

Registration test decision

Application name	Combined Thiin-Mah Warriyangka, Tharrkari, Jiwarli
Name of applicant	Herbert Eagles, Heidi Mippy, Lorraine Monika Dodd, Philomena Dodd, Peter Windie Senior, Wayne Lapthorne
NNTT file no.	WC2016/003
Federal Court of Australia file no.	WAD464/2016

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

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

Date of decision: 21 October 2016

Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 08 August 2014 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This native title determination application is made on behalf of the people who belong to the Thiin-Mah, Warriyangka, Tharrkari and Jiwarli language groups. Sometimes they are referred to as Thudgari people, a term that encompasses the four language groups who are closely interlinked culturally, linguistically and socially. Although, for the purpose of this application they are generally referred to by reference to the language groups or TMWTJ. The oral history records that these four groups have always been together. Under the traditional laws and customs of this broader group or society, each language group has the right to speak for their respective country, which includes the land and waters covered by the application.

[2] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Combined Thiin-Mah, Warriyangka, Tharrkari and Jiwarli claimant application to the Registrar on 7 October 2016. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act and make a decision about whether it satisfies all of the conditions of registration (i.e. the registration test).

[3] Below are my reasons, as the delegate of the Registrar, for my decision to accept the claim made in the application for registration.¹

¹ 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.

Procedural and other conditions: s 190C

Subsection 190C(2)

Information and affidavits (ss 61 and 62)

[4] In this subsection, there is a requirement the application contain particular details and other information. These are the details and other information referred to in ss 61 and 62. The condition in s 190C(2) is primarily procedural 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.

[5] 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.

Native title claim group: s 61(1)

[6] This requires the application be made by a person or persons who are authorised by all the persons in the native title claim group. That is, the application must contain the details of the person or persons who are the applicant and also the persons on whose behalf the application is made (i.e. the native title claim group). The native title claim group referred to in s 61(1) is a reference to all the persons 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'

[7] The condition at s 190C(2) 'directs attention to the contents of the application' and its purpose is to ensure the application contains all the details and information required by ss 61 and 62. If, however, those contents are found to be lacking, this necessarily signifies issues. At the outset it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group' — *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*),124/[35].

[8] At Part A, the application names Herbert Eagles, Heidi Mippy, Lorraine Monika Dodd, Philomena Dodd, Peter Windie Senior and Wayne Lapthorne as together being the persons who are authorised by the native title claim group to be the applicant. At Schedule A, the application describes the native title claim group.

[9] I consider the application meets this requirement of providing details of the applicant and the native title claim group.

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

Name and address for service of the applicant: s 61(3)

[11] The name and address for service of the applicant are provided in the application — Part B.

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

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

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

[14] The application at Schedule A contains a description of the native title claim group. Where there is a description, the provision in s 61(4)(b) applies and the application must contain the details/information that otherwise describe the persons in the native title claim group ‘sufficiently clearly so that it can be ascertained whether any particular person is one of those persons’ — s 61(4)(b).

[15] The task here is essentially limited to considering whether there ‘appears’ to be a description, which may meet the requirements of the Act, whereas at the corresponding merit condition of s 190B(3), I must consider whether the description operates to effectively describe the persons in the native title claim group — *Gudjala [2007]*, 123/[32] .

[16] I am satisfied that within the application at Schedule A there is a description of the persons in the native title group which appears to be sufficiently clear for the purpose of s 190C(2).

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

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

[18] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form to accompany the application. This section also requires the inclusion of certain statements and information in the affidavit/s.²

[19] Because the applicant is generally comprised of more than one person, this means that an affidavit from each of those persons should accompany the application — *Doolan v Native Title Registrar [2007]* FCA 192, [67].

[20] In this application, six persons are named as jointly comprising the applicant. The application is accompanied by an affidavit from each of those persons. Each of the affidavits contain the required statements and information, including details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. The decision-making process described in the affidavits is an agreed and adopted decision-making process, as provided for under s 251B(b).

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

² s 62(1)(a)(i)-(v).

Details required by s 62(1)(b)

[22] 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)

[23] The application must contain details and other information which describe the boundaries of the application area. These are the areas covered by the application and any areas within those boundaries that are not covered.

[24] Schedule B and Attachment B contain information about these boundaries of the application area.

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

[25] A map of the application area must be included in the application. A map of the application area is contained at Attachment C and it shows the external boundaries of the application area.

Searches: s 62(2)(c)

[26] The application should contain details and results of any searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the application area. Schedule D contains information about these searches, being that no such searches have been carried out.

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

[27] This requires the application contain a description of the native title rights and interests claimed. This description must not merely be a statement that all native title rights and interests in relation to the area are claimed. Schedule E contains a description of the native title rights and interests claimed, including exclusive and non-exclusive native title rights and interests.

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

[28] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii). Schedule F contains a general description of the factual basis on which it is said that the Thiin-Mah, Warriyangka, Tharrkari and Jiwarli people hold the native title rights and interests in the claim area. I consider this meets the requirements of s 62(2)(e) for the purpose of s 190C(2). The sufficiency of the factual basis is considered in the merit condition at s 190B(5).

Activities: s 62(2)(f)

[29] If the native title claim group carries on any activities in the application area, the application must contain details of those activities. Schedule G contains details about the activities currently being carried out by members of the native title claim group in the application

area. These include, among others, hunting, gathering, fishing and engaging in cultural activities and ceremonies.

Other applications: s 62(2)(g)

[30] The application must include details of any other applications to the Court or recognised State/Territory body that have been made over the application area and of which the applicant is aware. Schedule H states there are no other applications of which the applicant is aware.

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

[31] The application must contain details of any notifications under paragraph 24MD(6B)(c) that have been given over the application area and of which the applicant is aware. Attachment HA contains a table with details of s 24MD(6B)(c) notices.

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

[32] The application must contain details of any notifications under s 29 of the Act (or under a corresponding State/Territory law) that relate to the application area and of which the applicant is aware. Attachment I contains a table with details of s 29 notices.

Conclusion

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

Subsection 190C(3)

Common claimants in overlapping application

[34] This section requires the Registrar consider whether there are common members in the native title claim groups for a previous application and this application.

[35] A previous application is defined in s 190C(3) as being an application that overlaps the whole or part of the area covered by the current application, which was on the Register of Native Title Claims when the current application was made and not removed because of consideration under s 190A.

[36] There is no overlapping application currently on the Register of Native Title claims and this was the case at the time the application was made. There is, in my view, no overlapping application that meets the requirements of being a previous application as defined by s 190C(3).

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

Subsection 190C(4)

Authorisation/certification

[38] The application is accompanied by a certification from Yamatji Marlpa Aboriginal Corporation (YMAC).

[39] This means s 190C(4)(a) contains the relevant condition that must be satisfied. Where an application is accompanied by such a document (i.e. a certification), the task is simply to assess whether the certification contains particular statements and information.³ It does not require the Registrar or his delegate to test those statements or the information contained in the certification, all the task requires of me is that I be ‘satisfied about the fact of certification by an appropriate representative body’— *Doepel*, 134/[80]-[81].

[40] I consider that Yamatji Marlpa Aboriginal Corporation (YMAC) is the only body responsible for certification functions in relation to the area covered by the claim — see geospatial assessment.

[41] The certification contains a statement of opinion from YMAC that the requirements of 203BE(2)(a) and (b) have been met. The certification also contains its reasons for being of the opinion. These reasons refer to the anthropological research and work that has been carried out to identify the persons in the native title claim group and the authorisation meeting held on 6 June 2015.

[42] In my view, the certification addresses the matters in s 203BE(4).

