National Native Title Tribunal

Registration test decision

Application name	Malyankapa People
Name of applicant	Gerald Quayle, Michael Whyman, Alma Bates-Hannah, Jennifer Bates
NNTT file no.	SC2015/002
Federal Court of Australia file no.	SAD359/2015

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

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

Date of decision: 22 March 2016

Heidi Evans

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 (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Malyankapa People claimant application to the Registrar on 30 September 2015 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 30 September 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

[6] A preliminary assessment of a draft version of the application, prepared by a delegate of the Registrar, was provided to the applicant on 14 September 2015. This constitutes assistance provided by the Registrar pursuant to s 78.

Registration test

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

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

Information considered when making the decision

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

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

[11] The information and documents that I have considered in reaching my decision are set out below:

- Malyankapa People Form 1 and accompanying documents filed in the Court 30 September 2015;
- geospatial assessment and overlap analysis (GeoTrack: 2015/1973) dated 8 October 2015;
- email correspondence from the case manager dated 22 October 2015, 27 November 2015, and 15 December 2015.

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

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

Procedural fairness steps

[14] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are set out below.

[15] On 14 October 2015, the case manager for the application wrote to the State of South Australia (the State), providing a copy of the application and inviting the State to make submissions in relation to the registration testing of the application. By letter of 28 October 2015 to the case manager, the State advised it would not be making submissions.

[16] Also on 14 October 2015, the case manager wrote to the representative body for the area, South Australia Native Title Services Ltd (SANTS), advising of receipt of the application by the Registrar and providing a copy of the application.

[17] Letters of the same date acknowledging receipt of the application were sent to the applicant and the Federal Court. The applicant was invited to provide additional material for the delegate's consideration in applying the registration test provisions, by 30 October 2015.

[18] On 22 October 2015, I received an email from the case manager for the application advising that the applicant's legal representative sought an extension of time within which to provide additional material, until 27 November 2015. By email of 23 October 2015, I advised the case manager that that request was granted, and instructed the case manager to contact the applicant's legal representative to inform them of my decision. The email of 23 October 2015 also set out my reasons for granting the request.

[19] By email of 27 November 2015, the case manager informed me that the applicant's legal representative had requested a further two-week extension of time within which to provide additional material. By email of the same date, I advised the case manager that the request was granted, and instructed the case manager to inform the applicant's legal representative of my decision. The applicant was given until 11 December 2015 to provide the additional material. Again, that email set out the reasons for my decision to grant the request.

[20] On 15 December 2015, the case manager informed me by email that the applicant's legal representative had contacted her, requesting a further extension of time to provide the additional material, until 12 February 2016.

[21] The date the parties were initially advised (letters of 14 October 2015) I would make a registration test decision by was 15 January 2016. Noting that this would no longer be possible where the current request for an extension of time was granted, also on 15 December 2015, I prepared a memorandum setting out my consideration of the request, and the reasons for which I decided to grant the request.

[22] On 11 January 2016, I caused the case manager to write to the State, advising the State that a registration test decision would not be made by 15 January 2016, and that the decision would now be made on or before 25 March 2016. Also on 11 January 2016, the case manager wrote to the applicant, advising the same.

[23] By email of 19 February 2016, the case manager advised me that she had spoken with the applicant's legal representative who had informed her that no additional material would be provided.

Procedural and other conditions: s 190C

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

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

[24] 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.

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

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

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

Native title claim group: s 61(1)

[28] A description of the native title claim group appears at Schedule A. Further information about this description is contained in Attachment A. My understanding of the requirement at s 61(1) for the purposes of s 190C(2) is that it is only where, on its face, the description indicates that not all the persons in the native title claim group are included, or that the description is of a

sub-group of the native title claim group, that the application will fail the condition – see *Doepel* at [36].

[29] Having considered the terms of the description, and the additional information at Attachment A, I do not consider that the description seeks to exclude members of the group, nor is there anything that indicates that the persons described are only a sub-group of the actual native title claim group.

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

Name and address for service: s 61(3)

[31] The names of the persons comprising the applicant appear immediately above Part A of the application. The address for service for the applicant is set out in Part B.

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

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

[33] My task at s 61(4) is procedural only, and does not require me to consider the correctness of the description of the native title claim group, but merely that one is provided – see *Wakaman People 2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*) at [34]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[34] As above, a description of the native title claim group appears in Schedule A.

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

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

[36] The application is accompanied by four affidavits, sworn by each of the four persons comprising the applicant. Those affidavits all contain the same seven paragraphs. Having considered the contents of those paragraphs, I am of the view that they address each of the matters prescribed by ss 62(1)(a)(i) to (v).

[37] The affidavits are all signed, dated, and have been competently witnessed.

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

Details required by s 62(1)(b)

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

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

[40] Written information about the boundaries of the area and those areas within the boundaries that are not included in the application area, is contained in Schedule B and Attachment B.

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

[41] A map showing the external boundaries of the application area is contained in Attachment C to Schedule C.

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

[42] Information about searches of this nature appears at Schedule D of the application.

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

[43] A description of the native title rights and interests claimed in relation to the application area is set out at Schedule E.

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

[44] A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist is contained in Attachment F to Schedule F.

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

[45] Schedule G lists activities currently carried out by the members of the native title claim group in relation to the land and waters of the application area.

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

[46] Schedule H states that the applicant is not aware of any other applications overlapping the whole or part of the application area.

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

[47] Information about these types of notices appears at Schedule HA.

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

[48] Schedule I states that there are no known notices pursuant to s 29 affecting the application.

Conclusion

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

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and

(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[50] At s 190C(3), I understand that it is only where there is a previous application that satisfies all three criteria set out in subsections (a), (b) and (c) of the provision, that the requirement for me to consider whether there are common claimants between the current application and that previous application is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[51] The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services in relation to the map and description of the application area contained in the application (GeoTrack: 2015/1973, dated 8 October 2015) states that there are no applications that overlap the whole or part of the area covered by the current application. As the criterion at subsection (a) is not satisfied, therefore, I have not turned my mind to consider the remaining criteria.

[52] I am satisfied, therefore, 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.

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

Subsection 190C(4)
Authorisation/certification

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

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

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

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

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

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

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

the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

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

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[54] 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.

[55] Schedule R refers to Attachment R. Attachment R is entitled 'Statement by the Applicant in Relation to the Malyankapa Peoples Native Title Claim in South Australia', and has been prepared by the legal representative for the applicant, namely, South Australian Native Title Services Pty Ltd (SANTS). The document is signed by the representative body's Principal Legal Officer and dated 30 September 2015.

[56] Paragraph [2] of Attachment R states that '[t]he Registrar should be satisfied that the requirements of section 190C(4)(b) have been met for the following reasons…' Following that statement in Attachment R are a number of paragraphs setting out details of the way in which those requirements have been met. I accept, therefore, that the application has not been certified and that it is s 190C(4)(b) that I must turn my mind to in considering the application at this condition of the registration test.

[57] Pursuant to s 190C(5), I note that I cannot be satisfied that the requirement at s 190C(4)(b) is met unless the application contains certain statements and information. Paragraph [1] of Attachment R states that '[t]he 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'. In my view, this is sufficient for the purposes of s 190C(5)(a). As above, Attachment R sets out information about how the requirement at s 190C(4)(b) has been met. In my view, this is sufficient for the purposes of s 190C(5)(b) in 'briefly setting out the grounds' on which the Registrar should consider the requirement has been met.

[58] When addressing the requirement of authorisation of native title determination applications, Mansfield J in *Doepel* held that the Registrar was 'required to be satisfied of the fact of authorisation by all members of the native title claim group' – at [78]. Similarly, French J in *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) found that authorisation 'was a matter of considerable importance and fundamental to the legitimacy of native title determination applications' – at [57]. His Honour also commented that while s 190C(5) required only that the application provide 'brief' information about the way in which the authorisation

requirements had been met, formulaic statements in applications would not satisfy the condition – at [57].

[59] Noting the reference to the definition of 'authorise' in s 251B that follows s 190C(4)(b), it is my understanding that the application must address the requirements of that definition. Section 251B is set out above and deals with the way in which decisions surrounding authorisation are made. In short, s 251B provides that decisions must be made by one of two processes. The first is a process of decision-making mandated by the traditional laws and customs of the native title claim group for making decisions relating to authorising things such as native title determination applications (s 251B(a)). The second is a process agreed to and adopted by the members of the claim group for the purposes of authorisation (s 251B(b)). I note that a process of the latter type, that is, an agreed to and adopted process, can only be used where there is no process prescribed by the group's traditional laws and customs.

[60] Paragraph [4(h)] of Attachment R states:

> The native title claim group in accordance with the process of decision making agreed to and adopted (there being no applicable traditional decision-making process for these types of matters) authorised the Applicant to make the native title determination application within South Australia. The intention of the representatives at the meeting was that the Applicants would deal with matters in relation to the native title application. This is reflected in the discussion of who should be a named Applicant for the claim. Names were proposed and voted on by the native title claim group to ensure the ability of the Applicants to make decisions and successfully prosecute the native title claim.

[61] The information before me does not specify how votes were carried at the authorisation meeting discussed in Attachment R, whether by majority or otherwise. I note that the affidavits sworn by the applicant persons for the purposes of s 62(1)(a) do not provide any further detail on this point.

[62] Notwithstanding that the information does not specify how votes were carried, I consider the information provided is sufficient in addressing the requirement at s 251B. In my view, section 251B requires only that the application specify the type of decision-making process used, whether it be a traditionally-mandated process or an agreed to and adopted process. From the information before me, it is clear that the process involved discussion amongst the persons in attendance at the meeting as to who should be the applicant, and names being put forward and voted on by those persons. There is nothing to suggest that there was any disagreement amongst the group as to the process agreed to and adopted. It is my understanding that agreement to a process as contemplated by s 251B(b) may be proved by the conduct of the parties, even in the absence of proof of a formal agreement – see *Noble v Mundraby* [2005] FCAFC 212 at [18]; *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 at [71].

