National Native Title Tribunal

Registration test decision

Application name	Gumbaynggirr People #3
Name of applicant	Barry Phyball, Peter Gary Williams, Clive Joseph Robin Bryant, Colin Jarrett, Bridget Jarrett, Michele Donovan, Belinda Donovan, Annika Rotumah
NNTT file no.	NC2016/003
Federal Court of Australia file no.	NSD1350/2016
Date application made	15 August 2016

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: 2 December 2016

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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 20 November 2015 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 (Registrar), for the decision to accept the native title determination application made on behalf of the Gumbaynggirr People (the application) for registration pursuant to s 190A of the *Native Title Act 1993* (Cth) Act.

Application overview

[2] The application was filed with the Federal Court of Australia (the Court) on 15 August 2016 and the Registrar of the Court gave a copy of the application to the Registrar on 16 August 2016 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.

[3] Given that the claimant application was made on 15 August 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] 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.

Requirements of s 190A

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

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

Information considered when making the decision

[7] 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 8 and 9 September 2016;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2016/1302) prepared by the Tribunal's Geospatial Services on 19 August 2016 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

[8] 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 and other conditions: s 190C

Subsection 190C(2)

> 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.

[9] 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.

[10] 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).

[11] 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.

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

Native title claim group: s 61(1)

[13] 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 — see Part A, Item 2 and s 62 affidavits of each 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.

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

Name and address for service: s 61(3)

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

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

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

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

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

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

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

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

Details required by s 62(1)(b)

[21] 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)

[22] Schedule B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B also 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)

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

Searches: s 62(2)(c)

[24] Schedule D provides that the applicant was provided with a current and historical tenure report dated May 2008 by the State of New South Wales (the State).

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

[25] 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)

[26] Attachments F(1) and F(2) 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)

[27] 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)

[28] Schedule H indicates that that there are no current applications over part or the whole of the area covered by the application — see also Attachment H.

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

[29] Schedule HA states that the applicant is not aware of any notifications under paragraph 24MD(6B)(c) that have been given that relate to the whole or part of the application area.

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

[30] Schedule I indicates that there are no notices issued under s 29 that relate to the whole or part of the application area of which the applicant is aware — see also Attachment H.

Conclusion

[31] 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)

> 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.

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

[33] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …

35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[34] 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.

[35] 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].

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

[37] 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.

[38] 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.

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

Subsection 190C(4)

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

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

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

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

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

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

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

> Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:
> (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
> (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

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

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

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

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

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

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

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

> (a) The individuals who jointly comprise the applicant are members of the Native Title Claim Group and were authorised to make the application and to deal with all matters arising in relation to it at a meeting of the Native Title Claim Group held on 28 – 29 July 2016 at Nambucca Heads.
>
> (b) The grounds upon which the Registrar should consider this statement to be correct are:
>
> (i) The meeting held on 28 – 29 July 2016 at Nambucca Heads followed a process of consultation with members of the Native Title Claim Group by officers of NTSCORP LTD and by Native Title Claim Group members themselves.
>
> (ii) Notice of the meeting held on 28 – 29 July 2016 at Nambucca Heads was provided to members of the Native Title Claim Group by correspondence, fax and telephone contact by officers of NTSCORP LTD and communicated between claim group members. Public notice was also given through an advertisement placed NTSCORP in the Koori Mail [*sic*].

[45] In my view, the above constitutes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

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

The requirements of s 190C(4)(b)

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

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

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

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

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

[50] I note that a claim group is not permitted to choose between the two processes described in s 251B. If there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group — *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 at [1229] – [1230]; see also *Evans v Native Title Registrar* [2004] FCA 1070 at [7].

The applicant's authorisation material

[51] In addition to Schedule R, further authorisation material is contained in Attachments R(1) to R(9).

[52] Attachment R(1) provides the following information about the authorisation meeting:

- The purpose of the authorisation meeting was to allow the relevant Aboriginal people asserting native title rights and interests in the areas excluded from the Gumbaynggirr Warrell Creek native title determination application, which was determined in 2014, an opportunity to consider and authorise the filing of a new native title determination application over the excluded areas — at [2], [5] – [8].
- On 8 July 2016, a notice of the meeting was sent member of the Gumbaynggirr People for whom NTSCORP had a known mailing address, about 330 members of the claim group — at [9] – [12] and Annexure MH-1.
- On 7 July 2016, notice of the meeting was placed in the Koori Mail and published on 13 July 2016 — at [13] – [14] and Annexure MH-2.

