National Native Title Tribunal

Registration test decision

Application name	Dieri No. 3
Name of applicant	Edward Lander, Rhonda Gepp-Kennedy, Sylvia Stuart, Irene Kemp and David Mungerannie
State/territory/region	South Australia
NNTT file no.	SC2014/001
Federal Court of Australia file no.	SAD133/2014
Date application made	6 June 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: 16 January 2015

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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.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the native title determination application made on behalf of the Dieri People native title claim group (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 Registrar of the Federal Court of Australia (the Court) gave a copy of the application to the Registrar on 12 June 2014 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 6 June 2014 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[5] Therefore, 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, pursuant to s 190A(6B), I must not accept the claim for registration. This is commonly referred to as the registration test.

Registration test

[6] 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 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.

[7] 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 the information that must be included on the Register of Native Title Claims (the Register).

Information considered when making the decision

[8] 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 application and accompanying documents;
- the additional material provided by the applicant on 30 June, 10 October and 2 December 2014;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2014/0975) prepared by the Tribunal's Geospatial Services on 17 June 2014 (the geospatial assessment), the Ispatial report prepared by the Geospatial Services on 15 January 2014 (ispatial report) and email from Geospatial Services dated 16 January 2015; and
- the results of my own searches using the Tribunal's mapping database.

[9] 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

[10] 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] – [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 26 June 2014, the case manager for this matter sent a letter to the State of South Australia (the State) which informed the State that any submission in relation to the registration of this claim should be provided by 17 July.
- The case manager, also on 26 June 2014, wrote to inform the applicant that any additional information should be provided by 10 July 2014.
- On 30 June, 10 October and 2 December 2014, the applicant provided additional material for the purpose of meeting the requirements of the registration test.
- On 5 December 2014, the State was provided a copy of the additional material, upon receipt of a signed confidentiality undertaking. The State was given until 17 December 2014 to comment or respond to the material and was advised that the delegate would complete testing of the application for registration on or about 16 January 2015. The case manager also wrote to inform the applicant of the registration decision date.
- On 16 December 2014, the State wrote to inform that it had reviewed the additional material and did not wish to make a submission.

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.

[11] 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.

[12] In coming to this conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2) — see observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) at [37] and [39]; see also [16], [35] and [36]. Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[13] 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.

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

Native title claim group: s 61(1)

[15] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group and have been authorised by all the persons in the native title claim group to make the application and deal with all matters arising in relation to it — see Attachment R and s 62(1)(a) affidavits of the persons comprising the applicant. 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.

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

Name and address for service: s 61(3)

[17] The names of those persons comprising the applicant appear at page 2 of the Form 1. Part B provides the name and address for service of the applicant's representative.

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

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

[19] 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.

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

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

[21] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain all the statements required by s 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant.

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

Details required by s 62(1)(b)

[23] 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)

[24] 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)

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

Searches: s 62(2)(c)

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

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

[27] 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)

[28] Schedule F 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)

[29] 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)

[30] Schedule H states that the area subject to this application is not overlapped by any other claim.

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

[31] Attachment HA states that the applicant is not aware of any notifications given under s 24MD(6B)(c).

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

[32] Attachment I states that the applicant is unaware of any notices issued under s 29 of the Act.

Conclusion

[33] 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.

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

[35] I note that although the text of this provision reads in the past tense, I consider that 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:

> 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].
>
> …
>
> 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 — at 29.25 and 35.38.

[36] 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.

[37] 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].

[38] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application.

[39] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application — see also ispatial report.

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

[41] 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.

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

[43] Attachment R is a copy of the certification by the South Australian Native Title Services Limited (SANTS). 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)

[44] 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]. 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.

[45] 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

[46] Attachment R is entitled '[SANTS] – Certificate in Relation to Dieri #3 Native Title claim'. It is dated 30 October 2013 and signed by the Chief Executive Officer of SANTS.

[47] The certificate provides that the statements within the certificate are made pursuant to ss 203BE and 203FE of the Act and that SANTS is a body funded under s 203FE to perform the functions of a representative body in the application area.

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

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

[50] Having regard to the aforementioned information, I am satisfied that SANTS was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

[51] As mentioned earlier, 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].

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

Subsection 203BE(4)(a)

[53] 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.

[54] 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.

[55] The certification contains the statement required by s 203BE(4)(a) — at [4].

Subsection 203BE(4)(b)

[56] 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).

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

- SANTS has worked closely with members of the Dieri community for a number of years;
- the authorisation meeting was held on 15 December 2012;
- meeting notices were posted to members of the Dieri Aboriginal Corporation and advertisements were placed in local and regional newspapers;
- at the meeting, the persons comprising the applicant were authorised to make the application and deal with matters arising in relation to it by an agreed and adopted process as the group has no applicable traditional decision making process;
- SANTS is therefore satisfied that there was a clear decision making process, that all the persons in the native title claim group have authorised the persons comprising the applicant to make the application and to deal with all matters arising in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all other persons in the native title claim group — at [4] and [5].

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

Subsection 203BE(4)(c)

[59] This subsection applies where the application area is covered by an overlapping application for determination of native title.

[60] I do not consider that any application currently overlaps the application area — see my reasons at s 190C(3). Accordingly, in my view, the requirements of s 203BE(3) are not applicable to the area covered by this application. The certificate also states that the application does not overlap with any other native title claim and as such s 203BE(3) is not applicable — at [6].

[61] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and therefore find that the criteria under s 190C(4)(a) have been met.

[62] 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.

[63] Attachment B is titled 'Dieri # 3 Native Title Claim – External boundary description' and contains a metes and bounds description of the external boundaries of the application area referencing native title determination application boundaries, topographic features, land parcels and coordinate points.

[64] Attachment C is a copy of a map titled 'Native Title Determination Application – Dieri #3' prepared by the Tribunal's geospatial services on 28 February 2014. The map includes:

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

Consideration

[65] The geospatial assessment 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.

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

[67] In light of the preceding 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.

[68] 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.

[69] The following description of the native title claim group appears in Schedule A of the application:

> The Dieri Native Title Claim Group comprises those people who hold in common the body of traditional law and custom governing the area that is the subject of the claim and who:-
>
> 1. Are related by means of the principle of descent to the following apical ancestors:
>
> 1.1 Ruby Merrick and Tim Maltalinha (also known as Tim Merrick) who are the parents of the sibling set – Martin, Gottlieb, Rebecca, Selma (or Thelma);
>
> 1.2 Kuriputhanha (known as 'Queen Annie') mother of Karla-warru (also known as Annie);
>
> 1.3 Mary Dixon (born at Killalpaninna) mother of the sibling set – Dear Dear (known as 'Tear'), Jack Garret, George Mungerannie, Joe Shaw, and Henry;
>
> 1.4 Bertha mother of the sibling set – Johannes and Susanna
>
> 1.5 Walter Kennedy husband of Selma (also known as Thelma) nee Merrick;
>
> 1.6 Florrie wife of Martin Merrick;
>
> 1.7 Clara Stewart (nee Murray) mother of Eddie Stewart; and
>
> 1.8 The man Pinngipania (born at Lake Hope) and the woman Kulibani (born at Kalamarina) who are the parents of Sam Tintibana (or Dindibana Ginjmilina).