[63] Where the material relies upon a meeting of the claim group as the basis for the applicant's authority, despite the reference to 'all the other persons' in s 190C(4)(b), where an agreed to and adopted process is asserted, I understand that it is sufficient if a decision is made following the members of the group being given every reasonable opportunity to participate in the decision-making process – *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation NSW* [2002] FCA 1517 (*Lawson*).

[64] Attachment R provides the following information about how the members of the native title claim group were notified of the authorisation meeting, held on 16 and 17 October 2014 at the Palace Hotel in Broken Hill:

- the Malyankapa peoples worked closely with SANTS and extensive genealogical and anthropological research was carried out to assist in identifying all persons who identify as Malyankapa;
- all persons who identify as Malyankapa were invited to attend;
- the applicant was assisted by SANTS in convening and funding the meeting;
- assistance to attend the meeting was provided upon request in accordance SANTS' policies, and to ensure the maximum number of people were able to attend the meeting;
- a record of those in attendance at the authorisation meeting, and at meetings prior to the authorisation meeting, was made and a consideration of these records shows that descendants of each of the apical ancestors were present;
- these records also show that Malyankapa families were represented by those in attendance;
- Malyankapa elders were present at the meeting;
- the process was one of openness and inclusiveness;
- the applicant's view is that the meeting was representative of Malyankapa People;
- the applicant has made all reasonable efforts to ensure that all other persons in the native title claim group have been identified, that they are aware of the native title claim, and that they have had the opportunity to participate in the decision-making process.

[65] I note that I do not have before me copies of the attendance records that were made, nor do I have details of how the persons comprising the native title claim group were informed of the upcoming authorisation meeting. Despite this, again, there is nothing before me to suggest that persons were excluded from the meeting, or that persons within the group failed to be notified of the meeting. The information sets out the efforts gone to in identifying who the members of the Malyankapa People native title claim group are, and that all persons identifying as Malyankapa People were invited to the meeting. The applicant's view that the persons in attendance were representative of the members of the native title claim group is also stated. In light of this information, I consider I can be satisfied that all members of the group were given every reasonable opportunity to participate in the decision-making process.

[66] In *Ward v Northern Territory* [2002] FCA 171 (*Ward v Northern Territory*), O'Loughlin J found that he was unconvinced of the fact of authorisation on the basis of the material before him. His

Honour posed the following questions in relation to the information about the authorisation meeting asserted:

> …Who convened it and why was it convened? To whom was notice given and how 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? – at [24].

[67] O'Loughlin J found that it may not be essential that these questions be answered on any formal basis 'such as in terms of the convening and conducting of a meeting in a commercial atmosphere', but found that 'the substance' of the questions must be addressed – at [25].

[68] I note that in the circumstances before His Honour, the material revealed considerable uncertainty surrounding who the members of the native title claim group were, and the relationship between the meeting attendees and the native title claim group. There was also evidence of a dispute between factions within the group. In my view, therefore, the situation before me is distinguishable from that in *Ward v Northern Territory*. I have not received any adverse information from any person asserting that they were excluded from the process, or that the decision-making process used was incorrect and as a result the authorisation that took place is invalid or of no effect. Similarly, nothing within the material reveals any uncertainty about who the persons comprising the native title claim group are. The information before me addresses some of the questions posed by O'Loughlin J in *Ward v Northern Territory*, however in my view, in the circumstances, it is not necessary that the whole of those questions be addressed.

[69] While formulaic statements may be insufficient in allowing me to be satisfied of the fact of authorisation, I consider the use of the word 'briefly' in s 190C(5) indicates that a particularly detailed explanation of the authorisation process may not be required – see *Strickland* at [57]. In my view, the information before me is more than formulaic statements and in the absence of any controverting evidence is of a level of detail sufficient to allow me to reach the required level of satisfaction at s 190C(4)(b).

[70] For the reasons set out above, I am satisfied that the applicant is a member of the native title claim group and is authorised to make the application and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[71] The requirements set out in s 190C(4)(b) are met.

Merit conditions: s 190B

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

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

[72] Noting the wording of s 190B(2), I understand that my consideration is limited to the information contained in the application, prescribed by ss 62(2)(a) and (b). As above, that information is contained in Attachment B to Schedule B, and in Attachment C to Schedule C.

[73] Attachment B is titled, 'External boundary description', and contains a metes and bounds description referencing state borders, native title determination and determination application boundaries, a lot on plan, lakes and coordinate points. The description has been prepared by the Tribunal's Geospatial Services and is dated 23 September 2014.

[74] Schedule B contains a list of general exclusions, that is, areas within the external boundaries that are not included in the application area. I do not consider that there is anything problematic in adopting this approach to describing such areas for the purposes of s 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

[75] Schedule B also states that where there are any discrepancies between the written description and the map at Attachment C, the written description is to prevail.

[76] The map at Attachment C is a colour copy of a map also prepared by the Tribunal's Geospatial Services, dated 23 September 2014. It includes:

- the application area depicted as a bold dark blue outline;
- a topographic background with reserves, national parks, lakes, major localities, rivers, creeks and state borders labelled;
- a locality diagram;
- scalebar, northpoint and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[77] The geospatial assessment concludes that the map and description are consistent and identify the application area with reasonable certainty. Having turned my mind to the written description in Attachment B and Schedule B, and the map at Attachment C, I agree with this assessment. I am satisfied that the information about the application area contained in the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

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

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

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

[79] At s 190B(3), I understand that my consideration is limited to the information contained in the application about the native title claim group – see *Doepel* at [16]. As above, a description of the group appears in Schedule A, with further information at Attachment A. Consequently, it is the requirement at subsection (b) of s 190B(3) which the application must satisfy.

[80] In *Doepel*, Mansfield J held that the focus at s 190B(3) is 'not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [*sic*] of any particular person in the identified native title claim group can be ascertained' – at [37]. His Honour found that the condition does not require an examination of whether the persons described do in fact qualify as members of the native title claim group – at [37]. Kiefel J later affirmed this approach in *Wakaman* – at [34].

[81] The description at Schedule A appears as follows:

> The Native Title Claimants are those Aboriginal people who:
>
> (a) Are the biological descendants of the following ancestors:
>
> **(i) Jerry Tup:i of Cobham Lake**
> **(ii) Fanny *Buugali* Williams;**
> **(iii) Cobham Tommy Williams;**
> **(iv) Topsy Crowe;**
> **(v) Alf Barlow, Son of Jimmy and Jennie Barlow;**
> **(vi) Rosie Stapleton, daughter of Nellie from Cobham Station;**
> **(vii) Alice Stapleton, daughter of Nellie from Cobham Station;**
> **(viii) Willie Stapleton, son of Nellie from Cobham Station;**
> **(ix) Jimmie Stapleton (Harrison), son of Nellie from Cobham Station;**
>
> (b) Are identified and accepted as Malyankapa under traditional law and custom on the basis of descent from a Malyankapa person; or
>
> (c) Are accepted by those listed at (a) as being adopted into the Malyankapa community under traditional law and custom.

[82] My understanding of the description above, therefore, is that a person must meet at least one of the criteria set out at paragraphs (a), (b) and (c), to qualify as a member of the native title claim group. In my view, the criterion at paragraph (b) does not differ in any substantial way from the criterion at paragraph (a). That is, in both criteria, membership is on the basis of descent from a Malyankapa person. The criterion at paragraph (c) requires that a person is accepted by the other members of the group as being adopted into the group in accordance with traditional laws and customs.

[83] In *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), Carr J considered a similar description whereby members of the group were identified by the application of rules, or criteria. His Honour held that merely because factual inquiry was necessary in order to ascertain whether any particular person was a member of the group did not mean that the description was not sufficiently clear for the purposes of s 190B(3) – at [67]. Referring to the finding in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at [124], His Honour held that in light of the remedial character of the Act, the requirement should be construed beneficially – at [67].

[84] In that case, the criteria used in the description of the native title claim group included that persons were the biological and adopted descendants of named apical ancestors. I note that Carr J was satisfied that that description was sufficiently clear and met the requirement at s 190B(3).

[85] Having considered the terms of the description before me, I have formed the view that it would be possible, by starting with an individual and applying the specified criteria, through some factual inquiry, to determine whether any such person was a member of the native title claim group. Consequently, I consider that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

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

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

[87] In undertaking the task at s 190B(4), it is my understanding that I am restricted to the information contained in the application, that is, the description of the native title rights and interests claimed that is prescribed by s 62(2)(d).

[88] As above, that description appears at Schedule E of the application. Paragraph [1] of Schedule E is a claim to a right of the claim group members 'to possess, occupy, use and enjoy the lands and waters covered by the application […] as against the whole world'. In my view, there is

nothing problematic in using this broad terminology to describe a right claimed, for the purposes of s 190B(4) – *Strickland* at [60].

[89] Paragraph [2] of Schedule E includes a list of non-exclusive rights claimed in relation to the land and waters of the application area. Following that list, at paragraph [3], are a number of qualifications on the operation of the rights and interests, including that the rights and interests claimed are subject to the valid laws of the State and the Commonwealth and the traditional laws and customs of the native title claim group.

[90] In *Doepel*, Mansfield J approved the approach of the Registrar's delegate who found that the test of identifiability for the purposes of s 190B(4) is whether the claimed rights and interests are understandable and have meaning – at [99]. That approach affirmed by Mansfield J also involved the delegate referring to the definition of 'native title rights and interests' at s 223(1) and assessing whether the rights and interests claimed could be understood as 'native title rights and interests'. While I have had regard to that definition in applying this condition of the registration test, my view is that a consideration of whether each individual right or interest meets the requirements of the definition at s 223(1) is more appropriate for the task at s 190B(6), in assessing whether the rights and interests can be, prima facie, established.

[91] In discussing the correct approach at s 190B(4), in *Doepel*, Mansfield J also held that '[i]t was a matter for the Registrar to exercise his judgment upon the expression of native title rights and interests claimed', and it 'was open to the Registrar to read the contents of Schedule E together so that properly understood there was no inherent or explicit contradiction' – at [123].