- The notice contained the date, time and location of the meeting, the map of the proposed application area; agenda; and an invitation for Gumbaynggirr People and any other person who asserts native title rights and interests in the proposed application area to attend the meeting — at [15].
- The meeting took place in Nambucca Heads, NSW on 28 and 29 July 2016 — at [17].
- NTSCORP staff attended the meeting and assisted with the presentations at the meeting and the logistical arrangements — at [18]. Minutes and attendance records were kept by NTSCORP staff and 90 people attended on 28 July 2016 and 76 people attended on 29 July 2016 — at [19] – [20]. Attendance at meeting was considered to be sufficiently representative of the families who constitute the claim group — at [19].
- Maps of the proposed application area were displayed at the venue — at [21].
- The meeting was chaired by NTSCORP and the members of the native title claim group were given opportunities to ask questions and confirm their understanding of what was being discussed — at [24] – [27].
- Resolutions were put to and discussed by those in attendance. It was resolved by majority that an agreed and adopted decision making process should be used during the meeting, as there were no particular process of decision making under traditional laws and customs that must be complied with, and all decisions were made using that process — at [28] – [30]. This decision making process involved, among other things, general discussion of the issues guided by Gumbaynggirr People who are culturally associated with the claim area, a clearly worded motion reflecting the general consensus being read to the meeting, the motion moved and seconded by members of the claim group, decision then made by members of the claim group by a show of hands, and decisions made by majority vote and being binding.
- The resolutions passed, either unanimously or by majority, included:
    - There was sufficient notice of the meeting and there was sufficient representation at the meeting of the traditional owners of the proposed claim. Those in attendance were representative of members of their family who were unable to attend, and their families and elders were aware of the meeting and were consulted about the issues for discussion. The people in attendance represented the views of their elders and those who could not attend — at [32].
    - The name of the claim group for the proposed claim and the claim group description — at [34] – [35].
    - Identification of the claim area and information about tenure and land use — at [36].
    - The native title rights and interests that would be claimed in the application — at [36].
    - Authorisation of the persons comprising the applicant to make the application and to deal with matters arising in relation to it — at [36].

[53] Attachments R(2) to R(9) provide further details confirming the above information.

Consideration

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

[55] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[56] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified — *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

[57] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. Attachment R(1) indicates that the claim group does not have a decision making process that is traditionally mandated and therefore an agreed and adopted process was used during the authorisation meetings. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[58] Although in the context of s 66B, the requirements of s 251B(b) were discussed by Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) where her Honour observed that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' — at [25]. Her Honour held that:

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

[59] Justice Stone cited with approval the decision of *Ward v Northern Territory* [2002] FCA 171 (*Ward*), where O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance, were required to be addressed before his Honour would consider making an order pursuant to s 66B:

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

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

[61] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meetings and who it was convened by. It indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meeting, which included by public notice, letters and communicated between claim group members, and the notice indicate that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meetings were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion and asking questions. The meeting is said to have been well-attended and there was sufficient representation of the families. The resolutions were passed unanimously or by majority, including the authorisation of the persons comprising the current applicant to make the application and to deal with matters arising in relation to it.

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

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

Merit conditions: s 190B

Subsection 190B(2)

> 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.

[64] Schedule B describes the application area by a number of lots on deposit plans and lists general exclusions.

[65] Attachment C is a colour copy of a map titled 'Gumbaynggirr' prepared by the Tribunal's geospatial services on 28 July 2016. The map includes:

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

Consideration

[66] 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.

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

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

Subsection 190B(3)

> 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] Schedule A describes the native title claim group as including:

- persons who are biological descendants of a list of apical ancestors;
- persons who have been adopted into the families of those persons and the biological descendants of such adopted persons; and
- persons who have otherwise been incorporated, or who are direct descendants of a person who has been otherwise incorporated, as a member of the claim group and who identify as and are accepted as a Gumbaynggirr person, in accordance with traditional laws and customs.

[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 [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 expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[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 the application has a sufficiently clear description of the native title claim group, [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described' — at [67].