[70] 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)

[71] 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 [16] and [51].

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

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

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

Consideration

[74] I note that I am confined, in my view, to the material contained in the application for the purposes of s 190B(3) and I have therefore been informed by the applicant's factual basis material contained in Schedule F and Attachment M that accompanied the application in reaching my view about this condition.

[75] The description of the native title claim group is such that it comprises those persons who are the biological descendants of the named apical ancestors.

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

[77] 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.

[78] Attachment M is a copy of the Dieri native title consent determination (SAD6017/1998) (the Dieri determination), which is made over an area that abuts the application area. The orders states that the Dieri people are the descendants of the same apical ancestors identified in Schedule A of the application — at Order 3. The reasons for judgment state that the 'Dieri People as a group identifies itself as the traditional owner of the Determination area because its members are descended from those who had close ties to this area at sovereignty' — at [35]. In my view, descent from a named ancestor provides the fundamental basis for membership to the Dieri people native title group — at [24], [25] and [32].

[79] 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.

[80] 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).

[81] 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.

[82] 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] – [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].

[83] 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 …

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

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

1. The nature and extent of the native title rights claimed and interests in relation to the Claim Area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs, the land and waters of the Claim Area, being:
   (a) the right to access and move about the Claim Area;
   (b) the right to hunt and fish on the land and waters of the Claim Area;
   (c) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, stone, resin, ochre and feathers;
   (d) the right to use the natural water resources of the Claim Area;
   (e) the right to live, to camp and to erect shelters on the Claim Area;
   (f) the right to cook on the Claim Area and to light fires for all purposes other than the clearance of vegetation;
   (g) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;
   (h) the right to conduct ceremonies and hold meetings on the Claim Area;

(i) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;

(j) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Claim Area;

(k) the right to distribute, trade or exchange the natural resources of the Claim Area;

(l) the right to be accompanied on to the Claim Area by those people who, though not Native Title Holders, are:

(i) spouses of native title holders; or

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area; or

(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders; or

(iv) people required by native title holders to assist in, observe, or record traditional activities on the Claim Area; and

(m) the right to speak for and make decisions about the use and enjoyment of the Claim Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.

The native title rights and interest claimed are also subject to the effect of:-

(a) all existing non native title rights and interests;

(b) all laws of South Australia and the Commonwealth of Australia;

(c) valid interest conferred under those laws.

Consideration

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

[87] I have considered the description of the native title rights and interests claimed and find that the rights and interests claimed are sufficient to fall within the scope of s 223 and are readily identifiable as native title rights and interests.

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

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

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

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

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

The requirements of s 190B(5) generally

[89] 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].

[90] 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];

[91] 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].

[92] 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).

[93] The factual basis material is contained in Schedule F and Attachment M. I consider that the additional material provided by the applicant is also relevant to the factual basis. That additional material comprises of:

- an anthropological report dated May 2002;
- an anthropological report dated July 2002;
- affidavits of [name 1 deleted] affirmed on 10 October 2014 and 2 December 2014; and
- affidavit of [name 2 deleted] affirmed on 25 November 2014.

[94] I proceed with my assessment of the sufficiency of the factual basis 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)

[95] 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 whole 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)

[96] Schedule M states that the area covered by the application is isolated and abuts the Dieri determination area. In addition, the application area was not originally claimed in the earlier application as it was then overlapped by a claim by another claim group which has now been withdrawn as the land is acknowledged as Dieri country.

[97] As mentioned above, Attachment M is a copy of the orders and reasons for judgment for the Dieri determination by Mansfield J. The determination area adjoins the application area on the eastern side. The evidence before the Court included anthropological material (which has been provided by the applicant in relation to this application), preservation evidence from Dieri claimants and a pastoralist which was taken on country by the Court, and various statements, affidavits and videos of members of the claim group describing and demonstrating their traditional laws and customs. The evidence also included maps showing the geographic spread of the evidence — reasons for judgment at [22]. I consider that the reasons for judgment provide relevant information which supports the assertions at s 190B(5) for this application. In particular, I extract the following information:

> The claim is made over a significant part of the north-eastern region of South Australia on behalf of the claim group known as the Dieri People.
>
> It comprises some 47,000 square kilometres in area, with … part of its western boundary extending into the Lake Eyre National Park. Much of the Determination area comprises flat rocky desert east of Lake Eyre. … It is a country of high temperatures and low rainfall; generally desert country, but also within the wider "Lakes" region of periodic inundation from waters from the north-east, principally into Lake Eyre. Its north-western corner is defined by reference to the course of the Warburton River [I note, as mentioned above, that I understand the application area is situated within the eastern boundary of Lake Eyre and the western boundary of this determination area, with the Warburton River at the northern boundary of the application area — see also Attachments B and C] …
>
> The Dieri People as a group identifies itself as the traditional owner of the Determination area because its members are descended from those who had close ties to this area at sovereignty. It is comprised of individuals who identify as Dieri and who are predominantly descended from people who were similarly identified as Dieri in the earliest records. Included in the group are people whose apical forebears inter-married with Dieri. Through principles of incorporation under Dieri law and custom these people are recognised by others and recognise themselves as Dieri.
>
> The contemporary aggregated Dieri People group has apparently evolved from the original landed groups identified with the Determination area is and generally recognised as Dieri as far back as can be ascertained from the ethno–historical record. It is also, on the material, appropriate to accept that the Dieri People compromises people who affiliate with the Dieri language as an intrinsic component of their Dieri identity. It is also supported by the material that contemporary Dieri People observe laws and customs which have evolved from those of the original Dieri. These law and customs include:
>
> - Principles of recruitment to the group;
> - Identifying with the language;

- Principles of marriage;
- Modes of respect of systems of authority;
- Responsibility for nurturing, teaching and reproducing Dieri ways.

In my judgment, the level of detail provided by the Dieri People to identify the native title claim group and its society satisfies the requirements of the Native Title Act, as it has the expert anthropologists.

The relevant date of sovereignty for this area is 1788. The State is prepared in this matter to infer connection from the earliest records of contact. That is an appropriate course to adopt.