[92] Having turned my mind to the contents of Schedule E, therefore, I consider that the rights and interests claimed are clear, understandable and have meaning. I have read the contents of the description together, including the stated qualifications and am satisfied that there is no inherent or explicit contradiction within that description.

[93] I am, therefore, satisfied that the description contained in the application is sufficient to allow for the native title rights and interests claimed to be readily identified.

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

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
(c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[95] The task of the Registrar's delegate at s 190B(5) was expressed by Mansfield J in *Doepel* in the following way:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion.' That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17].

[96] This approach was approved by the Full Court in *Gudjala 2008*. It was noted by the Full Court that the delegate was able to rely on the statements within the affidavits required by s 62(1)(a) sworn by the applicant persons that the statements in the application were true, in accepting the asserted facts – at [91]–[92].

[97] While s 62(2)(e) makes it clear that it is only a 'general description' of the factual basis that is required to be contained in the application, it is my understanding that for the purposes of s 190B(5), that description must be in sufficient detail to enable a 'genuine assessment of the application', and be 'more than assertions at a high level of generality' – *Gudjala 2008* at [92].

[98] It is the particular matters prescribed by subsections (a), (b) and (c) of s 190B(5) that the factual basis must address – *Doepel* at [130]. That is, the factual basis must provide information that relates to the particular native title claimed, by the native title claim group, over the land and waters of the application area – see *Gudjala 2007* at [39].

[99] I note that my consideration at this condition of the registration test is not restricted to information contained within the application, and for that purpose, I may have regard to the sources prescribed by s 190A(3) – *Doepel* at [16].

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

Reasons for s 190B(5)(a)

[101] The assertion at s 190B(5)(a) is that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. Where the factual basis addressing this assertion consists only of broad statements that lack geographical particularity to the land and

waters of the claim area, or where the information fails to speak to an association with the entire area claimed, it is my understanding that it is unlikely to satisfy the condition at s 190B(5)(a) – *Martin* at [26].

[102] In *Gudjala 2007*, in an aspect of the decision not criticised by the Full Court on appeal, Dowsett J's comments indicate that the information required at this condition may need to address:

- the way in which the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The applicant's factual basis material – s 190B(5)(a)

[103] The applicant's factual basis material is contained in Attachment F to Schedule F. There is also some relevant information at Attachment A to Schedule A. The information within the application that I consider addresses the assertion at s 190B(5)(a) is summarised below:

- the Malyankapa People native title claim group are the direct descendants of the Aboriginal persons who were in occupation of the application area at least at the time of first contact – Attachment F at [1.2];
- the claimants identify with the land and waters comprising the application area as their country through being taught by their elders who continue to maintain and pass on their traditional knowledge in accordance with traditional laws and customs – Attachment F at [1.2];
- the claimants enjoy the resources of the area in accordance with their traditional laws and customs which they continue to observe – Attachment F at [1.2];
- all of the apical ancestors identified are Malyankapa people and have affiliations with Malyankapa country – Attachment F at [2.2];
- the application area is located in the central to western portion of traditional Malyankapa country – Attachment F at [3.1];
- the application area is in the Strzelecki Desert and is covered by extensive dune fields with interlinked salt lakes and clay pans scattered throughout the area – Attachment F at [3.1];
- historically, due to seasonal weather patterns and the arid nature of the country, Malyankapa peoples' occupation of the area would have been intermittent – occupation would have depended on the occurrence of substantial rain, vegetation growth and the presence of wildlife – Attachment F at [3.1];
- water and food were more readily available in the eastern parts of traditional Malyankapa country where the predecessors of the group would have moved about – Attachment F at [3.1];
- first European contact is understood as being in 1844 when explorer Charles Sturt travelled through central Australia, including areas in the eastern and north-eastern portions of traditional Malyankapa country – Attachment F at [3.2];

- in Sturt's account of this expedition, he records a number of direct encounters with Aboriginal people and evidence of their presence in areas including Floods Creek, Grey Range, Evelyn Creek, Depot Glen – Attachment F at [3.5];
- various excerpts from this source speak to a correlation between the location of the encounters, the language and customs of the Aboriginal people recorded at these places, and the language and customs particular to Malyankapa society – Attachment F at [3.5];
- explorers Burke and Wills came across an Aboriginal camp at Torowoto in Malyankapa country in 1860 – Attachment F at [3.2];
- further encounters occurred from the 1860s onwards through the gold prospecting and pastoral settlement periods in parts of Malyankapa country including Tibooburra, Milparinka, Mt Browne and Mt Arrowsmith – Attachment F at [3.2];
- Frederic Bonney wrote about the Malyankapa and groups of the Darling River region while working at Momba Station between 1865 and 1880 – Attachment F at [3.2];
- with respect to the application area, no early accounts of Europeans travelling to and interacting with Aboriginal people in the area have been uncovered – Attachment F at [3.3];
- it appears that other than Sturt, the only explorer who came close to the location of the application area was Captain E C Frome during his 1843 expedition to Lake Frome – his party had brief encounters with Aboriginal people along the journey and came across evidence of their presence – Attachment F at [3.3];
- Frome's party only travelled as far as the south-western base of Lake Frome within the vicinity of the Pasmore River – they did not travel to the eastern side of the Lake and beyond where traditional Malyankapa country lies – Attachment F at [3.3];
- early historical and ethnographic accounts record traditional Malyankapa country with varying degrees of accuracy – Attachment F at [3.4];
- Edward Curr writing in 1886 refers to a report by Morton which observed that the *Mulya-Napa* group 'dwells between Lake Torowoto, the southern boundary of Queensland and the country of the Pono Tribe' – Attachment F at [3.8.2];
- Elkin in 1931 found that the *Malyanapa* were 'mostly in the far north west corner of New South Wales but belonged to the Lakes group of South Australia', however in 1938 revised this location, finding that Malyankapa country is mainly in South Australia and Queensland and only partly in New South Wales – Attachment F at [3.12];
- in 1940, Tindale located Malyankapa country around Milparinka, New South Wales, to the eastern shores of Lake Frome, south to Eurinilla Creek, South Australia, and on the western side of the Barrier and Coko Ranges – Attachment F at [3.14];
- in 1953, Nekes and Worms found Malyankapa language to be spoken between Bancannia in New South Wales (approximately 130 km north of Broken Hill) and Lake Frome in South Australia – Attachment F at [3.16];
- writing in 1958, Beckett located Malyankapa territory in New South Wales around the Tibooburra, Milparinka and Cobham Lake areas, and he noted locations significant to the Malyankapa such as the Salisbury, Yantara and Cobham Lakes, water holes near Mount Poole and camping sites at Yancannia Station and Mount Woods – Attachment F at [3.17];
- Hercus in 1974 located the group between the north-eastern shores of Lake Frome and the New South Wales border – Attachment F at [3.20];
- in addition to the locations referred to in the sources above, more recent sources refer to Malyankapa country as including places such as Yandama Creek, Salisbury Downs, Mt Poole,

Mt Arrowsmith, Quinyambie, Mindulpa Creek, Coonee Creek, Lake Boolka, Lake Muck, Poverty Lake, Starvation Lake and Lake Callabonna – Attachment F at [3.24] to [3.29].

My consideration – s 190B(5)(a)

[104] From my consideration of the material before me, it is my understanding that traditional Malyankapa territory includes areas in both South Australia and New South Wales, covering the border between the two States around the intersection with the southern edge of the Queensland border, at Cameron's Crossing. I also understand that traditional Malyankapa territory extends as far west as the eastern shore of Lake Frome in South Australia.

[105] The application area, however, is only one portion of this country, falling wholly within South Australia, and bordered on the eastern side by the South Australia-New South Wales border. On the western side, the application area does not extend as far as Lake Frome.

[106] The requirement at s 190B(5)(a) is that the factual basis is sufficient to support an assertion that the native title claim group have, and its predecessors had, an association with the entirety of the area claimed. The statements within the material must also have geographical particularity to the land and waters of the application area – *Martin* at [25] to [26]. Using the Tribunal's iSpatial database, and other online mapping products, I have managed to locate almost all of the places referred to within the material. I note that approximately half of those places fall within New South Wales, rather than South Australia. I accept that the information that speaks to these New South Wales locations may be relevant in supporting an association of the native title claim group and its predecessors with the wider traditional Malyankapa country. In my approach to the task here, however, particularly where the information speaks to places a significant distance from the border of the application area, I have considered it appropriate to disregard that information.

[107] The assertion at s 190B(5)(a) is that the native title claim group have, and its predecessors had, an association with the land and waters of the application area over the period since sovereignty. The factual basis material provides that the native title claim group identify as Malyankapa people because they are the 'direct descendants of those Aboriginal persons who were in occupation of the application area at least at the time of first contact'. Attachment F goes on to provide information about first contact in, and settlement of, the area, stating that explorer Captain E.C. Frome traversed the region around Lake Frome in 1843. Explorer Charles Sturt also wrote in 1844 to 1846 of his party's interactions with the Aboriginal people inhabiting an area including Floods Creek, which runs across the border from New South Wales into South Australia (within the application area). Attachment F states that further contact within the region including the application area occurred from the 1860s onwards, as a result of gold prospecting and pastoral settlement. From this information before me, I consider that I can infer first contact in the area to have occurred around 1844, and that settlement in the area began to take place sometime around the 1860s. Noting the isolated location of the application area, and from

statements in Attachment F (for example at [3.3]), I accept that settlement was a more gradual process in the region surrounding the application area than experienced in other parts of Australia.

[108] Regarding whether the predecessors of the group had an association with the land and waters of the application area at sovereignty, from information contained in Attachment A, I understand the factual basis to assert that the apical ancestors were persons who were present in the application area at around the time that settlement took place, or in the decade or so following settlement. For example, Attachment A provides that apical ancestor Fanny *Buugali* Williams was born in 1856 and died in 1916, and that she and her three children and their descendants are all Malyankapa People. Similarly, Attachment A states apical ancestor Topsy Crowe was born in 1858.