Consideration

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

[75] I will discuss each criteria below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[76] I note that in reaching my view about this condition, I have been informed by the material contained in the application.

Descent

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

[78] 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.

[79] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

Adoption

[80] In respect of membership by adoption, I note that in *WA v NTR*, Carr J accepted the approach of identifying members of the native title claim group by biological descendants, *including by adoption*, of named people. His Honour accepted the description without any qualification indicating whether the method of adoption of persons was according to traditional laws and customs — at [67]. I note Attachment A provides the rules by which a person can be part of the Gumbaynggirr claim group by way of adoption.

[81] In light of the above, I am of the view that the description of this criterion is sufficient to ascertain, after some factual inquiry, the persons who are the adopted descendants of the apical ancestors.

Incorporation

[82] Attachment A provides the rules or objective test by which a person can be incorporated into the Gumbaynggirr native title claim group.

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

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

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

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

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

[86] Attachment T is the native title determination, *Phyball on behalf of the Gumbaynggirr People v Attorney-General of NSW* [2014] FCA 851, where the consent determination orders note the same claim group description as in this application.

[87] In light of this and that objective points of reference have been provided, I am satisfied that this part of the description is described sufficiently clearly in order to ascertain whether any particular person is a member of the group.

Conclusion

[88] 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).

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

Subsection 190B(4)

> 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.

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

[91] 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 …

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

[93] Schedule E contains a description of the claimed native title rights and interests. For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

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

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

Subsection 190B(5)

> 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.

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

The requirements of s 190B(5) generally

[97] 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].

[98] 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].

[99] 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].

[100] 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).

[101] The factual basis material is contained in Attachments F(1) and F(2). The applicant has also provided additional material including an affidavit from a senior historian dated 8 September 2016 and anthropological outline dated 9 September 2016.

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

Reasons for s 190B(5)(a)

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

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

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

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

[104] The factual basis contains the following relevant information about the association of members of the native title claim group, and that of their predecessors, with the application area:

- The application area consists of strips of coastal land between Nambucca Heads and Scotts Head on the mid-north coast of NSW — anthropological outline at [20]. It is surrounded by the Nambucca River and Warrell Creek and is about 1.5 kilometres square in area.
- Writings from an early surveyor indicate that Aboriginal people were encountered near the Nambucca River in the early 1840s — affidavit of senior historian at [10]. Some of the Aboriginal people were observed to go hunting brush kangaroo and some were spearing fish. The Aboriginal people were also observed performing male initiation ceremonies near the area.
- This was followed by confrontation between timber cutters in the area. In the early 1850s, over 70 Aboriginal people were recorded as living on the various arms of the Nambucca River — at [11].
- Settlement in the area occurred around the 1870s — at [12]. A reserve was created adjacent or proximate to the northwestern boundary — at [13]. Some of the predecessors were residents at the reserve, many of whom supported themselves by fishing in the Nambucca River.
- Other Aboriginal people lived outside the reserve but proximate to the western and southern boundaries of the application area — at [14].
- Residents at another Aboriginal reserve proximate to the northwestern region included apical ancestors Maggie Buchanan, Davey Cowling and their children— at [15]. They supported themselves by hunting, gathering and fishing.
- Proximate to the northern boundary is a ceremonial site and location of a tribal battle in the late 19th century — at [15].