The anthropological reports adopt two approaches to establishing the connection of the current Dieri People with the native title holders at sovereignty. One is by analysing the historic literature relevant to the area and identifying broad correlations between the language groups recorded there with the language group identities of the Dieri People. The other is by way of claimant family histories.

The evidence suggests that there are a substantial number of members of the Dieri People whose ancestors going back to first contact and close to the time of sovereignty were demonstrably associated with the Determination area at the time. Further, the evidence from historic ethnography suggests that the other mechanisms by which claimants obtain rights in country, i.e. birth, long-term residence and religious knowledge, are likely to have also been operating at the time of sovereignty. Across the generations this has allowed those whose ancestors were primarily associated with country elsewhere within the domain of the "Lakes" group, to establish connections to the claim area. It is a process that continues today.

On the basis of the information contained in the Evidence and for the purposes of the Determination, the State is satisfied that the contemporary native title claimants' society is directly linked to the native title holders at sovereignty. I agree with that view.

The Determination can be made without the necessity of strict proof and direct evidence of each issue as long as inferences can legitimately be made. In consent determination negotiations, it is the State's policy to focus on contemporary expressions of traditional laws and customs and pay less regard to laws and customs that may have ceased. The State can reasonably infer that such contemporary expressions are sourced in the earlier laws and customs. So can the Court.

The Evidence tends to show that much of the behaviour of the Dieri People is regulated or influenced by traditional laws and customs and that there has been continuity of the core features of Dieri society from the past to the present.

The evidence of both the ethnohistorical record and the fieldwork of current researchers is that there is a system evident in both the traditional and the contemporary society. Their outward expression has been transformed, but they remain coordinated by beliefs, norms, practices and connections that are distinctly Dieri. Their core referents are persons and place – which contemporary claimants understand in terms of being Dieri persons connected to Dieri places.

With respect to the evidence about continued existence of traditional law and custom, Dr Martin states that the analysis concerning composition and laws and customs constituting the group was insightful and anthropologically entirely defensible. There were significant amounts of evidence amongst the material of the contemporary practise of the Dieri people of traditional laws and customs. Further, he could see no evidence of a break in continuity of these laws and customs relating to identity and structure of the group.

The materials contained significant evidence of the continued existence of traditional law and custom in relation to, particularly, transmission of knowledge, protection of country, cooking practises and spiritual practises.

There is evidence of transmission of knowledge pursuant to a system of traditional law and custom.

The Court agrees with the view of the State that the material supports the inference that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, and whilst there has been inevitable adaptation and evolution of the laws and customs of that society, there is nothing apparent in the Evidence to suggest the inference should not be made that the society today (as descendents of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty.

It is a requirement of native title law that the Dieri People must show that they follow traditional laws and customs which are connected to the land, and which give rise to rights and responsibilities in relation to that land. Therefore it is not "connection" to the land in the abstract that must be considered, but the content of the traditional laws and customs, the nature and extent of the connection with the land required under those laws and customs, and the relationship between the laws and customs and rights or interests in land which is important.

There is evidence provided in the reports and claimants' statements of the continuing connection of members of the contemporary Dieri People group with at least a substantial part of the claim area through their laws and customs. Evidence of activities undertaken in and across the claim area include:

- Travelling over and monitoring land;
- Visiting, camping and living there;
- Hunting, fishing and gathering and sharing resources;
- Making decisions and actively managing, conserving and protecting resources;
- Managing sites and "old people" things;
- Spiritual practises;
- Using Dieri language.

There is some evidence of transmission of knowledge and practise among the group about country and connection to the country of the claim area. This includes:

- Cultural geography;
- Dreamings;
- Movement on country;
- Management of sites;
- Health of the country;
- Rules about spiritual transgression;
- Language associated with the claim area.

On consideration of all the material, the Court agrees with the State that the Dieri People claim group has traditional laws and customs which demonstrate a connection to the Determination area.

…

> The statements and reports in the Evidence provide support for the view that a number of claimants continue to regularly access and move about the Determination area, including for the purpose of camping, hunting and gathering, and that their actions whilst undertaking these activities are to some extent governed by traditional laws and customs. A number of contemporary claimants were born or raised on the claim area, and have lived on parts of the claim area for periods of their life. There is evidence that a number of claimants continue to access the resources of the claim area. People continue to hunt on the claim area, including for kangaroos; they fish along the Cooper Creek [I understand this creek to flow through the middle region of the application area] and gather bush foods.
>
> There is also evidence that some Dieri People continue to have knowledge of traditional practices such as how to prepare and cook game, which has been transmitted to younger generations.
>
> Whilst there is no evidence in relation to the continued holding of initiation or like ceremonies on the Determination area, there is evidence of other ritual activities and important meetings or events taking place on the Determination area. While births and deaths today are more often associated with large centres such as Whyalla, Port Augusta or Adelaide, there is evidence of the claimants' antecedents being born and buried on the claim area. There is also evidence of the importance to Dieri People of protecting their country and its culturally significant sites, and the cultural significance of birthplaces.
>
> …
>
> The Court is satisfied that the native title rights and interests granted arise from the traditional laws and customs of the Dieri People and inferences can be made that they have evolved from the native title rights and interests as they were likely to have been at sovereignty — at [2] – [3], [35] – [52], [55] – [57] and [59].

[98] Although referred to in the reasons for judgment of the Dieri determination, I consider the anthropological material provides the following additional information about the association of claimants and their predecessors with the application area. For instance, the report of July 2002 states that:

- Prior to settlement, Dieri predecessors were seen around Cooper Creek — at [259].
- The Dieri people had a number of local divisions, with one located west of Kopperamanna (outside but proximate to the mid-eastern boundary of the application area) and another located at the junction of the Coopers Creek with Lake Eyre — at [96].
- One of the Dieri 'local groups' was reported to have lived along the Cooper Creek around Lake Kopperamanna and Lake Killalpaninna (both locations are outside but proximate to the mid-eastern boundary, within the Dieri determination area) — at [102].
- The Tirari/Thirrari people lived on the south-east shores of Lake Eyre, between the embouchures of Cooper Creek and the Clayton River (outside but proximate to the southern boundary of the claim area) — at [97]. The descendants of the Thirrari consider themselves, and are considered by other Dieri, to be Dieri people — see fn 37.
- The Dieri people continued to move adaptively around their territory from the time of settlement into the 1960s. Many Dieri people have remained either on the edge of their country or in proximate locations — at [248].
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the report includes the following information:

- Apical ancestor Tim Merrick arrived at a location outside but proximate to the mid-eastern boundary, within the Dieri determination area) in mid-1882 — at [174]. At this location, he married apical ancestor Ruby in 1884 and their children were born there between 1886 and 1908 — at [91] and [175] – [176]. Both ancestors and some of their children lived at the station until its closure — at [175] and [178]. One of their children was married there in about 1911 — at [178]. Tim Merrick died in 1932 and was buried in an area east of the application area — at [182].
- Apical ancestor Queen Annie was a Thirrari woman. Her grandson was born in 1891 proximate to the southern boundary of the application area where his mother was living — at [109] – [110]. When he was about 4 or 5 years old, his mother, with her sisters and children, moved to another location proximate to the southern boundary, within traditional Thirrari country where Queen Annie lived. Queen Annie taught her grandson the Thirrari language — at [110].
- The granddaughter of apical ancestors Pinngipania and Kulbani went to school proximate to the eastern boundary — at [159].
- Apical ancestor Bertha's son and grandchildren were born proximate to the eastern boundary. Bertha and her son were recorded as having died at this location as well — at [280].