[109] Attachment F speaks to various historical and ethnographic sources that refer to Malyankapa People inhabiting or being associated with locations within the application area. For example, Tindale in 1940 cited sources dated 1884, 1886 and 1931 in concluding that Malyankapa country stretched from Malparinka in New South Wales to the eastern shore of Lake Frome and south to Eurinilla Creek in South Australia – see Attachment F at [3.14]. Attachment F also includes a statement that it can be inferred that the Aboriginal people encountered by Sturt and his party in 1844 were Malyankapa, as the areas the party traversed are within traditional Malyankapa country. This includes the encounter of one of his men, Flood, with Aboriginal people at Floods Creek. From my own research, I am aware that Floods Creek crosses the border from New South Wales into the application area in South Australia.

[110] I consider that the factual basis also speaks to an association of the apical ancestors of the group with the application area around the time of settlement. Information provided by members of the claim group that appears in Attachment F includes information about the apical ancestors of the Malyankapa People, and the claimants' knowledge of the places where those ancestors spent time. For example, Attachment F states that one member of the claim group recalls his grandmother, Hannah Quayle (the daughter of apical ancestor Fanny *Buugali* Williams), telling him how as a young girl, she travelled around Malyankapa country, and spent time at places such as Lake Muck and Quinyambie, and that she used to hunt the Hopping Mouse around Lake Boolka. From my research, I understand Quinyambie is within the application area, Lake Boolka flows over the eastern border of the application area (the New South Wales-South Australia border), and Lake Muck is immediately adjacent to the eastern edge of the application area. From this information, I consider it reasonable that I can infer Hannah would have spent time at these places with her parents, including her mother, apical ancestor Fanny *Buugali* Williams.

[111] Further, Attachment F states that another claimant remembers apical ancestor Alf Barlow working as a drover moving cattle from New South Wales to stations in South Australia, including to Quinyambie station – Attachment F at [7.1.3].

[112] Attachment F also speaks to the way in which the apical ancestors or their direct descendants were informants for a number of anthropologists working in the area. For example, apical ancestor Alf Barlow was one of the informants for Beckett and Hercus who recorded the story of 'The Two Ngatyi' (rainbow serpents). In the story, the two *ngatyi* travel over country starting at a spot on the Paroo River (near Wilcannia in New South Wales), across to the Flinders Ranges (south of the application area in South Australia), and then back up to a spot not far from Tibooburra (New South Wales). Attachment F describes how Alf recounted those places traversed by the two *ngatyi* on their journey, including Starvation Lake (within the application area), Lake Boolka and Lake Muck – at [3.27]. Attachment F quotes Beckett and Hercus as noting that 'the telling of the myth of the *The Two Ngatyi* is to illustrate the way in which Ancestors created and named the country' – Attachment F at [4.6.3]. From this information, I consider the material sufficient to support a spiritual association of the group with the application area, as well as a physical association.

[113] Attachment F also explains how George Dutton, who referred to apical ancestor Jerry Tup:i as his father, shared with Beckett (recorded in Beckett's 1958 publication) the way in which he spent time travelling the country 'up into Queensland, over as far as South Australia and down to the Darling at Wilcannia'. Attachment F provides that George described how during this time Jerry taught him 'the names of the hills and waterholes and the myths and legends associated with them' – at [7.12.1]. I consider this information to further support an assertion that the apical ancestors of the native title claim group had an association with the application area.

[114] In light of this material before me, therefore, and noting my view of the asserted facts that the apical ancestors were persons who were present in the application area at the time of settlement, I consider the factual basis sufficient to support an assertion that the predecessors of the native title claim group were associated with the application area at settlement. Following on from this, I consider it reasonable to infer that prior to any disruptions brought to the area as a result of settlement, it was none other than the immediate predecessors of the Malyankapa People in the area at first contact and settlement who occupied the area at sovereignty.

[115] Section 190B(5)(a) also requires that the factual basis is sufficient to support an assertion of an association of the predecessors of the group with the application area over the period since settlement. Attachment F includes information supplied by claimants, and recorded in anthropological and historical sources, which speaks to predecessors of the group having a physical presence at places within the application area. For example, Attachment F provides that one claimant explains how in the 1970s he worked with his father, Alfie Bates, on Quinyambie and Mulyangarie Stations (both within the application area), and that his father used to come and take him out of school to work on the stations. From the information supplied in Attachment A, I understand Alfie Bates to be a descendant of apical ancestor Rosie Stapleton.

[116] A further example is where Attachment F speaks of a claimant explaining how her grandmother, Hannah Quayle (daughter of apical ancestor Fannie *Buugali* Williams), told her about the bore-sinking work she and her husband did throughout Malyankapa country, including near Brougham's Gate (on the border of the application area), and at Quinyambie and Lake Muck – at [7.3.6]. Attachment F provides that another claimant describes how his grandmother, also Hannah Quayle, told him that Grandfather Quayle would take her back to Lake Frome to camp, and that they had a bullock and camel team and would travel up to Cameron's Corner and over the border to Lake Frome – at [7.1.4].

[117] Attachment F goes on to describe how the same claimant shares the way his mother (daughter of Hannah, and granddaughter of Fannie) used to talk about Starvation Lake, and emphasised the importance of the lake. His mother also spoke of living in that area while the claimant's father worked around the lake – at [7.1.6].

[118] In my view, the material also speaks to an association of the members of the claim group with the land and waters of the application area today. For example, Attachment F provides that one claimant explains that when he goes out on country, 'he still gathers bush fruit and vegetables to eat and knows what to eat because his mother showed him' – at [7.5.5]. Attachment F states that the same claimant recalls how he used to camp between Lake Frome in South Australia, and the South Australia-New South Wales border and that he collected and ate *kullaka* (bush onion) while he was camping there – at [7.5.5].

[119] Another example is where Attachment F refers to a claimant describing how he and his cousin would travel over the border into South Australia, including around Quinyambie Station, and shoot kangaroos and trap rabbits, taking them back to their family to share – at [7.4.7] and [7.6.3]. Consequently, I consider the material sufficient to support an assertion of an association of the members of the native title claim group with the application area today.

[120] In my view, the information before me is more than general statements about the requisite association, and it has a sufficient level of detail to enable me to identify the particular geographical area with which the claim group asserts they and their predecessors have and had an association. As above, I consider approximately half of the material before me speaks to an association with the New South Wales portion of what is asserted as traditional Malyankapa country, and therefore, my view is that this information does not address an association with the application area. Despite this, however, noting the examples I have set out in my reasoning above, I have formed the view that the material is sufficient to support an assertion of an association of the members of the group and their predecessors with the application area, including back to settlement.

[121] In my consideration, I have also had regard to the information in Attachment F that speaks to the intermittent occupation of the application area by the group and its predecessors, due to

the arid nature of the land and seasonal variations including periods of insufficient resources able to sustain the presence of the Malyankapa people in the area – see Attachment F at [3.1]. From these facts, I accept that there may be limited material that addresses an association of the group and its predecessors with this area. Having considered what is before me, however, I am of the view that the material speaks to various locations within the application area and its immediate vicinity, such that I can be satisfied that the factual basis is sufficient to support an assertion of an association with the entirety of the area.

[122] Consequently, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[123] The application meets the condition at s 190B(5)(a).

Reasons for s 190B(5)(b)

[124] The requirement at s 190B(5)(b) is that I am satisfied that the factual basis is sufficient to support an assertion that there exist 'traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title'. Noting the focus of the assertion on the claimed native title, it is my view that the task at s 190B(5)(b) should be undertaken having regard to the definition of 'native title rights and interests' at s 223(1).

[125] Pursuant to subsection (a) of that definition, native title rights and interests are those communal, group or individual rights and interests in relation to land and waters where 'the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In light of the similarities between this definition and the terms of s 190B(5)(b), I consider it appropriate that I turn my mind to the leading authority in relation to s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

[126] The High Court held that not only were 'traditional laws and customs' those that had been passed down from generation to generation of a society, by word of mouth and/or common practice, but there were two further crucial elements that attached to the definition of that term – *Yorta Yorta* at [46]. Firstly, the High Court held that the origins of the content of the law or custom concerned must be found in the normative rules of the relevant Aboriginal pre-sovereignty society, and secondly, the normative system under which those rights and interests were possessed must have continued substantially uninterrupted since sovereignty – at [46]–[47], [79] and [86]–[87].

[127] In *Gudjala 2007*, in an aspect of the decision not criticised on appeal, Dowsett J approved this approach to the task at s 190B(5)(b). His Honour summarised the principles from *Yorta Yorta* and then sought to apply them to the factual basis material before him. Dowsett J again revisited

the requirement in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). His Honour's comments from each of those decisions suggest the following types of information may be required to satisfy the condition at s 190B(5)(b):

- information addressing how the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala 2007* at [63];
- information that speaks to the existence at European settlement of a society of people living according to a system of identifiable laws and customs, and that identifies the persons comprising that society who acknowledged and observed the laws and customs – *Gudjala 2007* at [65] and [81]; *Gudjala 2009* at [37] and [52];
- an explanation of how current laws and customs can be said to be traditional (that is, laws and customs derived from those of a pre-sovereignty society), and more than an assertion that those laws and customs are traditional – *Gudjala 2009* at [52] and [55];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve identifying some link between the apical ancestors named in the application and any society existing at sovereignty, even if the link arose at a later stage – *Gudjala 2007* at [66] and [81];
- information addressing the claim group's acknowledgement and observance of the asserted traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

The applicant's factual basis material – s 190B(5)(b)

[128] The information within the factual basis material that I consider addresses the requirement at s 190B(5)(b) is summarised below:

- the claimants are the direct descendants of those Aboriginal persons who were in occupation of the application area at least at the time of first contact – Attachment F at [1.2.1];
- the native title claim group consider their predecessors to have been members of a distinct society as well as part of a wider 'cultural region' which acknowledged and observed shared laws and customs – Attachment F at [1.2.2];
- the predecessors of the group identified themselves as Malyankapa-speaking people and claimants today continue to identify as members of the Malyankapa language group – Attachment F at [1.2.2];
- the members of the native title claim group identify the land and waters of the application area as Malyankapa country on the basis of what they were taught by their elders – Attachment F at [1.2.3];
- Malyankapa elders continue to maintain and pass on their traditional knowledge in accordance with their laws and customs – Attachment F at [1.2.3];
- claimants continue to observe, acknowledge and practice Malyankapa traditional laws and customs – Attachment F at [1.2.4];
- claimants enjoy the resources of the application area in accordance with their traditional laws and customs – Attachment F at [1.2.5];
- Sturt in his expedition through the region including traditional Malyankapa country made observations of the Aboriginal inhabitants of the area camping by waterways (including

constructing shelters and lighting camp fires), collecting seeds, and also observed the practices of circumcision and tooth avulsion – Attachment F at [3.5.1] to [3.5.6];
- Bonney first referred to the Mullia-arpa as the Aboriginal persons associated with traditional Malyankapa country in his 1884 publication – Attachment F at [3.7];
- later sources identify the Malyankapa as belonging to the Yarli languages subgroup – Attachment F at [3.26] and [3.28];
- Elkin (1931) identifies the Malyankapa as comprising part of the 'Lakes Group' – this group generally shared laws and customs, however Elkin notes a number of distinctions in the acknowledgement and observation of those laws and customs by the Malyankapa – see for example Attachment F at [4.3.4];
- Beckett and Hercus (2009) provide that the tribes of the 'corner country' (the region surrounding the intersection of Queensland, New South Wales and South Australia) are connected though Dreaming or *mura* stories, including the story of 'The Two Ngatyi' – Attachment F at [3.28];
- early historical and later anthropological sources describe various aspects of the system of laws and customs acknowledged and observed by the Malyankapa people occupying the application area around the time of settlement – see for example Attachment F at [7.5.1], [7.5.2] and [7.9.1];
- aspects of this system include laws and customs addressing kinship, totems and marriage (Attachment F at [4.3.1]), the *mura* mythology (at [4.2]), religious rites and ceremony (at [4.4.1]), burials (at [7.10.1]), and the use of the natural resources of the application area (at [7.5.1]);
- some of the apical ancestors of the native title claim group and their immediate descendants were informants for anthropologists working in the region of the application area, and shared with them details of Malyankapa laws and customs – see for example Attachment F at [4.4.3] and [4.6.3];
- today, claimants make reference to their forebears when talking about both their group identity and the acquisition of rights to country – Attachment F at [5.3];
- membership of a Malyankapa descent group provides claimants with kin-group identity and a means of identification with country – Attachment F at [5.3].

[129] Attachment F also includes information provided by members of the native title claim group about Malyankapa laws and customs acknowledged and observed by the group presently. I have included relevant excerpts from the material in my reasoning below.

My consideration – s 190B(5)(b)

[130] The starting point at s 190B(5)(b), as held by Dowsett J in *Gudjala 2007*, is the identification of an indigenous society at the time of European settlement living according to identifiable laws and customs of a normative content, in the application area – *Gudjala 2007* at [65] to [66]. As I have explained in my reasons at s 190B(5)(a) above, I consider that I can infer settlement of the area began to take place in the 1860s. As I have also explained above, it is my understanding that the material before me asserts that the apical ancestors were persons who were present in the

application area at around the time at which settlement began to occur, or were at least born in the decade or so following settlement.

[131] Attachment F provides that the members of the native title claim group are the descendants of the nine individuals identified in Schedule A, namely the apical ancestors. Attachment F also states that the claimants are the direct descendants of the predecessors occupying the application area at least at the time of first contact, and that the claimants believe these predecessors to have been members of a distinct society that was also part of a cultural region, sharing laws and customs. Consequently, I consider it reasonable to infer the material to assert that the apical ancestors of the Malyankapa People were, in fact, members of this distinct society. In this way, I am satisfied that the factual basis is sufficient in identifying a link between the apical ancestors and the society at settlement, namely that those ancestors were members of that society.

[132] Attachment F provides information from historical and anthropological sources about the laws and customs of the Malyankapa People around the time of settlement or shortly thereafter. For example, Attachment F provides that explorer Sturt and his party on their travels though the region in 1844 encountered Aboriginal persons in part of traditional Malyankapa country and observed that 'all of them [were] circumcised, and all but one wanted the right front tooth of the upper jaw' – at [3.5.5]. Attachment F also states that Morton in Curr (1886) recorded a number of Malyankapa rituals including circumcision, tooth avulsion and nasal septum piercing – at [7.9.1]. Further to this, predecessor George Dutton, who referred to apical ancestor Jerry Tup:i as his father, shared with Beckett (1958) the story of how he was taken through the initiation ceremony by his father, including being circumcised – at [7.11.3].

[133] Another aspect of Malyankapa laws and customs as acknowledged and observed by the predecessors of the group at around the time of settlement described in the material is the *mura* mythology. Attachment F provides that apical ancestor Alf Barlow shared the story of 'The Two Ngatyi' with Beckett and Hercus (2009), describing the way in which the two rainbow serpents travelled across the region including the application area, forming the landscape – at [4.6.3]. Attachment F also states that predecessor George Dutton explained to Beckett (1958) how he travelled through Malyankapa country with his father, apical ancestor Jerry Tup:i, during which time Jerry taught him 'the names of the hills and waterholes and myths and legends associated with them' – at [7.12.1].

[134] From this information, I also consider the factual basis material to assert the passing down of knowledge about country from generation to generation as another important aspect of the system of laws and customs acknowledged and observed by the predecessors of the group occupying the application area at settlement. This is also seen elsewhere in Attachment F where it provides that Hannah Quayle, daughter of apical ancestor Fanny *Buugali* Williams, told her grandchildren that when she was a young girl she had travelled across the application area with her mother and that this trip was associated with 'women's business' – at [7.12.8].

[135] Burials are another ritual discussed in the material as an aspect of Malyankapa laws and customs. Attachment F provides that Reid, in Curr (1886), recorded that the Malyankapa buried their dead in the ground and that 'the ceremony also involved cutting one another's heads to let them bleed onto the corpse in the grave'. Attachment F also provides that Hercus (1963) recorded Hannah Quayle (daughter of apical ancestor Fanny *Buugali* Williams) retelling the burial of her uncle in accordance with Malyankapa law and custom. Her mother was with her at this ceremony, and it involved the relations of the deceased hitting each other on the head with a boomerang and letting the blood fall onto the corpse – at [4.4.4].

[136] In addition to the examples provided above, Attachment F provides excerpts from early historical sources recording the observations of explorers and researchers in the area. This information provides that the Aboriginal persons in the area around the time of settlement travelled across the application area, camping by waterways and gathering natural products from their surroundings to sustain them – Attachment F at [3.5.1] to [3.5.6]. These sources referred to in Attachment F also suggest the persons occupying the application area were speakers of a distinct language, later identified as Malyankapa – see for example Attachment F at [3.8].

[137] Having regard to this information before me, I am satisfied that the factual basis is sufficient to support the existence of society of Aboriginal people, living in the area at the time of settlement, acknowledging and observing laws and customs. It is my view that the laws and customs that I have set out above as examples from the material, are normative in their character, that is, they prescribe particular rules of conduct and behaviour.

[138] Section 190B(5)(b) also requires that the factual basis address how laws and customs currently observed derive from the laws and customs of the society at settlement, and how they have been acknowledged and observed by a continuing society – *Gudjala 2007* at [63]. Attachment F makes reference to various members of the native title claim group recalling how either they or their immediate predecessors have acknowledged and observed laws and customs in relation to the application area. In my view, the factual basis addresses the way in which these laws and customs are rooted in the laws and customs of the society at settlement set out above.

[139] For example, Attachment F provides one claimant's description of his attendance at his first funeral on country at the age of five, and that he clearly remembers one of the relatives of the deceased hitting herself with a stick and letting her blood drip into the grave. He describes this as the 'traditional "sorry cuts"'. In my view, in light of the similarities between this experience and those earlier Malyankapa burial experiences around the time of settlement, documented in anthropological sources and set out in Attachment F, I consider the factual basis sufficient to support laws and customs that are derived from those of the relevant society at settlement.

[140] Another example is from an excerpt in Attachment F where a claimant explains how his knowledge of Malyankapa country, including its boundaries, significant sites and dreaming

stories, have been passed down to him by his grandmother, Hannah Quayle (daughter of apical ancestor Fanny *Buugali* Williams). It states that she chose him 'as the person to whom she would give the knowledge', and the claimant explains how he will one day pass this knowledge onto his children '"when they are ready"' – at [7.12.6]. He is further quoted as stating "[i]f you know your dreamtime stories, you know where your country starts and ends", and explains that he knows the boundaries of Malyankapa country by following the two *ngatyi* (rainbow serpent) tracks, a story passed down to him by his grandmother – at [7.12.7].

[141] In the same way, the material speaks of another claimant describing how as a child he and his siblings would sit around Granny Quayle while she taught them about Malyankapa culture and stories – at [7.12.5]. This claimant is quoted in Attachment F as saying '"it's real, not a myth, you feel it and see it. I was shown the signs and grew up learning how to track the *ngatyi*"' – at [7.12.5]. Noting this information before me regarding the pattern of passing down of knowledge about country between generations, and the way this has carried on since the time of the apical ancestors in the area at settlement, I consider the factual basis sufficient to support this aspect of Malyankapa laws and customs as one that is derived from the laws and customs acknowledged and observed by the Malyankapa society at settlement. I also consider the way in which the factual basis addresses the importance of the *mura* mythology, including the dreamtime story of 'The Two Ngatyi', across the generations of Malayankapa People, including today and back to the apical ancestors at settlement, supports laws and customs that are rooted in the laws and customs of the society at settlement.