- In the late 19th century, apical ancestors King Ben Bennelong, Charles Layton and Fred Briggs worked as trackers within Gumbaynggirr country — at [17].
- The reserve proximate to the northwestern boundary continued to be an important living place in the first half of the 20th century — at [18]. They were largely self-sufficient, operating an independent farm and fishing in the Nambucca River, and visited nearby islands within the application area. The residents, such as apical ancestor Walter Smith, were also recorded as speaking the Gumbaynggirr language. He was a fisherman on the Nambucca River and he married apical ancestor Stella Jane Davis at Nambucca Heads in 1936.
- Descendants of the claim group regularly participated in funerals proximate to the northwestern boundary — at [19]. Apical ancestor Biddy was buried in this area in April 1910. Residents continued to participate in traditional activities such as initiation ceremonies, which were held proximate to the northwestern boundary in 1914 and the 1930s.
- When the reserve proximate to the northwestern boundary closed in 1955, the residents were moved to another reserve proximate to the northwestern boundary — at [19].
- Children who were returned to their families were initiated and taught the Gumbaynggirr language — at [20].
- Gumbaynggirr predecessors and their descendants continued to practice traditional activities such as hunting, fishing, gathering, burials and protection of sites of significance in the application area — at [21].
- Current members of the claim group are descendants of the Gumbaynggirr apical ancestors whose predecessors at sovereignty exercised and held rights and interests on Gumbaynggirr country — at [22] and anthropological outline at [164].
- The Gumbaynggirr people continue to have a spiritual association with country and have knowledge of the travels and stories of the ancestral hero and the presence of totemic increase sites, ceremonial initiation sites, and other sacred places in an around the application area — anthropological outline at [26] – [27]; see also Attachment F(1) at [10] – [28], [44] – [61] and Attachment F(2) at [11] – [24]. They continue to believe in the presence of spirits on their country and speak of a spirit along the eastern boundary of the application area — Attachment F(1) at [70] – [82].
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - King Ben Bennelong was born in 1830 proximate to the northern region — anthropological outline at [90]. He lived in this area from at least 1871 till his death in the 1920s. His descendants main connections are with this area and knowledge and responsibility for these sites have been passed down the generations in accordance with traditional laws and customs — at [92].
  - Maggie Buchanan's descendants have connections around the application area — at [94].
  - Biddy was born around 1840 proximate to the northwestern region — at [99].

- Fanny Purrapine was born proximate to the northwestern region and died around that area in 1907 — at [101].
- John 'Jack' Dotti was born proximate to the western/southwestern boundary in about 1848 and died there in 1915 — at [111].
- Son of apical ancestor Susan was born in 1873 and around 1900 he worked around the application area — at [130] – [131]. His children and grandchildren married into other families from the area and they have traditional connections and interests in areas including the application area — at [131].
- Rose Taylor's children were born around the application area in the 1870s — at [132].
- Walter Smith worked as a fisherman around the application area in the 1930s — at [159]. He later worked with his wife Stella Jane Davis at plantations north but proximate to the application area. His descendants have interests in and around the application area.

- Current claimants continue to have knowledge of the boundaries of Gumbaynggirr country and they continue to live around the application area — Attachment F(1) at [9] and [29] – [30]. One claimant says he would go to the application areas as a child with his parents to fish, swim, feed and camp nearby — at [32]. Claim group members continue to go there to catch oysters, fish and catch crab — at [34]. Another claimant speaks of going on camping trips while growing up, such as south but proximate to the application area, where they would explore country, go fishing, hunting, learn from their older relatives and meet with other relatives — Attachment F(2) at [5]. They call out to spirits of their ancestors and to protective totems to look after them and the area and to increase food species — anthropological outline at [77].
- Claim group members are taught traditional laws and customs from a young age from their parents, aunts and uncles and they continue to teach the younger generation through stories and practice — Attachment F(1) at [102].

Consideration

[105] 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 Gumbaynggirr 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 Gumbaynggirr land and waters including ceremonial initiation sites, totemic sites, the travels of the ancestral hero, burial sites as well as areas that certain Gumbaynggirr family are connected to within Gumbaynggirr country.

[106] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European settlement, which I understand from the factual basis to have occurred around the 1870s. For instance, apical ancestor King Ben Bennelong was born proximate to the application area in 1830 and he lived in this area from at least 1871 till his death in the 1920s. The son of apical ancestor Susan was born in 1873 and he worked around the application area in 1900. His children and grandchildren married into other families from the area and they have traditional connections and interests in areas including the application area. Walter Smith worked as a fisherman around the application area in the 1930s. The asserted facts indicate that the descendants of the apical ancestors, including their children and grandchildren, being present on the application area and surrounding areas. Subsequent generations of Gumbaynggirr families all have knowledge of the boundaries of their traditional country and they have all been present on the application area at various times. They continue to reside, hunt, fish, swim and camp in and around the application area.