[99] The report of May 2002 provides the following relevant information:

- European settlement in Dieri country occurred after the early 1860s — at Appendix 1, 2 and 14.
- Early commentators considered the Thirrari to be a subgroup of the Dieri — at Appendix 1, 7 and 37.
- The literature refers to the Dieri living on country along Cooper Creek and, in particular, associates the Thirrari within the wider Dieri territory and 'with the eastern or south-eastern shores of Lake Eyre [western boundary of the claim area], the lower Frome Creek [outside but proximate to the southern boundary], and the lower Cooper Creek [within the middle region], north to the Warburton River' — see for instance 4-10, 15, 16, 18, 20; see also Appendix 1 at 28, 41 and 66, table 1 and maps 2, 12, 15 – 18 and 25a.
- Early accounts record a Dieri subgroup being at the junction of Cooper Creek with Lake Eyre and that there were people residing at the lower Cooper Creek — at Appendix 1, 64 – 65.
- Dreaming tracks significant to the Dieri transect [placename deleted] — at Appendix 1, 63.
- Early genealogies record births, marriages and deaths of the predecessors of the claim group. One predecessor is recorded as having died in 1885 at Killalpaninna and another was born around 1840 at Cooper Creek. Another predecessor was born on the lower reaches of the Cooper Creek and lived along the creek — see Appendix 3.

[100] The affidavit material also contains information that is relevant to the association of the claim group with the application area. For instance, [name 1 deleted] in his affidavit of October 2014 says that:

- He is a descendant of apical ancestor Kuriputhanha, who was a Thirrari woman — at [3].
- As an initiated Dieri man, he has been told about the Thirrari/Dieri stories and connections with the claim area — at [6].
- He has knowledge of stories that travel through the claim area, such as the [text deleted] Story. That story runs along the eastern edge of [placename deleted] and connects to the sacred wells in the claim area — at [7]. He also has knowledge of the [text deleted] Dreaming and the '[text deleted] story' which also travel through the claim area — at [8] – [9].
- He has travelled into the claim area with his uncles and cousins to find and visit the sacred wells as well to hunt rabbits and kangaroos — at [11]. He has also been fishing in the claim area when the Cooper Creek is running — at [13].
- He has taken his sons to the claim area, hunting, camping and showing them sites of significance. There he has told his sons stories of the land — at [12].

[101] In his affidavit of December 2014, [name 1 deleted] says that:

- His knowledge of Dieri/Thirrari laws and customs comes from his grandmother, great grandmother, elders with a Dieri/Thirrari ancestry and from senior men in neighbouring groups with common laws and customs — at [3].
- From these people, he learnt that, pursuant to Dieri law and custom, control and ownership of land is inherited from the mother's line. His mother, grandmother and great-grandmother were Dieri/Thirrari. It is this right that gives him ownership to Dieri land, which includes the application area, and the right to control access and hunt and use the resources from the land — at [4].
- He was taught by his elders that 'the Thirrari were a subgroup of the Dieri [who] spoke the same language although with a slightly different accent and some slightly different words' — at [5]. Other Dieri subgroups occupied different places on Dieri country.
- Every member of the Dieri claim group holds a common interest in all of the Dieri land, however members of a particular subgroup have additional rights in relation to a particular area or different areas of responsibility. His family and another family group have a particular interest in the western side of the Dieri country, including the application area. He has knowledge of the areas of responsibility for other families — at [4] – [6].
- Other claim groups have a right to come on to Dieri country to follow their story lines but need permission from the Dieri before they can exercise that right — at [7] – [8].
- He has knowledge of the waterholes or wells within the northern region of the application area that relate to the [text deleted] story, which he says are restricted — at [14].
- He was told by his grandmother about a Thirrari ceremonial ground which is located east but proximate to the claim area. His great-great-grandmothers lived at or near this location — at [16].

[102] [Name 2 deleted] says that:

- The application area is part of Dieri land and neighbouring claim groups recognise this — at [19].
- He is a descendant of apical ancestors Ruby and Tim Merrick. Their daughter was his great-grandmother and she was born proximate to the eastern boundary of the application area in 1892 — at [4] and [6]. This place was traditionally a very significant place as it had a permanent water supply and later became the site of a mission station — at [7].
- He has worked at a station proximate to the southern boundary of the application area. He was told about a campsite within the southern region of the claim area — at [9].
- He says that his great-grandmother was particularly keen on fishing along Cooper Creek in the application area — at [16].
- He and his wife have passed down their knowledge to their children — at [20].

Consideration

[103] The application area is situated in the north-east region of South Australia, and is described as an isolated strip of land adjacent to the eastern boundary of Lake Eyre and the western boundary of the Dieri determination area. I note that the reasons for judgment for the Dieri determination indicates that the region comprises mostly of flat rocky desert, the country is of high temperatures and low rainfall, generally desert country, but also has periodic inundation from waters from the north-east, principally into Lake Eyre — at [3].

[104] 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 Dieri 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 Dieri land and waters including the Dreaming tracks and story lines, sites of significance, as well as ancestral lands that are protected by different Dieri family groups.