[142] One further way I consider the factual basis addresses laws and customs derived from the laws and customs of a society at settlement is the information before me that speaks to the use of the resources of the application area by the claimants and their predecessors. Attachment F provides that Sturt observed the way in which Aboriginal people inhabiting traditional Malyankapa country took seeds from pods for use as food (at [3.5.2]), and also that Morton in Curr (1886) recorded Malyankapa people's use of various resources, including the use of gypsum or *kopi* to paint their skins for corroborees and burial ceremonies – at [7.5.1]. Beckett also recorded the interaction between kinship obligations and use of resources – at [7.6.1]. In this way, I understand the material to assert that the Malyankapa people occupying the application area around the time of settlement took and used the natural resources of the area for a range of purposes, including sustenance and ceremonial purposes. I also understand the material to assert that this use was in accordance with their laws and customs, and flowed from the rights and interests they possessed in the area – see for example Attachment F at [1.2.5].

[143] The material includes a number of references to claimants today explaining how they and their predecessors similarly access and use the resources of the application area. For example, Attachment F provides one claimants' explanation of how he and his siblings went out hunting with his mother and uncle and that his mother taught him her knowledge of bushtucker which

she had learnt from her mother, Hannah Quayle – at [7.4.5]. Attachment F also includes another claimants' description of how he and his cousin go over the border into South Australia shooting kangaroos and bring the meat back to share with their families – at [7.6.3]. In my view, this information indicates that claimants and their predecessors have continued to access and use the resources of the area in the same way the apical ancestors at settlement did, and as they have been taught by their elders.

[144] From the material, therefore, my understanding is that it's asserted little change has occurred in the acknowledgment and observation of laws and customs over the period from settlement when the apical ancestors inhabited the application area, to today. I note from the material that there are only two or three generations between the apical ancestors at settlement and the members of the native title claim group.

[145] I consider that I have before me information that speaks to the acknowledgement and observance of laws and customs by the apical ancestors in the area at settlement, and information that addresses the way in which those laws and customs have been passed down through the generations to the claimants today, including details of the way in which those laws and customs were acknowledged and observed by the intervening generations. Consequently, I am satisfied that the factual basis is sufficient to support an assertion that the laws and customs acknowledged and observed by the native title claim group are rooted in the laws and customs of the Malyankapa society who occupied the application area at settlement. In this way, I consider the factual basis sufficient to support an assertion of traditional laws and customs.

[146] I am, therefore, satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title.

[147] The application satisfies the condition at s 190B(5)(b).

Reasons for s 190B(5)(c)

[148] It is my understanding that 'those traditional laws and customs' in the assertion at s 190B(5)(c), refers to the laws and customs that answer the assertion at s 190B(5)(b). On that basis, it is my view that the requirement at this condition flows directly from that at s 190B(5)(b), such that where the factual basis is not sufficient to support the former assertion, I cannot consider it sufficient to meet the assertion here – see *Martin* at [29].

[149] Noting the focus on continuity in s 190B(5)(c), in my view, the assertion can be equated with the second element of the meaning of 'traditional' discussed by the High Court in *Yorta Yorta*. That is, 'traditional laws and customs' are those pursuant to which the members of the native title claim group have continued to hold their native title rights and interests, by acknowledging and

observing laws and customs rooted in those of a pre-sovereignty society, in a substantially uninterrupted way – see *Yorta Yorta* at [47] and [87].

[150] This approach appears to be supported by Dowsett J in *Gudjala 2007*. In addressing the requirement at s 190B(5)(c), His Honour held that the factual basis may need to address the following:

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

[151] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of traditional laws and customs. That is, that the laws and customs acknowledged and observed by the native title claim group are rooted in the normative laws and customs of a society at settlement, in the area. I have also set out above my view of the factual basis material, that it asserts there are only two or three generations separating the apical ancestors occupying the application area at settlement, and the members of the claim group today.

[152] Further, I have explained above that I consider I have information before me regarding how each of the intervening generations has acknowledged and observed Malyankapa traditional laws and customs. For example, Attachment F provides that apical ancestor Alf Barlow told the dreamtime story of 'The Two *Ngatyi*' to researchers Beckett and Hercus, explaining how the two rainbow serpents travelled across Malyankapa country, over the border into South Australia and through places in the application area such as Starvation Lake and Boolka Lake – at [7.12.3]. Attachment F then sets out information about how a claimant remembers his grandmother, Hannah Quayle (the daughter of apical ancestor, Fanny *Buugali* Williams), telling him about the *ngatyi* and how they 'cross over at Cameron's Corner into South Australia to Lake Callabonna and then down to Lake Frome' – at [7.12.4]. This claimant explains that these stories were handed down from the group's elders – at [7.12.4].

[153] Another claimant is quoted in Attachment F as stating '"it's real, not a myth, you feel it and see it. I was shown the signs and grew up learning how to track the *ngatyi*. When I worked on the stations I would come across them [their tracks]"' – at [7.12.5]. Attachment F provides that this claimant affirms that he now passes on what his grandmother, Hannah Quayle, taught him to his children, grandchildren and nieces and nephews – at [7.12.5]. Finally, Attachment F refers to another claimant who says that '"[i]f you know your dreamtime stories, you know where your country starts and ends"'. The information sets out his explanation that he knows where

Malyankapa country is by following the *ngatyi* tracks, and that this dreaming story was passed down to him by his grandmother – at [7.12.7].

[154] I have set out at s 190B(5)(b) above the information from the factual basis material that addresses the way in which laws and customs, and knowledge of country, have been passed down through the generations to the claimants today, and the way in which they continue to pass this knowledge onto their children and grandchildren. I have also explained my view that this pattern of transferring knowledge from generation to generation is supported by the factual basis material as constituting a key aspect of the system of traditional laws and customs acknowledged and observed by the native title claim group.

[155] In light of this information before me, therefore, I consider the factual basis speaks to the way in which there has been continuity in the acknowledgement and observance of traditional laws and customs going back to at least European settlement.

[156] Consequently, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title claimed in accordance with their traditional laws and customs.

[157] The application satisfies the condition at s 190B(5)(c).

Conclusion

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

Subsection 190B(6)
Prima facie case

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

[159] The relevant standard for the test at s 190B(6) regarding whether rights and interests can be established, is 'prima facie'. In *Doepel*, Mansfield J held that there was no need to depart from the ordinary meaning of the phrase, namely, 'at first sight; on the face of it; as appears at first sight without investigation', that the High Court had adopted in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2 – *Doepel* at [134].

[160] Regarding the task of the Registrar's delegate at s 190B(6), Mansfield J further held that, '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' – at [135].

[161] I note that there is no requirement that all of the rights and interests claimed satisfy the requirement at s 190B(6), and that even where only some of the native title rights and interests can be, prima facie, established, the condition will still be met – *Doepel* at [16].

[162] I do consider, however, that in order for a right or interest to be, prima facie, established for the purposes of s 190B(6), it must truly be of the nature of a 'native title right or interest'. The definition of 'native title rights and interests' appears at s 223(1) as follows:

> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

[163] Consequently, I am of the view that the rights and interests claimed must be possessed under the traditional laws and customs of the group, rights and interests in relation to land or waters, and rights and interests that have not been extinguished over the entirety of the application area.

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

Consideration

Right to exclusive possession

[165] Paragraph [1] of Schedule E is a claim by the members of the native title claim group to a 'right to possess, occupy, use and enjoy the lands and waters covered by the application as against the whole world, pursuant to their laws and customs'. I understand this to be a claim to a right of exclusive possession of the application area.

[166] The nature of a native title right to exclusive possession has been considered in some detail by the courts. In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the High Court held that:

> a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others – at [88].

[167] The Federal Court in *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*) took a similar approach, finding that:

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

[168] In *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), the Full Federal Court found that the trial judge had incorrectly approached the question of exclusivity by applying common law concepts of proprietary rights to native title. The Full Court held that it was not necessary that the evidence disclose rights and interests of that nature, or rights and interests that rise above the level of proprietary rights. Whether a claim group's native title rights included a right to exclusive possession was found by the Full Court to 'depend rather on what the evidence discloses about their content under traditional law and custom' – at [71].

[169] Further to this, the Full Court acknowledged that a native title right to exclusive possession may be shown to be a spiritual matter, finding that:

> …It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive… If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right to possession, use and occupation… - at [127].

[170] In my view, noting the case law principles set out above, there is information before me that speaks to a right of the members of the native title claim group to exclusive possession. Having considered the substance of that information, I have formed the view that it is sufficient to allow me to consider that, prima facie, the right can be established.

[171] Attachment F sets out an explanation by two claimants of how, in early times, the Malyankapa would invite people from the neighbouring group, the Adnyamathanha, over to Malyankapa country near Lake Frome for corroborees and to exchange resources – at [7.6.2]. These claimants also explain that Lake Frome is the boundary or 'cross over' point between Malyankapa and Adnyamathanha country. Attachment F provides that one of the claimants explains how if Adnyamathanha people wanted to come over into Malyankapa country, they would have to ask, and then the Malyankapa People would extend an invitation for the Adnyamathanha to come over – at [7.2.1]. In this way, I accept the material to assert that a process

or custom exists whereby non-Malyankapa people are required to seek the permission of Malyankapa People before coming onto Malyankapa country.

[172] That such a practice or custom exists is supported, in my view, by information in Attachment F provided by a claimant regarding laws and customs for taking non-Malyankapa people onto Malyankapa country. The claimant explains that his wife is a non-Malyankapa woman and that pursuant to Malyankapa traditional law, on the basis of their being married, his wife is allowed to accompany him onto Malyankapa country. He explains, however, that he tells his wife where she can and can't go on Malyankapa country, according to traditional law and custom. In this way, I understand the material to assert that claimants continue to exercise some measure of authority or control over and around the presence of non-Malyankapa people on Malyankapa country, including the application area.

[173] Regarding a right to speak for country as a core concept of the native title right to exclusive possession, Attachment F quotes one claimant as saying '"I speak for my grandmother's country, because Granny Quayle passed her knowledge of country onto me"' – at [7.13.2].