[107] The factual basis is also sufficient to support the assertion that the Gumbaynggirr People have a spiritual association with the application area and is sufficient to show the history of that association. The Gumbaynggirr People have knowledge of the travels and stories of the ancestral hero and the presence of totemic increase sites, ceremonial initiation sites, and burial and other sacred places in and around the application area. They continue to believe in the presence of spirits on their country and call out to their ancestors and protective totems to look after them and country. The claimants are taught traditional laws and customs from their immediate predecessors through traditional teaching so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Gumbaynggirr People have with the application area.

[108] 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. The application area includes small strips of land mostly surrounded by water. The factual basis contains information about the predecessors and current claimants fishing and swimming in these waters. The asserted facts indicate that some of the apical ancestors, other predecessors and their descendants lived at reserves proximate to the northwest and western boundaries. There are also sacred places within and near the application area and there are references to a spiritual being around the eastern boundary. The claimants continue to camp around the application area including near the southern boundary. The factual basis also contains references to certain families having connections to the application area.

[109] 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.

[110] 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)

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

[112] 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].

[113] 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].

Society

[114] The identification of a pre-sovereignty society or a society that existed prior to European settlement of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the

assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Gumbaynggirr People belong to a distinct society, with a distinct language, social factors and territory to neighbouring groups — anthropological outline at [32] and [47].
- The Gumbaynggirr comprise a society of people bound together by their ongoing observation of traditional laws and customs — at [50].
- The members of the society followed system of laws and customs and a kinship system involving classificatory kinship, division into four named sections and marriage rules — at [33] – [34], and [37] – [38].
- They also followed a system of local organisation which governed landholding — at [35]. A person acquired rights and interests in their father's country and primary rights in their father's local clan area — at [36]. The relationship to land was both economic and spiritual — at [39]. The spiritual relationship to country included belief in creation of sites, travels of the ancestral hero, presence of ancestral and other spirits on country, and totemic increase sites — at [39] – [40].

Traditional laws and customs

[115] The factual basis contains the following relevant information about the traditional laws and customs of the Gumbaynggirr People native title claim group.

[116] The native title claim group continue to observe a kinship system and system of traditional laws and customs — at [51]. These laws and customs give rise to the native title rights and interests on country and are passed on by parents to their children — at [69] – [70].

[117] Current claimants follow a system of local organisation based on descent from ancestors as well as other factors such as long term residence, acquisition of knowledge of country and spiritual responsibilities — at [52]. Certain Gumbaynggirr families have strong associations to certain parts of Gumbaynggirr country — at [52] and [58] – [59]. For instance, descendants of Maggie Buchanan, Susan, and Walter Smith have interests and connections to the application area — [94], [131] and [159]. The great grandson of ancestor Lavina Duncan speaks of claim group members being shown by their immediate predecessors how they should look after country and they continue to visit places on country and make sure they are being looked after — Attachment F(1) at [42] – [43].

[118] Neighbouring groups continue to recognise the Gumbaynggirr People as a distinct, social, political and cultural entity with members speaking a common distinct language — anthropological outline at [55] – [56].

[119] The Gumbaynggirr language plays an important factor in self-identification as Gumbaynggirr and current claimants continue to use Gumbaynggirr words in everyday speech — at [57]. One claimant says that he grew up listening to the adults speaking in language and that Gumbaynggirr people of his generation use Gumbaynggirr words in everyday conversations — Attachment F(2) at [55]. He taught his own children some of the language as they were growing up — at [56]. He now teaches the language to his grandchildren.

[120] Membership to the native title claim group is based on cognatic descent, but a person can claim descent through either parent based on the individual's life circumstances including birth place, residence and acquisition of cultural knowledge, particularly the spiritual content of country — anthropological outline at [61].

[121] Current claimants continue to follow traditional marriage rules and do not marry close kin — at [63].

[122] The Gumbaynggirr People believe their country is imbued with spiritual meaning and have knowledge of the travels of the ancestral hero who created the landscape, the presence of totemic increase sites, ceremonial grounds and other special places, and the presence of spirits including ancestral spirits and various protective and malevolent creatures — at [65]; see also Attachment F(1) at [10] – [15]. The claimants speak of a malevolent presence along the eastern boundary of the application area — at Attachment F(1) at [70] – [82]. The claimants identify with and call on a number of totemic species as protectors and messengers, with some totemic relationships still being associated with particular sites — anthropological outline at [64]. They call out at certain sites, to let the ancestors and other inhabitants know of one's presence and intentions — at [79].

