and customs of the native title holders. The right being claimed here is, in my view, qualified or limited this way. I consider that where the material supports the prima facie existence of the right, it will be able to be recognised for the purposes of s 190B(6).

[197] The factual basis contains references to sites of avoidance, which I understand to be places that the Wangan and Jagalingou people are not allowed to access under their traditional laws and customs. For instance, the claimants are told not to swim at a waterhole where the water serpent resides after dark — affidavit of [Claimant 1 name deleted] at [11]. The claimants are also prohibited from removing objects from country — Attachment F/M at [25].

[198] In my opinion, this right is prima facie established under Wangan and Jagalingou traditional laws and customs.

Rights prima facie not established

[199] I note that the provisions of s 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include rights that are not prima facie established on the Register.

(d) To hunt, fish and gather on the land or waters of the area for commercial purposes

[200] I consider that the factual basis does not contain examples of observance of this right by both the predecessors of the native title claim group and the current members.

[201] I note that the Court has stated that where there is a claim to a right to exploit resources for commercial purposes, 'it is not necessary as a matter of logic to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists' but can be proved if the native title claim group can 'show that they had the right to do so if there were traditional laws and customs which gave them such a right' — *BP (Deceased) on behalf of the Birriliburu People v State of Western Australia* [2014] FCA 715 at [89].

[202] In my view, the information contained in the factual basis does not elucidate that the native title claim group has traditional laws and customs which establishes a right to hunt, fish and gather on the land or waters of the area for commercial purposes.

[203] I am therefore unable to be satisfied that this right is prima facie established pursuant to the traditional laws and customs of the native title claim group.

(e) To trade on the area for personal, domestic and non-commercial communal purposes

(f) To trade on the area for commercial purposes

(h) To hold meetings in the application area

[204] I consider that the factual basis provides insufficient examples of observance of these rights by both the predecessors of the native title claim group and current members.

[205] In my view, the factual basis material is not sufficient to indicate that these rights are held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that these rights are prima facie established.

(o) To speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs

[206] The way this right is expressed, in my view, exerts a degree of control indicating a level of exclusivity. However, unlike the right at paragraph (p) I consider that this right is not qualified to be against persons who are bound by the laws and customs of the native title holders but 'other Aboriginal People'. Although this right is claimed to be 'in accordance with traditional laws and

customs', I do not understand this to be a reference to the 'other Aboriginal People' being bound by the traditional laws and customs of the group given the expression of the right at paragraph (p).

[207] I am therefore unable to be satisfied that this right is prima facie established.

Conclusion

[208] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, 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.

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

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

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

[211] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Wangan and Jagalingou People acknowledge and observe the traditional laws and customs of the pre-contact society.

[212] I note that the factual basis contains relevant information that describe a traditional physical association of the Wangan and Jagalingou People with the application area, including travelling, hunting, fishing, gathering natural resources and camping on country — Attachment F/M at [41]. There are also references to claim members currently residing on the application area and also working within it — at [37]. Some claimants regularly visit and walk over the application area to

continue affirmation of their ownership and also for heritage protection and work area clearance in order to map archaeological sites — at [51] and affidavit of [Claimant 2 name deleted] at [13] and [14].

[213] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

[214] 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, and

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

[215] 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.

Reasons for s 61A(1)

[216] 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.

[217] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Reasons for s 61A(2)

[219] 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.

[220] Schedule B states that areas which are subject to valid exclusive possession acts are excluded from the application.

[221] Schedule L identifies a lease but states that the applicant reserves the right to the protections afforded in ss 47, 47A and 47B of the Act for the whole of the claim area. In *Doepel*, Mansfield J was of the view that it was not incumbent on the Registrar to resolve issues of fact or law as to whether ss 47, 47A or 47B may apply so as to require any extinguishment by a previous exclusive possession act to be disregarded when considering whether the application meets the requirements of s 190B(8) — at [135]. I note that s 61A(4) provides that an application may be made in circumstances where the application states that ss 47, 47A or 47B applies to any known previous exclusive possession act.

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

Reasons for s 61A(3)

[223] 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.

[224] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Schedules B and L.

[225] In my view, the application **does not** offend the provisions of s 61A(3).

Conclusion

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

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Reasons for s 190B(9)(a)

[228] Schedule Q provides that the applicant makes no claim to any mineral, petroleum or gas wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[230] Schedule P indicates that the native title claim group does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[232] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished. The application also claims the protections afforded by ss 47, 47A and 47B — see Schedules B and L.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wangan and Jagalingou People
NNTT file no.	QC2004/006
Federal Court of Australia file no.	QUD85/2004

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), 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:

27 May 2004

Date application entered on Register:

5 July 2004

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications

Persons claiming to hold native title:

The native title claim group is made up of families whose members identify as Wangan and Jagalingou, in accordance with traditional laws acknowledged and traditional customs observed

by them. Wangan and Jagalingou are tribal names for groups traditionally associated with the lands centered around the town of Clermont in Central Queensland.

Membership of the native title group must be in accordance with traditional laws acknowledged and traditional customs observed by them and is based on the principle of cognatic descent (i.e. descent traced through either mother or father). Including by adoption. Case of [sic] do not significantly alter the status of the claimant's descent rights neither do they compromise the identification of the group into which the child is adopted.

Claimants who identify with the name Wangan and Jagalingou are descendants of the following persons:

1. Billy and Lucy (parents of Jimmy Tarpot, Mary Ann Alboro and Mary Ellen)

2. Daisy Collins

3. Nellie Digaby

4. Dan Dunrobin (also known as Dunrobin, Christopher Dunrobin and Dan Robin)

5. Frank Fisher (Snr) of Clermont

6. Annie Flourbag

7. Jimmy Flourbag

8. Katy of Clermont

9. Charlie McAvoy of Logan Downs

10. Liz McEvcoy of Alpha

11. Maggie of Clermont (also known as Maggie Miller and Nandroo)

12. The Mother of Jack (Girrabah) Malone and Jim (Conee) Malone

13. Mary of Clermont (also known as Mary Johnson)

14. Momitja

Registered native title rights and interests:

Rights and Interests

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Wangan and Jagalingou People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group

2. Over areas where a claim to exclusive possession cannot be recognised the Wangan and Jagalingou claim the following rights and interests:

(a) To access, be present on, move about on and travel over the area

(b) To camp on the area and for that purpose, erect temporary shelters on the area

(c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes

(g) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes

(i) To conduct ceremonies in the area

(j) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places

(k) Teach on the area the physical and spiritual attributes of the area

(l) To be buried or bury native title holders on the area

(m) To live on the application area

(n) To move about the application area

(p) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders

(q) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

3. The native title rights are subject to and exercisable in accordance with:

a) The valid laws of the State of Queensland and the Commonwealth of Australia;

b) The traditional laws acknowledged and the traditional customs observed by native title holders.

[End of document]