[174] Attachment F also explains how Alf Barlow, one of the Malyankapa apical ancestors, was an informant for anthropologists Beckett and Hercus working in the region of the application area. Attachment F reproduces the authors' quotation of Alf Barlow as follows:

> When the *Ngatyi* [rainbow serpents] travel, they bring the water with them. When you see the water rushing up and coming a banker and shaking, that's the *Nagtyi* coming. When you feel water hot, *Ngatyi* been there. They only come after strangers: you've got to say 'ngabeda angagu giredja' – it's me, I've been reared here – at [3.28].

[175] From this statement by Alf Barlow, I understand that the Malyankapa People believe in and acknowledge the presence of spiritual creative forces (the *ngatyi*, or rainbow serpents) in their traditional country, and the power of those forces to cause people harm. In particular, I understand that there is a belief that those spiritual forces look favourably upon persons reared on that country, namely, the Malyankapa People, but that there is no equivalent protection for non-Malyankapa persons from any harm those forces may inflict in the area. Consequently, I accept the material to assert that there is a spiritual element underlying the claim to a right of exclusive possession.

[176] I consider that further detail of the nature of the right to exclusive possession asserted by the material is in information providing a claimant's explanation of his knowledge about sacred sites. As set out in Attachment F, the claimant states his knowledge of the location of a sacred burial site, and emphasises the importance of keeping this knowledge safe. The claimant explains that he will only pass his knowledge onto 'the right people who will preserve these places and stop the wrong people from going to them' – at [7.14.5]. In this way, I understand the material to

assert that, in accordance with their traditional laws and customs, claimants have a responsibility or obligation to ensure their country is protected from 'the wrong people'. It follows from this that claimants seek to control access to sites and locations within their country.

[177] In light of the material I have excerpted above, therefore, I accept that the members of the native title claim group assert that they possess a right to speak for their country, and a right to be asked permission by non-Malyankapa people to access their country. Further, I accept the material to assert that the nature of their native title right to exclusive possession is spiritually-based. That is, the native title claim group understand themselves to be 'gatekeepers' of their country, both to ensure protection of the country itself, and to ensure that harm is not inflicted upon non-Malyankapa people by the spiritual forces that inhabit the landscape. I consider the material to assert that this gatekeeper role of the native title claim group, and the obligations that flow from it, arise pursuant to the traditional laws and customs of the Malyankapa People.

[178] Consequently, I consider that, prima facie, the right of the native title claim group to possess, occupy, use and enjoy the land and waters of the application area, as against the whole world, is established.

Right to access and move about the application area

[179] Noting my view above that the right to exclusive possession is, prima facie, established, it follows that I also consider a non-exclusive right of the native title claim group to access and move about on the application area is, prima facie, established.

[180] Further, various statements within the factual basis material speak to the exercise of this right by members of the native title claim group, and by their predecessors. For example, Attachment F repeats information provided by a claimant about how his grandmother, Hannah Quayle (daughter of apical ancestor Fanny *Buugali* Williams), and his grandfather travelled around working on various pastoral stations situated on Malyankapa country, including Quinyambie station within the application area – at [7.1.3].

[181] Consequently, I consider that the right to access and move about the application area is, prima facie, established.

Right to regulate access to and use of the area by other Aboriginal People

[182] This right in Schedule E is expressed as '[t]he right to regulate access to and use of the Claim Area by other Aboriginal People in accordance with traditional laws and custom'.

[183] As I have set out above in relation to a right of exclusive possession, the courts have generally found that the ability to control access to country is necessarily an element of a right of exclusive possession. On that basis, there has been a reluctance to recognise a non-exclusive right to regulate access to and use of the area. In *Ward HC*, for example, the High Court held that:

> The expression "possession, occupation, use and enjoyment… to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead… - at [89].

[184] There have, however, been a number of instances where the Federal Court has been prepared to recognise a non-exclusive right of this nature. For example, in *Mundraby v Queensland* [2006] FCA 436, the Court recognised 'the non-exclusive right to: make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are governed by the traditional laws acknowledged, and traditional customs observed by, the native title holders' – at [para 3(c)(ii)].

[185] Similarly, in *Ngadjon-Jii People v State of Queensland* [2007] FCA 1973, in a consent determination decision, the Court recognised 'the non-exclusive rights of the Native Title Holders to use and enjoy the land and waters, being to: make decisions in accordance with traditional laws and customs about the use and enjoyment of the Determination Area by Aboriginal People who are governed by the traditional laws acknowledged and traditional customs observed by the Native Title Holders' – at [para 3.2(vii)].

[186] I consider, therefore, that these decisions indicate a willingness of the Court to recognise a non-exclusive right of the native title holders to control or 'regulate' access to the application area by other Aboriginal people, only where those other Aboriginal people are governed by the traditional laws and customs of the native title holders.

[187] The expression of this right claimed by the Malyankapa native title claim group in Schedule E, in my view, fails to make this distinction. Consequently, I do not consider that the right to 'regulate access to and use of the Claim Area by other Aboriginal People in accordance with traditional law and custom' is, prima facie, established.

Right to live, camp and erect shelters on the area

[188] Again, noting my view above that a right to exclusive possession is, prima facie, established, I consider it follows that a non-exclusive right to live, camp and erect shelters on the application is, prima facie, established. This is on the basis that the exercise of a right to exclusive possession naturally encompasses all of the activities associated with this non-exclusive right.

[189] The factual basis material does speak directly to the exercise of this right by the claimants and their predecessors. For example, Attachment F provides that Sturt and his party observed Indigenous people later understood to be Malyankapa inhabiting the application area around Flood's Creek, camping in structures made from the natural resources of the area – at [3.5.1], [3.5.3], and [3.5.7]. Further, Attachment F provides that many claimants and their predecessors have been born on and lived on the application area, such as on stations like Quinyambie and Mulyungarie – at [7.1.7] and [7.3.1].

[190] I consider, therefore, that the non-exclusive right to live, camp and erect shelters on the area is, prima facie, established.

Right to hunt and fish on the land and waters

[191] Again, in light of my view that an exclusive native title right is, prima facie, established, I consider that it follows that a right of the claimants to take the resources of the area, namely to hunt and fish on the area, is prima facie, established.

[192] The material does, however, directly address this non-exclusive right. For example, Attachment F provides that one claimant speaks of his grandmother, Hannah Quayle, and the way she used to hunt the Hopping Mouse around Lake Boolka in the application area – at [7.4.3]. Similarly, another claimant describes, in the information in Attachment F, how he fishes and traps rabbits whenever he goes out on Malyankapa country – at [7.4.9].

[193] Therefore, I consider that a right to hunt and fish on the application area is, prima facie, established.

Right to gather and use the natural resources of the area

[194] Schedule E specifies that the natural resources referred to include food, medicinal plants, wild tobacco, timber, resin, ochre and feathers as well as materials for fabricating tools and hunting implements. In my view, Attachment F speaks to the right of the native title claim group to gather and use the natural resources of the area where it provides that Reid in Curr (1886) recorded how for corroborees, Malyankapa people would paint their bodies with stripes of pipe clay and stick bird feathers on their backs – at [7.5.2]. Attachment F also provides a claimant's explanation of how he knows what to gather when he is out on country because his mother taught him – at [7.5.5]. Clearly, the right is one that has been exercised by the predecessors of the native title claim group and passed down to the claimants today in accordance with their traditional laws and customs.

[195] In light of this information before me, I consider that the right to gather and use the natural resources of the area is, prima facie, established.

Right to share and exchange the subsistence and other traditional resources of the area

[196] In my view, the factual basis material speaks directly to the way in which this right has been exercised by the predecessors of the native title claim group and how it continues to be exercised today. For example, Attachment F provides two claimants' explanation of how in early times, the Malyankapa invited the Adnyamathanha over to Lake Frome for corroborees and to exchange resources such as ochre – at [7.6.2]. Further, Attachment F provides how one claimant talks about hunting for kangaroo on the application area with his cousin, and that afterwards, they take the meat back to their families to share – at [7.6.3].

[197] In light of this material before me, I consider that a right to share and exchange the subsistence and other traditional resources of the area is, prima facie, established.

Right to use and take the natural water resources of the area

[198] The material emphasises at various points the dry climate of the natural environment within which the application area is situated, and the importance of water to the native title claim group and their predecessors as they have inhabited the area since before settlement – see for example Attachment F at [7.7.2] and [7.7.3]. From the material I consider it is clear that the claimants and their predecessors have, throughout that time, exercised a right to take the natural water resources of the area. For example, Attachment F provides that one claimant's mother explained to him the importance of Starvation Lake (within the application area) to the Malyankapa pursuant to their traditional laws and customs, and how she and the claimant's father camped around the Lake while his father was working in the area – at [7.7.6].

[199] On the basis of the information of this nature before me, I consider that the right to take and use the natural water resources of the area is, prima facie, established.

Right to cook on the claim area and to light fires

[200] Attachment F provides that Reid in Curr (1886) noted that the Malyankapa would cook the food they had caught on the fire or in the ashes – at [7.8.1]. It also describes one claimant's explanation of how when they had been hunting out on country, if they caught a kangaroo, his mother would cook the kangaroo tail "Aboriginal style" in the ashes – at [7.8.2] and [7.4.5].

[201] I consider, therefore, that the right to cook on the claim area is one that has been exercised by the claimants' predecessors, and passed down to them in accordance with traditional patterns of teaching pursuant to their laws and customs.

[202] I consider that the right to cook on the claim area and to light fires is, therefore, prima facie, established.

Right to engage and participate in cultural activities on the area including those relating to births and deaths
Right to conduct burials on the area
Right to conduct ceremonies and hold meetings on the area

[203] Having considered the list of rights and interests claimed by the native title claim group in Schedule E, it is my view that there is no substantive difference between the three rights set out above. That is, I consider that the exercise of these rights ultimately involves the same types of activities. Consequently, where I consider that one of those rights is prima facie, established, it is my view that I can consider all three, prima facie, established.