[123] The Gumbaynggirr people continue to believe that illness can be healed by supernatural means using practices handed down by their ancestors — at [67]. The claimants also continue to perform smoking ceremonies at funerals and when requested for cleansing and to keep the bad spirits away — Attachment F(2) at [60] – [61].

[124] The claim group members are told about avoidance places and about food taboos — anthropological outline at [68]. One claimant speaks of important cultural sites on the application area because of his trips there with his aunts and uncles — at [78]. Women continue to avoid eating certain types of food and some food types are not to be consumed until they are cooked and given by an elder — at [75].

[125] The claimants continue to hunt, fish, and camp in the application area like their ancestors did — at [72] and [76] – [77]. They are told about the appropriate behaviour and protocols associated with these activities by senior Gumbaynggirr People and continue to call out to ancestors and protective totems to look after them and country and increase food species — at [77] – [82]. The claim members know about the different types of bush tucker and bush medicine, and know how to collect and use them — Attachment F(2) at [78]. The claimants also continue to make traditional spears and boomerangs like their predecessors did — at [79] – [82].

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

Consideration

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

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

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

[129] In my view, the factual basis identifies a relevant pre-sovereignty society in the application area which consisted of the predecessors of the native title claim group who acknowledged and observed a body of laws and customs. The factual basis indicates that the society had a distinct language, social factors and territory to the neighbouring groups. The members observed a kinship system which dictated marriage rules and they observed a system of local organisation where rights and interests were acquired in an individual's father's country and primary rights in their father's local clan area. The members had a spiritual relationship to country including through belief in creation of sites, travels of the ancestral hero and presence of spirits on country.

[130] I infer from the factual basis that some of the apical ancestors identified in Schedule A were likely to have been part of, with or without others, the society at or around the time of European settlement of the application area given they were either born or living in or around the application area prior to and shortly after settlement of the region — see my reasons at s 190B(5)(a) above. From the asserted facts, I understand the current claim members are descendants of these ancestors.

[131] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Gumbaynggirr People continue to follow a system of social organisation and kinship which governs marriage and they have knowledge of their totems.

[132] The Gumbaynggirr people observe a landholding system which is based on descent and factors such as long term residence, acquisition of knowledge of country and spiritual responsibilities. Family groups have traditional connections to certain areas within the wider Gumbaynggirr country. The claimants learn about laws and customs which define country that must be protected or avoided and are shown how to look after sacred places.

[133] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as hunting, fishing and gathering natural resources for various purposes such as making boomerangs and spears like their predecessors. The claimants also continue to use Gumbaynggirr words in everyday speech and follow rituals in relation to food taboos and food preparation. . This in my view demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[134] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants speak of malevolent spirits at certain places on country and speak of performing smoking ceremonies to ward off bad spirits at funerals or when requested. The claimants believe in myths and that Gumbaynggirr country is imbued with spiritual meaning due to the travels of the ancestral hero. They identify with and call on totemic species as protectors and messengers. At certain places on country, they call out to the ancestors and other spirits to let them know of their presence and intentions. They also call out to their ancestors and protective totems to look after them on country and to increase food species.

[135] 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. The asserted facts state, for instance, that claimants are taught Gumbaynggirr words, shown how to protect sacred places and taught about food protocols and preparation. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of sustained European settlement.

[136] 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)

[137] 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.

[138] 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].

[139] 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.

[140] 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

[141] 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.

[142] The factual basis provides references to the predecessors telling stories and teaching practices to the younger generation. For instance, a claimant says:

> I learnt what I know about Gumbaynggirr culture from my old people when I was young. I didn't learn from a book. I learnt from my parents and aunties and uncles and I kept it with me. I teach those things to my son. I say to him "you know your mob". Books can't keep what I keep in my mind.
>
> I didn't learn my culture like lessons in school. I just learnt over time, little by little. You spend time with your family and you watch and you listen and you pick things as you go. Other times you might be told something straight out and you make sure you do as you're told. Some stories give you warnings too, for example, they might tell you about places you can't go to.
>
> …
>
> Going out on country is important for our learning. Aboriginal kids needs to be inquisitive, and go out in the bush to learn. I learnt a lot from trips I took with my mother and father, and my uncles and aunties, but I also learnt a lot just walking about as a kid — Attachment F(1) at [102] – [105].