[43] For the reasons set out above, I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each representative Aboriginal and Torres Strait Islander body that could certify the application.

³ See ss 203BE(2)-(4).

Merit conditions: s 190B

Subsection 190B(2)

Identification of area subject to native title

[44] This condition of registration requires that I be satisfied the information and map contained in the application about the area covered by the claim, are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

[45] This requires consideration of the description and map of the application area in the application, and for me to be satisfied the boundaries of the area covered, and those areas not included, can be adequately identified.

[46] Schedule B refers to Attachment B as containing a description of the external boundary. Attachment B contains a metes and bounds description, referencing native title determinations and applications, landmarks and geographic coordinates.

[47] Attachment C contains a colour map of the area, which depicts the external boundaries in dark blue outline and has a cadastral background with current native title determinations and applications.

[48] To assist my consideration, I have had regard to the information prepared by the Tribunal's Geospatial Services, including their assessment that the description and map provided identify the area with reasonable certainty. I agree with this assessment. I consider the external boundaries of the claim area are clearly identified.

[49] Schedule B contains a list of general exclusions. These more general or generic exclusions are provided for the purpose of s 62(2)(a)(ii), being information that enables the identification of any areas within the external boundaries that are not covered by the application. The use of general exclusions may be considered appropriate given issues of tenure are often not settled until the application is well advanced. In my view, it seems the appropriate level of detail in these circumstances.

[50] The description of the boundaries and the maps of the external boundaries are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

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

Subsection 190B(3)

Identification of the native title claim group

[52] This condition requires that I be satisfied the persons in the native title claim group are named in the application or otherwise described sufficiently clearly so that it is possible to ascertain whether a person is a member of the group.

[53] As noted above in these reasons, Schedule A contains a description of the native title claim group such that I must be satisfied it reliably enables the identification of persons in the group — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*), [33].

[54] The first criterion of membership of the native title claim is based on descent from named apical ancestors. This is a relatively common method of description in such applications and, in my view it provides an objective criteria by which to ascertain whether a particular person is a member of the group.

[55] Alternative to this, the Schedule A description provides that persons may be a member of the native title claim group if they are adopted by a biological descendant in accordance with traditional laws and customs and they identify and are identified by other members and have a connection with the land and waters in the claim area.

[56] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93 the description approved by the Court included rules or criteria that included descent from named apical ancestors and adoption. The Court held that using such rules is sufficient for this purpose even if it is necessary to engage in factual inquiry when ascertaining whether any particular person is in the group described — *Western Australia v Native Title Registrar* (1999) 95 FCR 93.

[57] Similarly, with this description there would be a need for some factual inquiry. As the criterion of adoption is to be informed by the traditional laws and customs, I consider that identifying the persons who would fall within this part of the description would be possible. I consider that the description, which includes persons descended from named persons or adopted, is sufficiently clear so that it can be ascertained whether any particular person is in that group.

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

Subsection 190B(4)

Native title rights and interests identifiable

[59] This condition requires that the description contained in the application is sufficient to enable the native title rights and interests claimed to be readily identified.

[60] Schedule E contains a description of the rights and interests claimed in relation to the area. This includes the exclusive right to possession, occupation, use and enjoyment of the claim area to

the exclusion of others. It also includes other rights and interests not claimed to be exclusive of other person's rights and interests.

[61] The rights and interests described in Schedule E are clear and, in my view, they can be understood as native title rights and interests — *Doepel*, 139/[99].

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

Subsection 190B(5)

Factual basis for claimed native title

[63] The factual basis must be sufficient to support each of the assertions at s 190B(5). There are three assertions relating to: the association with the claim area; the traditional laws and customs of the original society; and their continuity over the period since sovereignty — ss 190B(5)(a)-(c).

[64] The task here is not to test whether the facts of the claim are true. Rather, it is to make a decision about whether those facts are sufficient to support each assertion — *Gudjala FC*, 340/[92]; *Doepel*, 120/[17].

[65] In assessing whether the facts are sufficient to support each assertion there must be enough detail, including particular facts about the native title claim group, their association with the claim area and the traditional laws and customs of their predecessors that have continued since the time of sovereignty. The factual basis must explain how it is the identified native title claim group possess the claimed native title rights and interests through their acknowledgement and observance of traditional laws and customs — *Gudjala [2007]*, [39].

Section 190B(5)(a)

[66] The factual basis must demonstrate the whole claim group presently have an association with the claim area and their predecessors also had an association since sovereignty, or at least since European settlement. This does not mean 'that all members must have such an association at all times' but there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors — *Gudjala [2007]*, [52].

[67] Generally, a sufficient factual basis to support the association will need to include details specific to the area claimed, including details of either a physical or spiritual association with places within the area covered by the application. Broad and general references to the area will usually not be enough — *Martin v Native Title Registrar [2001]* FCA 16, [26] and *Corunna v Native Title Registrar [2013]* FCA, [39].

What is the claimant's factual basis in relation to association with the claim area?

[68] There are four different language groups who share close linguistic, religious and cultural relations and who together comprise the Thudgari society or Thiin-Mah, Warriyangka, Tharrkari and Jiwarli people (TMWTJ), which existed at sovereignty and has continued to the present day (*State's Position Paper August 2007, pages 8-9*).

[69] The claimants are said to be descendants of people who belong to the four distinct language groups, being Tharrkari, Warriyangka, Jiwarli and Thiin. Whilst the original configuration was at the language group level, over time each of the groups became less viable as a separate entity and their surviving members joined together. Claimants' continue, however, to self identify by reference to their specific language group (*State's Position Paper August 2007, page 4*).

[70] There is said to be general agreement within the relevant ethnohistorical material and amongst claimants that the area covered by this claim falls within the country of the TMWTJ claimants. The pastoralist A.S. Cameron (1891-1918) published an article, which cited the Tarkarri [variant spelling] as an Aboriginal group located on the Lyons and head of Minilya Rivers. Daisy Bates recorded Thiin-Mah country as east of Jiwarli at Wanderry Creek in the Capricorn Range. Radcliffe-Brown and other contributors to the ethnohistorical record were generally consistent in recording the country of the TMWTJ people as associated with the lands and waters that include the claim area (*Summary Document, [1]-[15]*).

[71] Current claimants are the descendants of the Thiin-Mah, Warriyangka, Tharrkari and Jiwarli forebears. The ancestors Maldurdari and Jiraguru are recorded by Radcliffe-Brown as Warriyangka (1910-1911). Balgonyunga and Warajulba and their descent group are also recorded in Radcliffe-Brown's genealogies as Warriyangka. This local group is likely associated with the important site at Mt Thompson, which borders the current claim area. The ethnohistorical records enable the birthdates of these ancestors to be estimated as 1825 (before effective sovereignty in the area) (*Summary Document, [27]-[36]*).

[72] Daisy Bates recorded the ancestors Thaldungu and Jigura as Jiwarli People from information provided by their son who was from the Glen Florrie area. The ancestor Nancy Cameron was born on Maroonah station and her mother [name deleted] was a Tharrkari woman (likely born in the 1880s). Nancy Cameron and Larry Brewer are the forebears of the [name deleted] and [name deleted] families. Togo Griffin (the brother of Nancy Cameron) was also born at Maroonah station. He was also a Tharrkari man and is the forebear of the Griffin family (*Summary Document, [42]-[51]*).

[73] The ancestor Marigold is a Tharrkari woman from Willimbury station and she was likely born around 1890. She is the forebear of the [name deleted] family. Warngarri Bob and Didibirri, the parents of a Tharrkari woman ([name deleted]) born in 1909 at Mangaroon or Willimbury station were likely born around 1889. Warngarri is the name of a pool on the Lyons River located

within the claim area. Warngarri and Didbirri are the forebears of the [name deleted] and [name deleted] family.