[105] 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]. I note that the reasons for judgment for the Dieri determination states that an appropriate course to adopt is to infer connection from the earliest records of contact in the determination area which adjoins the application area. I consider that a similar approach should be adopted for this matter. In my view, the factual basis contains references to the presence of the predecessors of the claim group within the application area prior to the date of European settlement, which I understand from the factual basis to have occurred after the early 1860s. In particular, early explorers in the region observed the predecessors at the lower reaches

of the Cooper Creek. The asserted facts indicate that the predecessors were born and lived along the Cooper Creek and others were located proximate to the application area. The asserted facts also contain information about the apical ancestors identified in Schedule A. For instance, apical ancestor Tim Merrick lived proximate to the mid-eastern boundary of the application area and married apical ancestor Ruby Merrick in 1884. Their children were born in this location between 1886 and 1908 and some of their children continued to live there, with one being married there in about 1911. One of their daughters would fish in Cooper Creek within the application area. Apical ancestor Bertha's son and his children were born proximate to the mid-eastern boundary of the application area. This location is also where Bertha and her son died, and is where the granddaughter of apical ancestors Pinngipania and Kulibani went to school. Apical ancestor Queen Annie was a Thirrari woman, with the Thirrari being a subgroup of the Dieri people that was associated with the area surrounding the claim area — see also my reasons at s 190B(5)(b) below. Her grandson was born in 1891 at a location proximate to the southern boundary of the application where his mother, being Queen Annie's daughter, was living. Her daughter and grandson moved to another location proximate to the southern boundary within traditional Thirrari country where Queen Annie was living in the mid-1890s.

[106] Subsequent generations of Dieri families all have knowledge of the boundaries of Dieri country, including that the application area is part of the wider Dieri traditional lands, and many have been present on the application area at various times. For instance, some claimants continue to fish in the lower reaches of the Cooper Creek, hunt in the southern regions of the application area and visit the sacred wells that connect to the [text deleted] story.

[107] The factual basis also demonstrates the spiritual association the Dieri People have with the application area and the history of that association. The Dieri People have knowledge of the dreaming stories such as the [text deleted] story that runs along the eastern edge of [placename deleted], namely through the application area, and connects to the sacred wells located in the northern region. They also have knowledge of the [text deleted] Dreaming and the '[text deleted] story' that travel through the claim area. The asserted facts also indicate that the predecessors of the claim group performed initiation and other ceremonies, which current claimants continue to practice and teach their children — see my reasons at s 190B(5)(b) below. This in my view reveals a continuing association with the area covered by the application.

[108] The dreaming stories, spiritual beliefs, ceremonies and rituals have been passed down through the generations 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 Dieri People have with the application area.

[109] In my view, the factual basis provides information that is sufficient to support the assertion that the ancestors were associated, both spiritually and physically, with the application area prior to sustained European contact. It is also, in my view, sufficient to support the assertion that this association has been continued by their descendants through to the current members of the claim group. The factual basis demonstrates the intergenerational transfer of knowledge about the stories of the mythic snake, sacred places, ceremonies, beliefs and other traditional practices.

[110] 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 anthropological material demonstrates that the predecessors of the claim group resided

and were associated with the application area. The factual basis material also indicates that current members are associated with the application area. The material indicates that family groups continue to associate or identify with areas, including the application area, where they have particular rights, interests and responsibilities. The material indicates that the predecessors and current members continue to hunt and fish along the lower reaches of Cooper Creek (middle region of the application area) and also hunt in the southern region. I also consider, as mentioned earlier, that the claim group has a spiritual association with the application area. The asserted facts refer to the [text deleted] story that travels through the eastern edge of [placename deleted], connecting to sacred wells, which I understand to be located in the northern region of the application area.

[111] 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.

[112] 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)

[113] 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] – [66].

[114] 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].

[115] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his 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].

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

[116] The reasons for judgment, although specific to the adjoining determination area, contain information about the relevant society, the claim group's connection to the society, and the relevant laws and customs acknowledged and observed by the claim group — see extract of the reasons at s 190B(5)(a).

[117] I also note that the anthropological material contains relevant information in support of the assertion at subsection (b). For instance, the report of July 2002 provides the following relevant information and opinions:

- Before settlement, the 'Dieri people and their culture were part of a regional system of cultures integrated through reciprocal links of trade, marriage together with connected and often mutually entailed responsibilities to the founding ancestors (and the tracks of their [travels, known as the *muramura*, which criss-crossed Dieri country and passed through the territory of neighbouring groups]) and to their territories species and living forces including cooperation in ceremony' — at [33] and [57]. The tracks of the founding ancestors were not just Dreaming tracks but also connected and related people with social and political consequences — at [58]; see also [362] and [363].
- Dieri law and custom formed an 'adaptive system of regional exchange and integration in respect of marriage and group membership' and the integration of Dieri people into the 'regional system was an adaptive response to the vicissitudes of their ecological niche' — at [33].
- Speaking the Dieri language is a defining feature of Dieri identity — at [312]. Language is 'believed to have been introduced and placed in the landscape in the Mura …, the Dreaming' — at [314].
- The Dieri society in the 19th century had two different but related kinds of organisation. The Dieri had social totems called *mardu*, which with the division of their society into two moieties, regulated marriage and much Dieri social organisation. A person inherited their *mardu* and moiety membership through their mother — at [104]. The Dieri also had

another totem called *pintara* which was inherited from their father. *Pintara* 'were the groups which had associations with, and responsibilities for, territory'. The *pintara*, however, could only discharge many of their responsibilities to sites and territory in reciprocal relations with a group called *maduka*. A person's *maduka* was the *pintara* of that person's mother or mother's brother — at [105].

- There has been 'significant change to all aspects of Dieri life and their relationships to their land and other aspects of their culture since settlement which made particular features of their cultural system, such as the preferential marriage system and the manager/owner relationship of *pintara*/*maduka*, untenable for demographic reasons if not other consequences of the settlement and stocking of their lands by non-Aboriginal people' — at [33].
- Some 'Dieri people have strong biographic and cultural links to particular areas of their lands which can be traced in the documentary record and their own oral knowledge' — at [33].
- 'Dieri culture persists and that fundamental to its endurance has been the vibrant life of its families and family lines' — at [33].
- The Dieri are part of the Lakes cultural groups. The groups came together for ceremonies, including corroborees that celebrated the emu myth, and to exchange goods — at [48].
- Neighbouring groups were all entailed in trade, in shared myth and *muramura* trails and in the ceremonial responsibilities which maintained the fertility of their territory — at [311].
- Much of Dieri culture survived when many of the predecessors were placed in missions — at [121]. The predecessors would continue to hunt and gather, using boomerangs and digging sticks — at [116]. They would make baskets, spears, boomerangs and other weapons — at [117] – [118].
- Some Dieri predecessors did not live in the missions and continued to live in the bush and attended the missions on occasions, such as to attend a 'divine service' — at [129].
- The Dieri observed initiation and other ceremonies — at [199] and [219] – [221]. Early research recorded information about 'Dieri legends' and details about the *pintara* and *maduka* from the son of apical ancestors Pinngipania and Kulibani — at [155].
- The 'Dieri people have concentrated in family groups constituted through a respect and authority system which has evolved from that of their ancestors' — at [249].
- Dieri culture has endured and evolved over time — [253]. Current claim group members continue to speak Dieri and perform initiations — at [217] and [245]. There is some indication of a continued observance of *pintara*-like local territorial responsibility and some recognition that different people had authority in different areas of Dieri country — at [328]. Close kin are a fundamental feature of contemporary Dieri social organisation and cultural life — at [329].
- Claim group members learnt language, traditional practices and about ceremonies from their immediate predecessors, such as grandparents — at [110].