[143] 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 Gumbaynggirr People in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[145] 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)

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

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

The requirements of s 190B(6)

[147] 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].

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

[149] 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.

[150] I also understand 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 — *Yorta Yorta* at [86] and *Gudjala 2007* at [86].

[151] 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.'

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

[153] 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. Subject to paragraphs 2 and 3 the nature and extent of the native title rights and interests claimed by the Gumbaynggirr People in the claim Area are the non-exclusive rights to use and enjoy the land and waters of the claim Area in accordance with Gumbaynggirr traditional laws and customs being:

a. the right to have access to and camp;

b. the right to take and use waters;

c. the right to hunt and gather natural resources for personal, domestic and non-commercial communal use;

d. the right to take fish in the temporary waters occurring above the mean high water mark;

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

[155] They also know where to get freshwater on country — see for instance Attachment F(1) at [83] – [101] and [110] – [113]. There are references to claimants moving across the application area, swimming and fishing in the waters surrounding the application area and camping on country — at [32] and [34].

[156] The factual basis indicates that some of the apical ancestors and other predecessors resided on country, accessed country for various traditional purposes such as tracking, hunting, fishing, swimming and camping within or around the application area — affidavit of senior historian at [10] – [19].

[157] 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.

e. the right to do the following activities on the land:

i. conduct ceremonies;

ii. teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and

iii. to have access to, maintain and protect from physical harm, sites which are of significance to Gumbaynggirr People under their traditional laws and customs.

[158] The factual basis indicates that the claim members have knowledge of and continue to perform smoking ceremonies at funerals to ward off bad spirits, have knowledge of myths and associated sacred sites as well as other significant sites which they learn about from their predecessors. They continue to maintain these sites 'by checking up on these places … and making sure that places are kept clean and haven't been disturbed' — see for instance Attachment F(2) at [5] – [24], [36] – [49] and [60] – [62].

[159] I consider these rights are prima facie established under Gumbaynggirr traditional laws and customs.

Conclusion

[160] 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)

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.

[161] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J

observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

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

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

[164] I note that the factual basis contains relevant information that describe a traditional physical association of the Gumbaynggirr People with the application area, including travelling, hunting, fishing, and camping on country — see for instance Attachment F(1) at [31] – [32].

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

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

Subsection 190B(8)

> 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.

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

Reasons for s 61A(1)

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

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

Reasons for s 61A(2)

[170] Schedule B states that areas which are subject to a previous exclusive possession act are excluded from the application, except to the extent that ss 47, 47A or 47B of the Act may apply — at [2] – [3]; see also Schedule L. Section 61A(4) provides that an application may be made in circumstances where the application states that ss 47, 47A or 47B applies to any known previous exclusive possession act.

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

Reasons for s 61A(3)

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

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

Conclusion

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

Subsection 190B(9)

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.

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

Reasons for s 190B(9)(a)

[176] Schedule Q provides that the applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[178] Schedule P indicates that the applicant does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

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

Conclusion

[181] 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	Gumbaynggirr People #3
NNTT file no.	NC2016/1302
Federal Court of Australia file no.	NSD1350/2016

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:

15 August 2016

Date application entered on Register:

2 December 2016

Applicant:

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

Applicant's address for service:

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

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications except change paragraphs 2(iv) and (v) to the following:

> iv. Category B intermediate period act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests
>
> v. previous exclusive possession act

Persons claiming to hold native title:

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

- change paragraph (a)(iv) to the following:

  (iv) Fanny Purrapine, the mother of Lily Kelly and Hilda Kelly Robinson;

- include the following as the last paragraph:

  See attachment A for an objective description of the process of adoption and incorporation

Registered native title rights and interests:

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

- change paragraph 1(a) to the following:

  a. the right to have access to and camp;

- change paragraph 1(i) to the following

  i. conduct ceremonies

- change paragraph 2 to the following:

  2. The native title rights and interests referred to in paragraph 1 are exercised for personal, domestic and non-commercial communal purposes and do not confer on the native title holders possession, occupation, use or enjoyment to the exclusion of all others. The native title rights and interests do not confer any right to control public access or public use of the land and waters of the Claim Area.

[End of document]