[74] Peter Salmon is a senior Thiin-Mah and Warriyangka elder, whose mother was Thiin through her father. His mother was born on Gifford Greek Station (on the claim area) and she lived on Maroonah. His grandfather was also born on Gifford and he belonged to the Gifford Creek and Minnie Creek area. His uncle was also a Thiin-Mah man, and he talked for all of that Thiin-Mah country. He was the last one to leave Gifford. His grandfather told him that both his parents had also come from Thiin-Mah and Warriyangka country and they spoke the language. This is why today, he speaks for Thiin-Mah and Warriyangka country (*Affidavit of Peter Salmon, [2]-[20]*).

[75] Speaking of his grandfather and great uncle, Peter says:

My grandfather [name deleted] told me that both his parents came from Thiin-Mah and Warriyangka country and they spoke this language, Thiin-Mah. I speak for this country today.

[Name deleted] [his grandfather] used to move around a lot and [name deleted] [his great uncle] more or less stayed in one place. We used to be in Maroonah outcamp. [name deleted] used to take me hunting and show me places. He showed me a bit of Gifford, on the Lyons River side there and around Alma Outcamp on Maroonah.

Later on when I worked at Gifford Creek I would go and see [name deleted] and I would describe the places I had been to and he would tell me the names of the pools and hills and creeks that I had been to. He lived there at Gifford Creek since he was a young fella but later on he also worked at Glen Florrie for a short period then went back to Gifford and Edmund again. He spent most of his life on the Thiin-Mah and Warriyangka country, where the new claim area is. He took me to *Wyamba* Hill riding around on horseback when I was young – I was old enough to ride a horse but only just (*Affidavit of Peter Salmon, [20]-[22]*).

[76] As far as he knows, the four language groups have always been together and they have always shared country, but a person from one of those four language groups cannot speak for another person's country. When you go onto country, you are required to talk the right language for that country and each of the four language groups are bound by the same laws and customs (*Affidavit of Peter Salmon, [36]-[42]*).

[77] The claim area is mostly in Thiin-Mah and Warriyangka country but there is some of Jiwarli country in the North (at Ulawarra and Kooline stations) and some of Tharrkari country in the West. This country has always belonged to the four language groups. His grandfather told him that Thiin-Mah country goes down to Wongarrie pool and hill. The boundary goes from Ericoothara Spring along the Kooroobooka Creek to Edithana Pool to Bangemall and across to Minnie Springs and Wongarrie Pool (*Affidavit of Peter Salmon, [51]-[56]*).

[78] He has been taught about many places within the claim area that are part of Thiin-Mah country. He remembers visiting Mount Thompson (*Wyamba*) which is on the Lyons River. This is where his forebears got the corroboree songs from. Needle Hill was the site of a big meeting and a battle between the groups in the past. He speaks for this country now as it is Thiin-Mah country even though it is on the whitefella's station boundary between Edmund and Maroonah. *Wongarri* Pool and hill is where his grandfather told him the boundary between Yinggarda and Thiin-Mah country is (*Affidavit of Peter Salmon, [71]*).

[79] Herbert Eagles is also a senior Thiin-Mah Warriyangka elder and was born on Maroonah Station ([this station is partly] within the claim area), which is mostly the traditional country of the Jiwarli language group. His mother and his aunt grew up near Minnie Creek station, which is within the claim area. They used to work on the station in Minnie Creek and they spent the majority of their lives on their father's country. As a child he was taken to live at a Mission, but a Thiin-Mah Warriyangka elder removed him from there and he started to work at Wanna station (which is Thiin-Mah Warriyangka country). He used to visit his sister who was at Minnie Creek (*Affidavit of Herbert Eagles, [1]-[23]*).

[80] His mother told him stories about their traditional country. *Wyamba* is a sacred hill that belongs to Thiin-Mah Warriyangka country and is where they get their songs from. His grandfather told him that *Wyamba* was given to him by all the old people. He was told that the sacred sites within the claim area 'belonged to the two [name deleted] brothers [name deleted] and [name deleted] and it was handed down to them from generation to generation' (*Affidavit of Herbert Eagles, [28]-[33]*).

[81] He knows that the boundary of Thiin-Mah Warriyangka country is all around Gifford, Wanna, Edmund, Minnie Creek and runs back to the Thudgari determined area as well. As a traditional owner he is allowed to go anywhere on Thiin-Mah Warriyangka country, whereas other people need to have permission to go certain places. He learnt about his country mostly from Peter Salmon, who in turn had been taught by the old people (*Affidavit of Herbert Eagles, [41]-[43]*).

[82] Throughout his affidavit, Herbert Eagles demonstrates intimate knowledge of special and significant country to the claim group within the application area. For instance:

There is a place situated on Thiin-Mah and Warriyangka country where the old people would walk the sheep up in the hills and back to the shearing shed and look after the sheep. *Iregully* is the name of the place's name and the old fella who used to look after the sheep was named after it. When I worked on Wanna with Peter Salmon I learned all about the country, I learnt about the hills, the plains and the waterholes. Later on Peter Salmon taught me that Wanna is part of traditional Thiin-Mah Warriyanka country. He knows this because the old people taught him. Peter also said we've got to look after this country now we're in charge and pass it on to the young generations.

Irregully, the place, is a part of country on Thiin-Mah land near the border of Jurruru man [name deleted] country. There are lots of waterholes there and springs and other things. Irregully, Ben Spring and Devil Spring and Minniera Spring they're all Irregully country which is sacred. Lots of people have been through there but it is still sacred to us including me and the younger Thiin-Mah and Warriyangka people. The rain water serpent still Jurruru man Toby Smirke's country. There are lots of waterholes there and springs and other lives there now and that's why its sacred. He is a part of that claim area at places called Damper springs and Sheen Spring which are in the new claim area.

I was told that back in the olden days to travel from Minnie Creek to Gifford or Wanna you would have to go by horse back or horse and cart. The old people used to walk from Minnie Creek to Gifford Creek, it would take about 3 days, some people got very sick from having no food or water (*Affidavit of Herbert Eagles, [43]-[45]*).

[83] [name deleted], anthropologist, in her affidavit dated 13 October 2016, says that she has interviewed senior Thudgari people about their country and culture over a number of years. She has knowledge of their country, genealogies and laws and customs. In her view, the Thudgari people native title holders are affiliated with the four languages and they are closely interlinked culturally, linguistically and socially. Although they are closely related, they continue to distinguish areas of country. The country covered by this claim is a result of research and discussions with Thudgari people native title holders and members of neighbouring native title claim/determination groups through the holding of boundary workshops. The result of that research and workshops is the current boundary of the claim area (*Affidavit of [name deleted] dated 13 October 2016, [1]-[22]*).

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[84] As indicated above, the factual basis must be sufficient to support the assertion the predecessors had an association with the claim area and similarly the native title claim group have a current association. In addition, the factual basis must be sufficient to demonstrate the continuity of association between the period at sovereignty or contact through to the present. In that sense, the factual basis must show the 'history of association'. This then requires more than facts which simply support the assertion of an association of the predecessors at sovereignty or contact and the association of current claim group members. It requires sufficient facts about a continuous association during that period— *Gudjala [2007], [51]-[52]*.

[85] In assessing the description of the factual basis relating to association, I have considered the map in the application, the map attached to the affidavit of [name deleted] and maps that are accessible through the Tribunal's mapping databases. This has assisted me in understanding the area covered by the application and the places that are referenced throughout the factual basis material.