[204] Attachment F provides that Hannah Quayle, daughter of apical ancestor Fanny *Buugali* Williams, shared with Hercus (1963) the traditional Malyankapa burial of her uncle. I note that

her mother was also present with her at the burial ceremony – at [4.4.4]. Attachment F also provides information about how in early days, neighbouring groups of Malyankapa were invited over to Malyankapa country for corroborees or to share in initiation ceremonies – at [7.6.2] and [7.11.5]. Further, the information sets out one claimant's explanation of how there is a Malyankapa gathering place at Quinyambie in the application area – at [7.11.7].

[205] In my view, the material before me addresses all three of the rights set out above, and explains how those rights have been exercised by the predecessors of the native title claim group, including the Malyankapa ancestors at settlement, and how they are exercised by claimants today.

[206] Therefore, I consider that the right to engage and participate in cultural activities on the area including those relating to births and deaths, the right to conduct burials on the area, and the right to conduct ceremonies and hold meetings on the area, are all, prima facie, established.

Right to teach on the area the physical and spiritual attributes of locations and sites

[207] Attachment F provides that a number of claimants recall the way in which their predecessors taught them about Malyankapa country. For example, the information includes one claimant's explanation of how as a child he and his siblings would sit around their grandmother, Hannah Quayle, and listen to her talk about Malyankapa culture and stories. This includes the story of 'The Two *Ngatyi*' – at [7.12.5]. Similarly, the material speaks to the way in which the predecessors of the group were taught about their country by their parents and grandparents, including the apical ancestors of the Malyankapa People. For example, Attachment F provides that one predecessor of the group travelled around Malyankapa country with his father, apical ancestor Jerry Tup:i, and that on this trip Jerry taught him 'the names of the hills and waterholes and the myths and legends associated with them' – at [7.12.1].

[208] In light of this information, it is my view that the right is asserted as being one that has been handed down through the generations pursuant to traditional patterns of teaching under Malyankapa law and custom.

[209] I consider, therefore, that the right to teach on the area the physical and spiritual attributes of locations and sites within the area is, prima facie, established.

Right to speak about the area among other Aboriginal People who seek access to or use of the area

[210] This non-exclusive right is expressed in Schedule E as '[t]he right to speak about the Claim Area among other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional law and custom'.

[211] It is difficult, in my view, to understand what activities and/or actions may fall within the scope of the exercise of this right by the native title holders. Clearly, however, it involves the

members of the group being able to speak for the area. Attachment F provides some insight into the nature of the right, referring to information about how claimants 'speak for' their predecessors' country and how responsibilities to care for country are connected to the requirement that other non-Malyankapa Aboriginal people have to ask permission to access the area – at [7.13.1] and [7.13.2].

[212] Again, as I have discussed above, the courts have generally held that the concept of a right to 'speak for country' is necessarily tied up in a right of exclusive possession. I have also discussed above those instances where the Court has diverted from this view, and noted that such instances are limited to those where the 'other Aboriginal people' referred to are 'governed by the traditional laws and customs of the native title holders'.

[213] The expression of this right as appears in Schedule E, claimed by the native title claim group, again, does not make this distinction. Consequently, I do not consider that the non-exclusive right 'to speak about the Claim Area among other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional law and custom' is, prima facie, established.

Right to visit, maintain and protect sites and places of cultural and religious significance

[214] There is various information that I consider speaks to a right of this nature. For example, Attachment F provides that one claimant talks about Quinyambie in the application area as being very important due to it being a Malyankapa gathering place. This claimant also explains that the step-son of apical ancestor Jerry Tup:i would have visited this place often while he was driving cattle around the area – at [7.14.2]. Information about another claimant describing his knowledge of a sacred burial site in traditional Malyankapa country is given in Attachment F. This claimant explains that it is important that he keep the knowledge of this site safe, and that he will only pass on this knowledge to the 'right people who will preserve these places and stop the wrong people from going to them' – at [7.14.5].

[215] In light of this information before me, I consider that the right of the members of the native title claim group to visit, maintain and protect sites and places of cultural and religious significance is, prima facie, established.

Right to be accompanied onto the area by non-native title holders

[216] Schedule E specifies that the non-native title holders referred to, are persons who are either spouses of native title holders, people required by traditional law and custom for the performance of ceremonies or cultural activities on the area, people who have rights in relation to the area according to Malyankapa traditional law and custom, and people required by Malyanakapa People to assist in, or record traditional activities on the area.

[217] Attachment F provides one claimant's explanation of how the exercise of this right operates today, namely that he is able to be accompanied onto the application area by his wife, a non-Malyankapa woman, so long as he is with her. He also explains that he tells her where she can and can't go within Malyankapa country, in accordance with Malyankapa traditional law and custom. Attachment F also provides information addressing the way in which non-Malyankapa people in early times, were invited onto Malyankapa country for ceremonies and cultural activities – see at [7.6.2].

[218] In my view, from this information, it is clear that the right arises under, and is exercised in accordance with, the traditional laws and customs of the Malyankapa People.

[219] I consider, therefore, that the right of the members of the native title claim group to be accompanied onto the area by non-native title holders is, prima facie, established.

Conclusion

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

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[221] In *Gudjala 2007*, in an aspect of the decision not criticised by the Full Court on appeal, Dowsett J approved the approach of the Registrar's delegate at s 190B(7), whereby the delegate 'considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society…' - at [89].

[222] As I have set out above at s 190B(5)(b), I am satisfied that the factual basis is sufficient to support an assertion of traditional laws and customs. It is my understanding, therefore, that s 190B(7) requires that the applicant provide evidentiary material addressing the way in which at least one member of the claim group has a connection with some part of the application area, and how that connection is in accordance with the traditional laws and customs of the Malyankapa People – see *Doepel* at [18].

[223] The Explanatory Memorandum to the Native Title Bill 1997 explains that 'the connection described in s 190B(7) must amount to more than a transitory access or intermittent non-native title access'. This appears to be supported by the High Court's decision in *Yorta Yorta*, where it was commented that the requirement at s 190B(7) 'strongly suggests the need for an actual presence on land' – at [184].

[224] Noting that the focus of the requirement at s 190B(7) is upon at least one member of the native title claim group, I have set out below that information which I consider addresses a traditional physical connection of a particular member of the claim group, namely John Quayle. Information within Attachment F provides that Mr Quayle is the great grandson of apical ancestor Fanny *Buugali* Williams, such that I am satisfied that Mr Quayle is a member of the native title claim group – see for example at [7.12.4].

[225] Attachment F provides the following information about John Quayle:

- his father taught him how to hunt and took he and his siblings out when they were children to teach them how to shoot kangaroos and trap rabbits – at [7.4.7];
- when he was older he and his cousin would go shooting kangaroos and trapping rabbits on the application area around Quinyambie Station – at [7.4.7];
- when he and his cousin would catch/kill an animal, they would take the meat back to their families to share – at [7.6.3];
- he remembers his grandmother, Hannah Quayle, telling he and his siblings stories that had been handed down from the group's elders – at [7.12.4];
- one story he was taught by Granny Quayle was that of 'The Two *Ngatyi*', including how they travelled over Cameron's Corner into South Australia to Lake Callabonna and then down to Lake Frome, leaving tracks as they went – at [7.12.4];
- he has now handed these stories down to his children – at [7.12.4].

[226] From this information, I consider it is clear that Mr Quayle has been physically present on the application area during occasions when he went hunting and trapping rabbits with his cousin around Quinyambie Station, and possibly during his childhood when his father taught him these skills. It is also clear, in my view, that Mr Quayle obtained knowledge about Malyankapa country, including dreamtime stories relating to the area, from his predecessors, particularly his grandmother. I accept, therefore, that Mr Quayle acquired this knowledge about country through traditional patterns of teaching pursuant to the group's traditional laws and customs. As I have explained in my reasons above at s 190B(5), I am satisfied the factual basis is sufficient to support an assertion that this method of passing on of knowledge to younger generations by Malyankapa elders is a key underlying element of the system of traditional laws and customs acknowledged and observed by the group and its predecessors.

[227] It is my view, therefore, that the physical connection of John Quayle to the part of the application area referred to, can be said to be a traditional physical connection. Therefore, I am

satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with some part of the land or waters covered by the application.

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

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If:
> (a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth; or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
> a claimant application must not be made that covers any of the area.
> (3) If:
> (a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;
> a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
> (4) However, subsection (2) or (3) does not apply to an application if:
> (a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
> (b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

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

Section 61A(1)

[230] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment states that no part of the application area is covered by an approved determination of native title.

Section 61A(2)

[231] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Paragraph (2) of Schedule B of the application states that any area within the boundaries of the application area, in relation to which a previous exclusive possession act has been done, is not covered by the application.

Section 61A(3)

[232] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Schedule E of the application, which contains a description of the rights and interests claimed in relation to the application area, at paragraph (1), provides that a claim to exclusive possession is only made where it can be recognised, that is, where there has been no prior extinguishment of native title.

Conclusion

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

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

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

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

Section 190B(9)(a)

[235] Schedule Q states that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[236] Schedule P provides that the native title claim group does not claim exclusive possession over all or part of the waters in an offshore place within the application area.

Section 190B(9)(c)

[237] There is nothing else in the application before me that in my view indicates that the native title rights and interests have otherwise been extinguished.

Conclusion

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

[*End of reasons*]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Malyankapa People
NNTT file no.	SC2015/002
Federal Court of Australia file no.	SAD359/2015

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:

30 September 2015

Date application entered on Register:

22 March 2016

Applicant:

Gerald Quayle, Michael Whyman, Alma Bates-Hannah, Jennifer Bates

Applicant's address for service:

As per the Schedule

Area covered by application:

As per the Schedule

Persons claiming to hold native title:

As per the Schedule

Registered native title rights and interests:

As per the Schedule – except for the following two rights which are not to appear on the Register of Native Title Claims:

(b) The right to regulate access to and use of the Claim Area by other Aboriginal People in accordance with traditional law and custom;

(m) The right to speak about the Claim Area among other Aboriginal People who seek access to or use of the lands and waters in accordance with traditional law and custom;

[End of document]