- Genealogical evidence demonstrates descent from many of the apical ancestors identified in Schedule A — see for instance [345] – [347].

[118] The anthropological report of May 2002 contains the following relevant information:

- The early records indicate that the Dieri occupied country on the eastern and south eastern sides of Lake Eyre. Some of those records include the application area within the boundaries of the wider Dieri territory — at 4-10.
- Research regarding the Dieri indicate that the predecessors believed that the 'ancestral *muramura* created named sites and estates as they moved across the landscape' and that '[t]heir human followers maintained and celebrated their actions, in lands that had been 'allocated ("assigned") to the *muramura's* 'followers' or 'servants', *milli*' — at 11. The travels of the *muramura* determined the extent of a group's boundary and a *muramura* were responsible for estates in different 'local groups' or 'tribes' depending on its travels.
- The groups in the Lake Eyre basin were linked by a network of similar social structures, widespread trade and exchange, as well as mythological and ritual associations such as similar ceremonies and corroborees. Groups 'allied to the Dieri by language, by custom, and by class system, all more or less intermarrying' — at Appendix 1, 10 and 18.
- In the early 1900s, the Dieri were observed to still follow their old customs — at Appendix 1, 25.

[119] The affidavit material also contains information about the traditional laws and customs acknowledged and observed by the claimants. For instance, [name 2 deleted] says:

- He is the great grandson of Thelma Merrick, who is the daughter of apical ancestors Ruby and Tim Merrick — at [4].
- He learnt about the Dieri way of life, rules, culture and tradition from his great-grandmother or from his mother who learnt from his great-grandmother — at [5] and [10].
- His great-grandmother told him that the 'Thirrari' were a subgroup of the Dieri. They spoke the same language, had the same cultures and inter-married with other Dieri subgroups — at [8].
- In 'Thirrari and Dieri culture, you are to follow your mother's line' — at [11]. He identifies and participates in Aboriginal culture as a Dieri man because his mother is Dieri — at [10] – [11].
- He has been told by elders and by talking with others that there were two 'blood groups' or moieties, which prescribed rules about marriage — at [12] – [14].
- He was told by his great-grandmother that the rules about the land for Dieri and Thirrari were the same. The land is inherited with your right as a Dieri person. Being Dieri gives a person rights to access the land for hunting and living there, the obligation to protect the land, and the right to take traditional foods from the area and fish there. A non-Dieri person would be required to seek permission to come onto Dieri land and they need to speak the Dieri language when they enter. His dad, being an 'Arabunna man, spoke Dieri out of respect to the owners of the land' — at [15] – [16].

- He says that the Dieri have an obligation to care for Dieri burial sites and speaks of the rules associated with deaths and burial sites, which he continues to follow — at [17] – [18].
- He and his wife have passed on their knowledge about being a Dieri person to their children who will pass this information onto their children — at [20].

[120] [Name 1 deleted] in his affidavit of October 2014 says that:

- He is a descendant of apical ancestor Kuriputhanha, who was a Thirrari woman — at [3].
- He has followed his mother's line back through to Kuriputhanha (being his great-great-great-grandmother), in accordance with strict Dieri/Thirrari tradition — at [5].
- As an initiated Dieri man, he has been told stories and connections that Thirrari/Dieri People have with the claim area — at [6].
- He has knowledge of stories that travel through the claim area, such as the [text deleted] story, the [text deleted] Dreaming and the '[text deleted] story' — at [7] – [9].
- He has travelled into the claim area with his uncles and cousins to find and visit the sacred wells as well to hunt rabbits and kangaroos and fish in the Cooper Creek — at [11] and [13].
- He has taken his sons to the claim area, hunting, camping, showing them sites of significance and telling them stories of the land — at [12].
- He says that within the wider Dieri group, there are over 200 people who have a Thirrari ancestory who now identify as Dieri but are aware of their heritage — at [14].

[121] In his affidavit of December 2014, [name 1 deleted] says that:

- He has learnt about Dieri/Thirrari laws and customs from his grandmother, great-grandmother, elders with a Dieri/Thirrari ancestry and from senior men in neighbouring groups with common laws and customs — at [3].
- According to Dieri law and custom, you inherit control and ownership of land according to your mother's line — at [4].
- Other claim groups have a right to come on to their land to follow their story lines but need permission from the Dieri before they can exercise that right — at [7] – [8].
- He says that there are Dieri rules about hunting and about the traditional ways of cooking food — at [11].
- He has been taught traditional stories, customs and ways to live by his family members and others. He says there is a traditional way for preparing and cooking food, how the sections are to be shared, to whom and the process for that sharing. This custom is important to ensure that the spirit of the kangaroo, goanna or other animals that are killed and cooked goes back to its country. This shows respect to the people that taught them, to the animal, the people that the meal is shared with and respect to the land. He has taught his sons to follow these processes — at [12].
- He also speaks of traditional burial rites and the associated story, which connects the deceased to Dieri country — at [13].

- He has knowledge of the waterholes or wells within the application area that relate to the [text deleted] story and says these sites are restricted — at [14].
- He also speaks of a Thirrari ceremonial ground which is located east but proximate to the claim area — at [16].

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

Consideration

[123] In my view, the factual basis identifies a relevant pre-sovereignty society in the application area, and the wider Dieri country, which consisted of the predecessors of the native title claim group who acknowledged and observed a body of laws and customs. The claim group is the same as the group granted native title in the Dieri determination being the descendants of persons identified in Schedule A (see Attachment M). In the reasons for judgment for the Dieri determination, Mansfield J stated that the material justified a conclusion that the Dieri are a society satisfying the requirements of the Act. Those reasons for judgment, and the reports and affidavit material before me, set out the nature, extent and the laws and customs of that society. In particular, the Dieri society comprise of members of the Dieri language group who share laws, customs and the Dieri country in common. The pre-sovereignty society acknowledged and observed a body of laws relating to principles of recruitment to the group; identifying with language; principles of marriage; modes of respect of systems of authority; and responsibility for nurturing, teaching and reproducing Dieri ways.