[86] The factual basis material provides information about the association of the identified ancestors of the native title claim group. On the basis of the material provided, I have assessed the

information supports that these persons were alive prior to effective sovereignty in the region of the claim, which is said to have occurred around the 1860s. There is ethnohistorical information that identifies these persons as being members of the society that existed at that time and various information about them being in the vicinity of the claim area. This kind of information provides support for the assertion that it is the TMWTJ People who were present in the area prior to European contact. I consider the material is such that I can reasonably draw the inference that given the factual basis provides sufficient facts to support that the TMWTJ people were present at or before effective contact, then it is sufficient to support the assertion that the predecessors were present at sovereignty.

[87] I also consider the factual basis supports the assertion that there has been a history of association with the application area from that period. For example, in the affidavit of Peter Salmon, he recounts information about his immediate predecessors, including his grandfather and great uncle. The information supports that these persons were present in the area around the late 1800s. His grandfather, [name deleted], was born on Gifford and he belonged to the Gifford Creek and Minnie Creek area. He used to travel around the application area. There are also details of his mother's association as well as his own. Thus, this oral account of the history of association, dates back to around the time of effective sovereignty in the area.

[88] Supporting the assertion that the association is of the whole claim group, the affidavits provide examples of how others have an association with parts of the claim area. For example, Peter Salmon says that:

The north part there of the new claim area going up from Ullawarra to Wyloo station, that's traditional Jiwarli country. We're claiming all this country together as one group and that is Jiwarli country, I can't speak for that country but I know it's part of the four language group's traditional lands. People like [name deleted], whose father was [name deleted], should talk for that country.

For the west part there of the new claim area going towards Moogaree over Williambury, the *Ngurrura* for that area would be [name deleted], [name deleted] and Peter Windie, all proper Tharrkari mob. I don't speak for that part but it is part of the four language group's traditional lands.

[89] In addition, the Summary document outlining the factual basis provides details of various family associations with places within the claim area. For instance, the ancestor Togo Griffin was an important person for Mangaroon and descendants of Warngarri and Didibirri maintain an association with this area. Maroonah, which mostly falls within Jiwarli country, is an important place which current claimant families are associated. Peter Salmon was also born at Maroonah and he recalls members of the [name deleted], [name deleted] and [name deleted] families living and working on the station. The ancestors Maldurdari, Jiraguru, Balgonyunga and Wurajulba and their descendants are known to be associated with [name deleted]. It contains an important site named *Kardumaya* (Needles Hill).

[90] From the factual basis material, it is clear that language affiliation was and remains important in connecting the land and waters and claimants. The affidavit material demonstrates current claimants have intimate knowledge of the claim area and also the external and internal boundaries that are premised upon language affiliation. It is clear that the four language identities have been maintained throughout the generations. As explained in the Summary document, 'the languages, people and country of the TWMTJ claim region were emplaced and connected.'

[91] I consider that the factual basis sufficiently describes the association of the predecessors and that of the native title claim group with the land and waters in the claim area. I am also satisfied that it supports the assertion that the whole group is associated with the area and that there has been continuity of association. The factual basis supports the assertion at s 190B(5)(a).

Section 190B(5)(b)

[92] Support for the assertion that there are 'traditional' laws and customs does not arise from simple statements that laws, and customs are traditional. There must be an outline of the basis upon which it is claimed the laws and customs are traditional. A sufficient factual basis for this purpose must clearly identify a relevant pre-sovereignty society and provide facts about that society. There must be some basis for my inferring the factual basis gives details of a society that existed prior to European contact and 'which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'. The facts set out must support the assertion those laws and customs give rise to the claimed native title rights and interests of the group—*Gudjala [2007]* at [62], [66] and [81]; *Gudjala [2009]*, 76-77/[52] and 80/[69].

[93] Where the membership of the current native title claim group is based on descent, which it is here, the factual basis must provide an explanation of the link between the ancestors of the group and the society they say existed at sovereignty. This is because the factual basis must provide an explanation of how current laws and customs are said to be traditional and this, in part, comes from describing how the group's predecessors were connected to the society — *Gudjala [2009]*, 72/[40].

The claimant's factual basis in relation to the society and its laws and customs

[94] The most potent support in relation to the existence of the relevant society is the Thudgari People's determination over an adjoining area of land and waters. The decision of Barker J in *Thudgari People v State of Western Australia [2009]* FCA 1334, in which the determination was made by consent, provides some information about the relevant society, including the following:

While there has been significant change experienced by the Thudgari as a result of European settlement and some aspects of their system of law and custom have been substantially altered

or discarded, the extant system of law and custom practiced by the Thudgari claimants is traditional, vital and normative ([30]).

In relation to the traditional and contemporary system of land tenure, the *State Position Paper* notes, amongst other things, that descent and birthplace are the two most important elements of a Thudgari person's proximate connections to land. A person with such connections is known as *ngurrara* and they can be seen to have a special status over particular parts of land for which they are *ngurrara*. They are also seen as having pre-eminent authority for a location associated with a parent or grandparent, and this authority is enhanced if they were themselves born at that location ([34]).

In addition to birth and descent, residence and knowledge assist to determine the authority with which a person can express rights, and should be deferred by others ([36]).

While members of the cognatic group and the *ngurrara* have primary rights, others might have secondary rights or contingent rights to country. These people are usually the spouses of Thudgari people ([37]).

The *State Position Paper* also notes that within the claim area, there are areas of cultural significance to the claim group, including mythological sites whereby natural features including hills, creeks and other water sources interpreted as evidence of activities of creative beings during the Dreaming. Knowledge of these sites has been transmitted to the Thudgari claimants by their elders ([38]).

[95] I note that the determination in *Thudgari People v State of Western Australia* [2009] FCA 1334 relates to the same native title claim group as described in this application (*Schedule 4 of the determination*).

[96] The *State's Position Paper*, which is referred to in the determination, was also provided in support of this application. Among other matters, the Paper refers to the vitality of the claim group's traditional laws and customs. For instance:

The life history accounts of the claimants reveal that, despite the influence of colonisation, the pastoral industry and missions, there has been a continuation of traditional practices, such as betrothal, birthing techniques, the use of traditional midwives, traditional foods and medicines, totemic affiliation, ritual and inter-group ceremonies ([134]).

The materials suggested a continuance in the operation of the kinship system (see section 7.4.1 above), but point to an attenuation of the system such that avoidance rules, though known by claimants are now not as frequently observed due to the disruptive effects of pastoral station employment. Thudgari kin terms are still used by the claimants in concert with English ones, which indicated to the authors that an underlying traditional structure persists ([135]).

There is evidence of the continued vitality of conception totems (see section 7.2 above), noting that they are believed by claimants to take the form of signs or marks on the body that originated in actions that occurred at conception. In other instances, marks on the body might be thought to mimic actions of the totem being itself. Since the introduction of non-native plant and animal species, conception totems are no longer restricted to indigenous species in the claim area ([136]).

Although older claimants were usually born in the bush using traditional techniques, children are now born in towns, generally in hospitals. However, there is still a strong belief among claimants in the existence of a persons *mangkurna* (a personal spirit which is born into the world with the physical body) and the need to care for both the physical and spiritual parts of the person ([140]).

Thudgari people have numerous names, including their personal name, birthplace name, conception totem name, clan totem name, totem class, name nickname and English name. They may also have a namesake if they develop a special bond with another Thudgari or Aboriginal group who bears the same name as them ([141]).

Children are taught their system of law and custom by their parents, because an important part of a child's education is considered to be instruction in the spiritual and supernatural forces that exist in Thudgari country. Evidence from younger claimants illustrates the ways in which knowledge is transmitted to them by their elders. This includes not only knowledge about their country and its resources, but Thudgari customs and modes of behaviour ([144]).

The Thudgari system of law and custom provides for rituals that can be performed at a number of *thalu* sites to increase natural species (see section 7.3.2 above), although claimants admit that the rites associated with *thalu* sites are no longer performed on a regular basis. Nevertheless, knowledge of what to do to make a *thalu* site work is still retained, and the right to perform ceremonies at the *thalu* centres is associated with a person's totem ([146]).

[97] Whilst the information in the determination and *State's Position Paper* of the adjoining area is significant to my consideration of the factual basis for this application, I must also consider whether there is sufficient information about those traditional laws and customs giving rise to the native title rights and interests claimed in this application. In that regard, the wording of s 190B(5)(b) is specific, in that the outline of facts must be sufficient to support the assertion that there exist traditional laws and customs, acknowledged and observed by the claim group and that give rise to the *claimed native title rights and interests*. That, in my view, is a reference to the specific area of the claim. That is, s 190B(5)(b) also has a spatial element.

[98] The affidavits provided with this application, in my view, contain information that supports the connection, in accordance with their traditional laws and customs, of the Thudgari or TMWTJ people with the land and waters in the claim area. For instance, they provide examples of their and their forebears connection with the land and waters under the traditional laws and customs.

[99] Peter Salmon provides information about the land tenure system and how that gives rise to his and other claimant's rights in the land and waters covered by the claim. He says that:

This new claim area has always belonged to the four language groups, with each talking for their own country. I don't know why the new claim area wasn't included in the old determination area, it should have been because its always been our country ([53]).

I am the *ngurrara* for the whole of Thiin-Mah and Warriyangka country, all that country and all the pools in it. In Wanna all the old *ngurrara* passed away, [name deleted] was the *ngurrara*

for Wanna. It's all passed on to me now that he passed away. I know it's passed to me because he told me that and showed me that country ([57]).

The *ngurrara* should be talked to if an outsider enters their country. *Ngurrara* should also be talked to if there are any problems associated with the country, and if anything goes wrong people go and see that *ngurrara*. So if you walk into country, well you go and ask the *ngurrara* ([58]).

If someone is born on country then they can be a *ngurrara* and they have more say over the other people in that group and they are usually the eldest one, as long as they have the right ancestry for that county ([59]).

We got the right to speak for this country from our grandfathers [name A deleted] and [name deleted] ([64]).

Our grandfathers [name deleted] and [name deleted] they got the right to speak for the country from their mother and father and they got the land from their parents ([66]).

Two weeks ago I went out to around Fraser Creek which is on Gifford Creek station- with some young people and taught them the names of places, and how to recognise aboriginal tools ([68]).

I've taken Herbert Eagles out onto country when I was younger as well. I call Herbert my brother (our mothers were sisters). I've also taught my sisters about country, [names deleted]. [Name deleted] grew up on Minnie Creek, she was born on *Partakaya*, near Alma Outcamp ([69]).

Only the Thiin-Mah Warriyangka people speak for Thiin-Mah Warriyanka country ([70]).

[100] In addition, he speaks about the continuity of connection with the claim area and how he has learned and continued the customs of his forebears. He explains how, in relation to the claim area, he is continuing to access and use it in accordance with traditional law:

I'm allowed to camp on my own country, but other people have to ask permission ([72]).

We went out onto Thiin-Mah country a couple of weeks ago for 2-3 days with a mining company at Fraser Creek. I told the people to stay away from the water sources, the creeks and permanent pools. There are a number of waterholes around there which I want to protect. I told them about some sacred sites like the *Kurpili thalu* (the kangaroo *thalu*) and told them not take anything from there. I also told them about the racehorse lizard *thalu* near *Yangibana* and not to take anything away from there. They said they will mark off the area around these so that they avoid those areas. It's really important to protect these areas because these sites and many of the water springs are sacred areas ([73]).

When I went out on to country a couple of weeks ago I sang out, I said "I'm here, I'm *Ngurrara*." I went out with some of the younger men, I took one of the younger guys [name deleted] (his mother's a Thiin-Mah lady, my sister) with me to the *thalu* and I introduced him to the country in language. He'll be one of the people I'll pass things onto but I'll try to make sure there's one leader ([74]).

I also sing out to the spirits of the old people when I'm on country like my grandfathers and the Thiin-Mah and Warriyangka people going back. That's our old people, [name deleted] mob, his mother and father. All my old people who passed on country ([76]).

I'm trying to keep my traditions alive and am teaching people about country and want to pass on my country and these rules to my younger family. I still think about country when I'm not at home ([77]).

Is the factual basis sufficient to support the assertion at s 190B(5)(b)?

[101] As stated above, the determination of native title in the adjoining area, provides the most potent support in relation to the sufficiency of the factual basis. That is because the Court has held that the Thudgari people (being the same native title claim group as the TMWTJ people) formed part of a society at the time of sovereignty that has continued to the present day, albeit with some adaptation necessitated by the effects of colonisation.

[102] In addition, both of the deponents in the affidavits (Peter Salmon and Herbert Eagles) identify themselves with one or more of the four language groups and the information they provide suggests an intimate knowledge of their predecessor's connection with the claim area and they also provide facts about their own and others continuing association. Most of the information in these affidavits is specific to the land and waters covered by this claim. They also explain how through language affiliation and descent, they have rights and interests in the claim area. The information within also reflects their understanding and adherence to the system of land tenure and how identification with a particular language group remains vital to an individual's rights and interests in the land and waters.

[103] The ethnohistorical information and oral tradition also provides support for the assertion that at least some of the ancestors of the claim group (i.e. those identified in Schedule A) were connected with the area covered by this claim and logically those persons had rights and interests under the traditional laws and customs identified in the material. It also provides information about genealogies, supporting the assertion that current members of the claim group are descendant from those persons who were in the area prior to effective sovereignty. The continuity of connection is also evidenced by the information in the affidavits. For instance, Herbert Eagles recounts that:

[name A deleted] is my Grandfather, he was born at a site called Deluxa Creek on Gifford Creek. Gifford Creek was its own station but now it's part of Wanna Station. Gifford Creek and Deluxa Creek are both on traditional Thiin-Mah Warriyangka country and neighbour Minnie Creek which is Warriyangka country. All of these areas are within the new claim area. [name A deleted] was of the bosses of the land, he was predominantly a hunter. He lived on Thiin-Mah country his entire life going between Gifford Creek and Minnie Creek station. He later married [name B deleted] who was a Jiwarli woman ([12]).

[name B deleted] gave birth to both [name C deleted] and [name D deleted] and one son [name E deleted]. [name D deleted] was [name C deleted]'s older sister. I also call [name D deleted]

my mother in the aboriginal way. [name D deleted] was born on Gifford Creek station. [name D deleted] and I had a close relationship, she taught me a lot about country and the land, she also taught me how to make bush tucker. She taught me these things on and around Thiin-Mah country when I used to go up on school holidays and during the Christmas break ([13]).

My mother [name C deleted] and her sister [name D deleted] grew up on and around Minnie Creek station, which is on Thiin-Mah country and part of it is in the new claim area. My mother conceived me on Maroonah Station, old [name D deleted] told me and showed me where I was born in shearer's quarters on Maroonah Station. It was either in 1946 or 1948, the government says 1946 but the mission mob they put 1948 ([14]).

[name C deleted] and her sister [name D deleted] used to work on the station in Minnie Creek as a house maide. They spent the majority of their lives living on their father's country [Name A deleted] and Minnie Creek Station, which is part of the new claim area ([15]).