[124] The anthropological material indicates that the Tirari/Thirrari people were in occupation of the application area prior to European settlement. I understand apical ancestor Kuriputhanha was a Thirrari woman and that some of the current members of the claim group are descendants of Kuriputhanha. I understand that this ancestor would have been alive prior to European occupation of Dieri country, which includes the application area, and therefore would have been part of, with or without others, the pre-sovereignty society that was in existence at the time of European settlement. In the reasons for judgment, Mansfield J was satisfied that the evidence before the Court justified a conclusion that the ancestors, who are the same as those identified in Schedule A, were associated with the wider Dieri country at the time of first contact and that members of the Dieri claim group are descended from them. From the anthropological material which contains genealogical evidence and other information before me, I understand the current claim members are descendants of the ancestors identified in Schedule A.

[125] 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. In this regard, Mansfield J states in the reasons for judgment that 'the materials contained significant evidence of the continued existence of traditional law and custom in relation to, particularly, transmission of knowledge, protection of country, cooking practises and spiritual practises'. I note that the Dieri people observe a landholding system in which family groups exercise rights, responsibilities and interests in relation to land. In my view, the factual basis is sufficient to show that the various Dieri family groups continue to have knowledge of their ancestral country and have knowledge of the sacred and mythological sites on country. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Dieri gain rights to particular 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 the time of first contact. 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.

[126] The factual basis also contains some information which speaks to the way the claim group continues to maintain the Dieri system of social organisation, kinship, social relationship, and the system of authority. The claimants continue to speak Dieri language, perform initiations and other ceremonies and follow the system of respect and authority. The asserted facts also demonstrate that the claim group continues to perform traditional practices such as hunting, fishing, gathering natural resources and traditional cooking methods — see also my reasons at s 190B(5)(a). This in my view is sufficient to show that these laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of settlement, and that they have been passed down the generations to the claimants today.

[127] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of the [text deleted] story, the [text deleted] Dreaming and the '[text deleted] story' that travel across the application area. In particular, the [text deleted] story travels along the edge of [placename deleted] and connects to the sacred wells in the claim area. The claim group members also have knowledge of the sacred sites and ceremonial and burial grounds.

[128] 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 common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants gaining their knowledge from their parents, grandparents and great-grandparents, which in my view reveals a continuing practice of teaching laws and customs to their descendants. The factual basis also indicates the children of the apical ancestors also practiced these modes of teachings. I note that the reasons for judgment conclude that there was sufficient 'evidence of transmission of knowledge pursuant to a system of traditional law and custom'. 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 European settlement.

[129] 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)

[130] 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.

[131] 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].

[132] 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.

[133] 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

[134] 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.

[135] In the reasons for judgment, Mansfield J finds that '[t]here is evidence of transmission of knowledge pursuant to a system of traditional law and custom' — at [8]. His Honour states that the material is sufficient to infer 'that the society today (as descendants of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty' — at [48]. His Honour indicates that there is evidence of the continuing connection of claim group members to Dieri lands through their laws and customs. For instance, there is evidence of activities undertaken in the Dieri country including travelling over and monitoring land; visiting; camping and living in Dieri traditional country; hunting, fishing, gathering and sharing resources; making decisions and actively managing, conserving and protecting resources; managing sites and 'old people' things; spiritual practises; and practicing the Dieri language — at [50] and [55]. Claimants continue to hunt for kangaroos, fish along the Cooper Creek and gather bush foods — at [55]. There is evidence of transmission of knowledge and practise among members about country and connection to country, including cultural geography, dreamings, movement on country, management of sites, health of country, rules about spiritual transgression, and language associated with the Dieri country — at [51]. The evidence also indicate that claim members still continue to have knowledge of traditional practices such as how to prepare and cook game, the knowledge of which has been transmitted to younger generations — at [56].

[136] The affidavit material is also sufficient to support the assertions of transmission and continuity. For instance, [name 2 deleted] says that he was taught about Dieri culture and tradition from his mother and great-grandmother, who was the daughter of apical ancestors Ruby and Tim Merrick — at [4] and [10]. He and his wife have passed on their knowledge to their children, who will pass it to their children — at [20].

[137] 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 Dieri People in relation to the application area;
- the factual basis was sufficient to support an assertion of a pre-sovereignty society acknowledging and observing a normative system.

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

[139] 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.

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

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

[141] 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].

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

[143] 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.

[144] 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].

[145] 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.

[146] 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.'

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

[148] 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. The nature and extent of the native title rights claimed and interests in relation to the Claim Area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs, the land and waters of the Claim Area, being:

(a) the right to access and move about the Claim Area;

(b) the right to hunt and fish on the land and waters of the Claim Area;

(c) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, stone, resin, ochre and feathers;

(d) the right to use the natural water resources of the Claim Area;

(e) the right to live, to camp and to erect shelters on the Claim Area;

(f) the right to cook on the Claim Area and to light fires for all purposes other than the clearance of vegetation;

[149] The claimants speak of their regular use of the application area for various purposes including hunting, fishing, camping and visiting sites of significance — see affidavit of [name 1 deleted] of October 2014 at [11] – [13]. Some claimants live within the wider Dieri country, with some living proximate to the application area. The claimants refer to the sacred wells within the application area needing to be 'dug down to access the water' there — affidavit of [name 1 deleted] of December 2014 at [15]. There are references to the claimants using the natural resources for purposes such as burials where rituals involve using leaves, sand, rocks and sticks — at [13]. The claimants also continue to prepare and cook game in a traditional manner and I infer that the claimants also light fires whilst camping — at [12].

[150] The reasons for judgment refer to evidence of the claim group members travelling over, monitoring, visiting, camping, living, hunting, fishing and gathering and sharing resources of Dieri country — Attachment M at [50].

[151] The factual basis material also indicates that the predecessors of the claim group resided on or proximate to the application area, lived in humpies, and accessed the application area to go hunting and fishing — affidavit of [name 1 deleted] of December 2014 at [11] and [16] and report of July 2002 at [110], [128], [159] and [280]. There are also references to the predecessors hunting and gathering resources to make boomerangs, digging sticks and baskets — report of July 2002 at [116] – [117].

[152] 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.

(g) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;

(h) the right to conduct ceremonies and hold meetings on the Claim Area;

[153] The factual basis material refers to various ceremonies including burial rituals and other cultural activities being performed on Dieri country. For instance, there are references in the anthropological records that the ancestors of the claim group performed initiation and other ceremonies — see for instance report of July 2002 at [219] – [221].

[154] In his affidavits, [name 1 deleted] says he is an initiated man and refers to the continuance of traditional burial rites and traditional practice of preparing and cooking game — affidavit of 10 October 2014 at [6] and affidavit of December 2014 at [12] – [13].