[104] In my view, the claimant's factual basis, including the information above, is sufficient to support the assertion at s 190B(5)(b).

Section 190B(5)(c)

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

[106] Much of the factual basis about this requirement is outlined above, including information about the pre-sovereignty society, the persons who acknowledged the laws and customs of that society, the links between that society and the current native title claim group and material that demonstrates a continuity— see, *Gudjala* [2009], 72/[33].

[107] In the determination decision of *Thudgari People v State of Western Australia* [2009] FCA 1334, Barker J noted that:

The *State Position Paper* also deals with the nature of the system of law and custom under which native title is held and such matters as traditional and contemporary systems of land tenure, totemism, areas of cultural significance, kinship and marriage, resource use, language and vitality of traditional law and custom. Having considered these matters, the State has formed the opinion that the Thudgari claimants have continued to exist as a body united by the acknowledgement and observance of a normative system of traditional laws and customs, which continues to be transmitted to younger members of the claimant group ([30]).

[108] In addition, the affidavits of current claimants speak to the continuity of the traditions and customs of the relevant society and how these continue to regulate rights and interests in the claim area. For instance, Herbert Eagles says that:

I learnt about my country mainly from Peter Salmon. I learned in the early 60s most of what I know about country. The rules were that you have to be very careful about where you go. If

you go on sacred sites that aren't on your country you will get very sick. You have to take note of whose country it is, you can't go and claim other people's country or go to other country or go protecting sites on country without another pass (or permission) from the original owner of that country, I would have to get a pass to go onto a neighbouring country like Yinggarda ([26]).

Thiin-Mah and Warriyangka people speak for Thiin-Mah and Warriyanka country and Tharrkari, Jiwarli, Wajarri and Yinggarda people can't speak for this country just like we can't speak for their country ([28]).

Thiin-Mah and Warriyangka country stands out on its own with its own song and dance which come from my Hill called Wyamba, the white fella name is Mt Thompson. That rests in my mind about that country because it is dedicated to me and my family. It's with me because of what the old man said ([30]).

[109] This kind of factual basis material provides details of how the pre-sovereign system of laws and customs has continued to the present day. In particular, rights in country were based upon the principles of descent, birthplace and language identity. Today, current claimants continue to recognise their associations with language groups and descent from ancestors that were associated with particular areas, remains a primary criteria of membership to the native title claim group.

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

Conclusion

[111] The application satisfies the condition of s 190B(5) because the factual basis provided is not sufficient to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)

Prima facie case

[112] This condition requires me to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[113] Generally, being satisfied for the purpose of this condition requires consideration of whether the material presents an arguable basis for the existence of the claimed rights and interests under the traditional laws and customs. That is, a right or interest may be said to be prima facie established 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at 147/[135].

[114] It may require the making of some favourable assumptions. It may also involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to

the individual rights and interests claimed.’ Where appropriate, s. 190B(6) may also require some consideration of contradictory material—*Doepel*, 145-146/[126]-[127] and [132].

[115] In *Gudjala* [2007], Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*) and to the Court’s consideration of s. 223 and ‘traditional’ where it held ‘the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question’—[86].

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

[117] Often the factual basis will provide examples of current exercise of the claimed rights and interests that are said to arise under the traditional laws and customs of the native title claim group. Whilst the focus is not on exercise but possession under the relevant laws and customs, this kind of material can assist in demonstrating the relevant laws and customs and it may be possible to infer current exercise is in accordance with traditional laws and customs that were acknowledged and observed prior to European contact.

[118] The claimed native title rights and interests I consider can be prima facie established are identified below.

Consideration of claimed native title rights and interests

Rights in Area A

The right to possess, occupy, use and enjoy the area as against the whole world

[119] Area A is described as being areas within the external boundary of the claim where there are areas of unallocated Crown Land that has not previously been subject to any grant by the Crown, areas to which ss 47, 47A and 47B of the Act apply, and other areas to which the non-extinguishment principle set out in s 238 of the Act applies.

[120] The expression in these terms (a right to possess, occupy, use and enjoy the area as against the whole world) is said to reflect ‘not only the content of a right to be asked permission about how and by whom country may be used, but also the common law’s concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing’— *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), [88].

[121] Further, the expression conveys ‘the assertion of rights of control over the land’, which necessarily flow ‘from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country’ – *Ward HC*, [89] and [93].

[122] This control of access to country can flow from ‘spiritual necessity’ rather than being a physical demonstration, due to the harm that would be inflicted upon those that entered country unauthorised – *Griffiths v Northern Territory of Australia* [2006] FCA 903 (*Griffiths*) at [127].

[123] The factual basis material evidences that there are traditional laws and customs that regulate the clearly defined boundaries, even internally between the four language groups. The material also refers to sanctions being visited upon those who trespass onto country without permission. For instance, the affidavit of Herbert Eagle refers to the belief that persons will get ill if they go to certain places without permission ([35]).

[124] The right to ‘speak for country’ is clearly articulated throughout the affidavit material and this, it is said, emanates from the traditional laws and customs. For instance, Peter Salmon says that he speaks for Thiin-Mah and Warriyangka through his family and he cannot ‘go to somebody else’s grandfather’s country and speak to their waterhole because that’s their country and in the same way they can’t come to my country and speak to my country’ ([42]).

[125] There is also material that provides a factual basis, which supports that some of the ancestors were present in the claim area and had an affiliation with particular places. The material also links particular ancestors and their descendants with places within the claim area.

[126] In the contemporary context, the factual basis material also records the continuation of the right to occupation and the traditional laws and customs as they pertain to gaining rights to country and the right to speak for that country. The principal means of gaining rights to country of the TMWTJ people continues to be via descent and birthplace. Language affiliation and connection also remains critical to claimant’s understanding of the boundaries of their country. Claimants continue to hold significant genealogical knowledge about their forebears, their affiliation with significant and sacred places and they are passing this knowledge to their children and grandchildren.

[127] I consider this right is prima facie established.

Rights in Area B

[128] Area B means the land and waters within the application area that is not included in Area A. These rights claimed in relation to Area B are claimed as non-exclusive rights.

A right to hunt in the area; A right to fish in the area

[129] There is material within the factual basis that supports the existence of these rights in accordance with the relevant traditional laws and customs. For instance, Peter Salmon discusses how he can fish and hunt in the claim area and that he was taught how by his 'old people.' He says that he is 'allowed to take what I've caught on my country and if I've got other people with me they can hunt with me and share it as well' ([108]). He says that there is also a special way that we prepare and cook the meat. He was taught a way to go fishing 'where you'd grab some milkbush in a bag and put some sand in it and put it in the water and then the milk would spread out and then the fish wouldn't be able to breathe and they'd come to the surface.' He says that 'old [name deleted]' showed him this method ([107]).

[130] Herbert Eagles says that when he was young some old people taught him about hunting with spears on Wanna Station. He says that he is allowed to go hunting on Thiin-Mah Warriyangka country because the old people passed it on to him. He is also allowed to go fishing ([33]).

[131] I consider these rights to be prima facie established.

A right to take traditional resources, other than minerals, petroleum and gas from the area; A right to take fauna

[132] I consider that the right to take and use traditional resources and fauna within the claim area is documented in the material. Peter Salmon talks about his right to use resources such as timber and rocks from Thiin-Mah Warriyangka country. He says that:

I'm allowed to make things using the timber from my country. Old [name deleted] taught me how to make spears. I've seen those spears being used on country.

I still have a few things that I made back when I was on Maroonah. I've also got an old spear made by [name deleted].

You can go onto country and make a fire using wood. *Purgardi* (snakewood) is the best wood to use. The only thing that you're not allowed to do with wood is make a boomerang or spear if you're on someone else's country. Anyone can pick up dry wood from the ground and use it to make a fire but they would have to get permission if they're going to use it to make a boomerang or spear.

Other people can't take the stones from Thiin-Mah and Warriyangka country it has to stay there where you found it, but I can take them on Thiin-Mah and Warriyangka country. Any tools that have been made by my ancestors if I see them there on the ground I leave them there ([86]-[89]).

[133] He also talks about hunting, preparing and cooking meat from animals in the claim area (see [108]-[114]).

[134] I consider this kind of information in the factual basis to be sufficient to support that these rights exist pursuant to the traditional laws and customs.

[135] I consider these rights to be prima facie established.

A right to occupy the area; A right to use the area; A right to enjoy the area; A right to be present on or within the area; A right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title group belong; A right to invite and permit others to have access to and participate in or carry out activities in the area; A right to speak authoritatively about the area among other Aboriginal people in accordance with traditional laws and customs; A right to control access to and use of the area by other Aboriginal people who seek access in accordance with traditional laws and customs; A right of access to the area; A right to live within the area; A right to erect shelters upon or within the area; A right to camp upon or within the area; A right to move about the area

[136] These rights to occupy, access, be present on and to generally speak for the country essentially flow from the traditional laws and customs relating to the land tenure system and how rights and interests in country are acquired by claimants, being by descent, birthplace and language affiliation. The factual basis material speaks extensively about how claimants derive their rights in the land and waters and how they have occupied and used that country since prior to sovereignty. This includes the right to restrict others who are bound by their traditional laws and customs, in their access to the country. In relation to the right to control access, I consider that because this is confined to Aboriginal people who seek access under the traditional laws and customs and because it is claimed as non-exclusive, it can be recognised.

[137] I have considered each of these claimed rights individually and consider that there is sufficient material to support the assertion that these exist pursuant to the traditional laws and customs.

[138] I consider these rights to be prima facie established.

A right to engage in cultural activities within the area; A right to conduct and participate in ceremonies and meetings within the area; A right to visit, care for and maintain places of importance and protect them from physical harm; A right to transmit cultural heritage of the native title claim group related to the area, including knowledge of significant sites and places; A right to maintain, conserve and protect significant places and objects located within the area

[139] Although participation in ceremonial activities has somewhat declined, it is clear that it still remains an important right for claimants. The oral tradition holds that such activities were common place in the times of immediate predecessors and even when the deponents were younger. Herbert Eagles recalls what he was told about meetings and ceremonies that occurred in the past:

I was told back before my time they used to have a big meeting at Gifford Creek at the homestead near the river. Different tribes would come from all over the area, like Wajarri,

Yinggarda, Budinea and Thalanyji. They would have a big song and dance and they would show their dance but they have to get a pass or permission from my grandfathers to continue on with their dance and songs ([32]).

[140] Cultural activities and knowledge remain significant for claimants and there are examples of passing on knowledge of country and undertaking cultural activities. Oral teachings of laws and customs appears to remain the most important means of transmission to younger generations. This is also recorded in the *State's Position Paper* ([144]).

[141] There are numerous references to significant and sacred sites within the area covered by the claim and the desire and obligation to protect these remains paramount for current claimants. Peter Salmon refers to a Kangaroo *thalu* at Gifford Creek, which is an important place, and people cannot touch or take anything ([71]).

[142] I consider these rights are prima facie established.

A right to conduct burials on the area

[143] There is, in my view, insufficient information about this right such that I cannot be satisfied that it is prima facie established.

[144] This right is not prima facie established.

A right to take flora (including timber); A right to take soil; A right to take sand; a right to take stone and/or flint; a right to take clay; a right to take gravel; a right to take ochre; A right to take shells

[145] The right to take and use various resources of the area is discussed within the affidavit material. For instance, Peter Salmon says that:

There are a few places on our country where you can get ochre (paint) from, Minniera Gap where Irregully is, there's a spot where you can get red ochre. Further down at Alma on the Edmund River there's a place where you can get white ochre from.

People used that paint to dress up for ceremonies. I used to put red and white ochre on myself and shield for when we'd do dancing and stuff. I would've been about 10 maybe. There's also some stuff on Maroonah country which was Old [name deleted]'s country, Jiwarli, he would go get it and let us use it ([84]-[85]).

[146] He also talks about the use of plants, saying that he is allowed to go and get berries (called *tharwarja*) because he was taught by his mother that he is allowed to take these from his country and if he has other people with him, they are also allowed to share ([79]-[80]).

[147] Whilst not all of these different resources are mentioned in the material, I consider it reasonable to infer that the right to take and use these natural resources of the claim area arises pursuant to the traditional laws and customs.

[148] I consider these rights are prima facie established.

A right to have access to water ; A right to take water

[149] Peter Salmon says that water is very important to the native title claim group and there are traditions and customs that must be exercised when they go to water holes. He says that:

I am also known as *Kajartu* which is the rain maker, from my grandfather [name deleted]. Mum and [name deleted] and the other old people would call me that. I was shown a *kajartu thalu* in Mundong country, at a spring in Glen Florrie country. It was called *Murrkara* and it belongs more or less to the Jiwarli mob, it's on Glen Florrie but I was never instructed in how to perform the ritual at *Murrkara*. A *kajartu thalu* can only work if you are *kajartu* in your own country. They showed me where this site is but didn't show me how to do it ([123]).

Wakurranu is a spring and is another *kajartu* (rain) *thalu* place near Maroonah.

[150] I consider these rights are prima facie established.

A right to trade in shells; A right to trade in the resources of the area

[151] According to Herbert Eagles the oral tradition holds that trading occurred with neighbouring groups in the past. He says that his 'grandfathers told me we used to trade with tribes from neighbouring countries. We would trade spears, boomerangs, anything with value we would sometimes trade food, a lot of bush medicine was also traded. We would trade to the Wajarri mob and others' ([36]).

[152] I consider these rights are prima facie established.

A right to manufacture traditional items from the resources of the area

[153] Peter Salmon talks about the claim group's right to manufacture items from the resources of the area. For instance:

I use the ashes (*ngarri*) of snakewood (*pugardi*) and the Blackheart Tree (*wirlu*) to use with tobacco (*purlgu*). The old people used to do this a lot. You can find this at Gifford Creek, there's plenty of these things in the claim area. My mum did this a lot and my grandfathers too.

Spinifex wax is used to haft tools. *Tirti* is the ordinary Spinifex seed and *purlka* is another one but they more or less have the same sorts of seeds but *purlka* is the wax Spinifex. You get a big lump and just sort of melt it, melt it into a tin. I've seen it being put on – the old people used to make it – to tie the little barb on their spears using the wax and the kangaroo sinew. It is used to tie the spearhead on. Wrap it up with the Spinifex wax and sinew and then it dries on hard.

[154] I consider this right to be prima facie established.

Conclusion

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

Subsection 190B(7)

Traditional physical connection

[156] This condition is about being satisfied at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. Alternatively, it may be that a person reasonably would be expected to have a traditional physical connection, but for things done by the Crown or a government authority or a holder of a lease over the land or waters.

[157] The material about this must be capable of satisfying the Registrar of a particular fact(s), specifically that at least one member of the claim group ‘has or had a traditional physical connection’ with any part of the claim area. While the focus is necessarily confined, as it is not the same consideration given by the Court in making a determination, it ‘is upon the relationship of at least one member of the native title claim group with some part of the claim area’ — *Doepel* at [18].