[155] The reasons for judgment say that '[w]hilst there is no evidence in relation to the continued holding of initiation or like ceremonies … there is evidence of other ritual activities and important meetings or events taking place' — at [57].

[156] I am of the view that these rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

(i) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;

[157] The claimants speak of taking their children to the application area showing them sites of significance and teaching them stories of the land — see affidavit of [name 1 deleted] of October 2014 at [12]. The claimants speak of learning from their predecessors about the stories that travel across the application area and about ceremonial grounds and sites of significance.

[158] I consider that the factual basis demonstrates that this right is prima facie traditionally based.

(j) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Claim Area;

[159] The reasons for judgment provide that the claimants continue to manage sites — Attachment M at [50]. The affidavits refer to the claimants protecting sacred sites by banning mining activity within the area — see affidavit of [name 1 deleted] of December 2014 at [13].

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

(k) the right to distribute, trade or exchange the natural resources of the Claim Area;

[161] The anthropological material refers to the predecessors of the claim group trading natural resources with other claim groups — report of July 2002 at [46]. The reasons for judgment state that '[t]here is evidence provided in the reports and claimants' statements of the continuing connection of members of the contemporary Dieri claim group' and that activities undertaken include sharing resources — Attachment M at [50].

[162] 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.

(l) the right to be accompanied on to the Claim Area by those people who, though not Native Title Holders, are:

(i) spouses of native title holders; or

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area; or

(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders; or

(iv) people required by native title holders to assist in, observe, or record traditional activities on the Claim Area; and

[163] There are references in the factual basis material of members of neighbouring groups seeking permission to enter Dieri land for cultural purposes such as to follow their story lines which travel through the application area — see affidavit of [name 1 deleted] of December 2014 at [8] – [10].

[164] I consider that this right is prima facie traditionally based.

Rights prima facie not established

[165] 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.

(m) the right to speak for and make decisions about the use and enjoyment of the Claim Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.

[166] 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].

[167] 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 will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lease entitling the pastoral lessee to determine who has access to the land; the latter right is not — *NT v Ward* [2003] FCAFC 283 at [27].

[168] In light of the case law cited above, I consider that there is a 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).

[169] I consider that the factual basis does not contain sufficient examples of observance of this right by the predecessors or current members of the claim group.

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

Conclusion

[171] 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.

[172] I consider the High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* to be 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].

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

[174] I refer to my reasons above at s 190B(5)(b) that I am satisfied there is a sufficient factual basis to support the assertion that the Dieri People acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[175] Schedule M provides that current claimants, and their predecessors, would camp, erect dwellings and shelters, travel, visit, hunt, gather, prepare and cook bush food, use resources, maintain and protect the natural environment and sites of significance in the claim area — see also Schedule G.

[176] I consider that the anthropological and affidavit material contain some facts that show a traditional physical association of the Dieri People with the application area. For instance, [name 1 deleted] says he has travelled into the area of the claim on a number of occasions to find and visit the wells connected to the [text deleted] story and to hunt rabbits and kangaroos — affidavit of October 2014 at [7] and [11]. He has travelled to the claim area with his uncles and cousin — at [11].

[177] 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.

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

Section 61A(1)

[179] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The ispatial report dated 15 January 2014 confirms that there is no overlap with any native title determination — see also email confirmation from the Tribunal's Geospatial Services of 16 January 2014. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Section 61A(2)

[181] The application is not made over areas covered by a previous exclusive possession act — see Schedule B.

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

Section 61A(3)

[183] 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 — see Schedule E.

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

[185] 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.

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

Section 190B(9)(a)

[187] Schedule Q of the application provides that there is no claim in the application to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Commonwealth or State.

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

Section 190B(9)(b)

[189] Schedule P of the application indicates that there is no claim being made to exclusive possession of any offshore place.

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

Section 190B(9)(c)

[191] There is nothing, in my view, within the application or accompanying documents which indicate that the native title rights and interests claimed have otherwise been extinguished.

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

Conclusion

[193] 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	Dieri No. 3
NNTT file no.	SC2014/001
Federal Court of Australia file no.	SAD133/2014

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:

6 June 2014

Date application entered on Register:

16 January 2015

Applicant:

Edward Lander, Rhonda Gepp-Kennedy, Sylvia Stuart, Irene Kemp and David Mungerannie

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:

As follows:

The Dieri Native Title Claim Group comprises those people who hold in common the body of traditional law and custom governing the area that is the subject of the claim and who:-

1. Are related by means of the principle of descent to the following apical ancestors:

   1.1 Ruby Merrick and Tim Maltalinha (also known as Tim Merrick) who are the parents of the sibling set – Martin, Gottlieb, Rebecca, Selma (or Thelma);

   1.2 Kuriputhanha (known as 'Queen Annie') mother of Karla-warru (also known as Annie);

   1.3 Mary Dixon (born at Killalpaninna) mother of the sibling set – Dear Dear (known as 'Tear'), Jack Garret, George Mungerannie, Joe Shaw, and Henry;

   1.4 Bertha mother of the sibling set – Johannes and Susanna

   1.5 Walter Kennedy husband of Selma (also known as Thelma) nee Merrick;

   1.6 Florrie wife of Martin Merrick;

   1.7 Clara Stewart (nee Murray) mother of Eddie Stewart; and

   1.8 The man Pinngipania (born at Lake Hope) and the woman Kulibani (born at Kalamarina) who are the parents of Sam Tintibana (or Dindibana Ginjmilina).

Registered native title rights and interests:

As follows:

1. The nature and extent of the native title rights claimed and interests in relation to the Claim Area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs, the land and waters of the Claim Area, being:

   (a) the right to access and move about the Claim Area;

   (b) the right to hunt and fish on the land and waters of the Claim Area;

   (c) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, stone, resin, ochre and feathers;

   (d) the right to use the natural water resources of the Claim Area;

   (e) the right to live, to camp and to erect shelters on the Claim Area;

   (f) the right to cook on the Claim Area and to light fires for all purposes other than the clearance of vegetation;

   (g) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;

   (h) the right to conduct ceremonies and hold meetings on the Claim Area;

   (i) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;

   (j) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Claim Area;

   (k) the right to distribute, trade or exchange the natural resources of the Claim Area;

(l) the right to be accompanied on to the Claim Area by those people who, though not Native Title Holders, are:

(i) spouses of native title holders; or

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area; or

(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders; or

(iv) people required by native title holders to assist in, observe, or record traditional activities on the Claim Area; and

The native title rights and interest claimed are also subject to the effect of:-

(a) all existing non native title rights and interests;

(b) all laws of South Australia and the Commonwealth of Australia;

(c) valid interest conferred under those laws.

[End of document]