[158] The reference to this being a ‘traditional physical connection’ is about the connection being pursuant to the traditional laws and customs of the native title claim group. In that way, it is likely this connection is in exercise of a right or interest held under the traditional laws and customs — *Gudjala [2009]*, [84].

[159] The affidavits provide detailed information about the deponents traditional physical connection with the land and waters in the application area. For instance, the affidavit of Peter Salmon provides details of his physical ‘association’ with the claim area. In addition, he also describes how this is in accordance with the traditional laws and customs of the TMWTJ people, supporting that this is a traditional physical ‘connection’ with the country. He describes his country in detail and he knows the boundaries as taught to him by his mother and grandfather. He says that ‘I am the *ngurrara* for the whole of Thiin-Mah and Warriyangka country, all that country and all the pools in it. In Wanna all the old *ngurrara* passed away, [name deleted] was the *ngurrara* for Wanna. It’s all passed on to me now that he passed away. I know it’s passed to me because he told me that and showed me that country’ ([57]). He explains how he acquired his rights in the land and water, through his mother and grandfather who both spent most of their lives in the area. He also has spent considerable periods of his life in the claim area.

[160] In my view, this is sufficient such that I can be satisfied that at least one member of the native title claim group has a traditional physical connection with the claim area.

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

Subsection 190B(8)

No failure to comply with s 61A

[162] 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 there is compliance with s 61A.

Section 61A(1)

[163] Section 61A(1) provides a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

[164] There is no approved determination over any of the land and waters covered by the claim according to a geospatial assessment and overlap analysis conducted over the claim area.

Section 61A(2)

[165] Section 61A(2) provides a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

[166] The claim does not cover any areas where there has been valid extinguishment unless the extinguishment can be disregarded under certain provisions of the Act. The description of the claim area in Schedule B excludes such areas where there has been a previous exclusive possession act.

Section 61A(3)

[167] 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.

[168] Schedule B states that there is no claim to exclusive native title rights and interests over any areas where a previous non-exclusive possession act was done.

Conclusion

[169] In my view the application does not offend 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

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

Section 190B(9)(a)

[171] This requirement relates to the restriction upon a claim being made to the ownership of minerals, petroleum or gas, wholly owned by the Crown (Commonwealth, State or Territory).

[172] The application does not claim ownership of minerals, petroleum or gas, wholly owned by the Crown — Schedule Q.

Section 190B(9)(b)

[173] This requirement relates to the restriction to claiming exclusive rights in offshore waters.

[174] The application does not claim any rights to offshore places — Schedule P.

Section 190B(9)(c)

[175] This requirement is about whether the claim relates to native title rights and interests that are extinguished, unless the extinguishment can be disregarded under certain sections of the Act, including ss 47, 47A and 47B.

[176] It is clear from the information in the application, that the claim is only over areas of land and waters where there has not been valid extinguishment — Schedule B.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Combined Thiin-Mah Warriyangka, Tharrkari, Jiwarli
NNTT file no.	WC2016/003
Federal Court of Australia file no.	WAD464/2016

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

7 October 2016

Date application entered on Register:

21 October 2016

Applicant:

Herbert Eagles, Heidi Mippy, Lorraine Monika Dodd, Philomena Dodd, Peter Windie Senior, Wayne Laphorne

Applicant's address for service:

C/-Yamatji Marlpa Aboriginal Corporation

Level 8, 12-14 the Esplanade

Perth WA 6000

Area covered by application:

(a) **the area covered by the application**

The external boundaries of the area of land and waters covered by the application are as set out in the document entitled "Description of External Boundary" which is annexed as **Attachment 'B'** [Attachment B is an attachment to this Register extract. Attachment C, which is a map of the application area, is an attachment to this Register extract].

(b) **any areas within those boundaries that are not covered by the application.**

1. Subject to Schedule B paragraph 5, the applicant excludes from the application area any areas that are covered by any of the following acts as these are defined in either the Act, as amended (where the act in question is attributable to the Commonwealth), or *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)*, as amended, (where the act in question is attributable to the State of Western Australia) at the time of the Registrar's consideration:
 - (a) Category A past acts;
 - (b) Category A intermediate period acts;
 - (c) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests; and
 - (d) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.
2. Subject to Schedule B paragraph 5, the applicant excludes from the application area any areas in relation to which:
 - (a) a "previous exclusive possession act", as defined in s.23B of the Act, was done and the act was an act attributable to the Commonwealth; or
 - (b) a "relevant act" as that term is defined in s.12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)* was done and the act is attributable to the State of Western Australia; or
 - (c) a previous exclusive possession act under s.23B(7) of the Act was done in relation to the area and the act was attributable to the State of Western Australia.
3. Subject to Schedule B paragraph 5, the applicant does not claim any native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others over areas in relation to which:
 - (a) a "previous non-exclusive possession act" as defined in s.23F of the Act was done and the act was an act attributable to the Commonwealth; or

(b) a “previous non-exclusive possession act” as defined in s.12M of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)* was done and the act is an act attributable to the State of Western Australia.

4. Subject to Schedule B paragraph 5, the applicant also excludes from the application area areas in relation to which native title rights and interest have otherwise been wholly extinguished.
5. The application area includes any area in relation to which the non-extinguishment principle (as defined in s.238 of the Act) applies, including any area to which ss 47, 47A and 47B of the Act apply, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.

Persons claiming to hold native title:

The descendants of the people who belong to the Thiin Mah, Warriyangka, Tharrkari and Jiwarli (“TMWTJ”) language groups, in particular the descendants of the following ancestors:

- (i) Maldurdari and Jiraguru;
- (ii) Balgonyunga and Wurajulba;
- (iii) Yagaraja and Kurmainma;
- (iv) Thaldungu and Jigura;
- (v) Larry Brewer and Nancy Cameron;
- (vi) Togo Griffin and Agnes Barron;
- (vii) Marigold; and
- (viii) Warngarri and Didibirri.

OR

Who are adopted by such biological descendants in accordance with the traditional laws acknowledged and the traditional customs observed by the TMWTJ groups;

AND

Identify themselves as members of the TMWTJ groups under traditional law and custom and are so identified by other native title claimants as members of the TMWTJ groups;

AND

Have a connection with the land and waters in the claim area, in accordance with traditional laws acknowledged and traditional customs observed by the TMWTJ groups.

Registered native title rights and interests:

“*Area A*” means land within the application area that is landward of the high water mark and which comprises:

- (i) areas of unallocated Crown land that have not been previously subject to any grant by the Crown;

- (ii) areas to which s.47 of the Act applies;
- (iii) areas to which s.47A of the Act applies;
- (iv) areas to which s.47B of the Act applies; and
- (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

“Area B” means land and waters within the application area that is not included in Area A.

Subject to laws and customs

The native title rights and interests claimed in this application are subject to and exercisable in accordance with:

1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia;
2. valid interests conferred under those laws; and
3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land and waters the subject of this application.

Rights in Area A

The applicant claims the following listed native title rights and interests relating to exclusive possession, subject to any native title rights and interests which may be shared with any other native title claimants, in relation to Area A only:

1. The right to possess, occupy, use and enjoy the area as against the whole world.

Rights in Area B

The applicant claims the following listed native title rights and interests in relation to Area B:

1. a right to hunt in the area;
2. a right to fish in the area;
3. a right to take traditional resources, other than minerals, petroleum and gas from the area;
4. a right to take fauna;
5. a right to occupy the area;
6. a right to use the area;
7. a right to enjoy the area;
8. a right to be present on or within the area;
9. a right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
10. a right to invite and permit others to have access to and participate in or carry out activities in the area;
11. a right to speak authoritatively about the area among other Aboriginal people in accordance with traditional laws and customs;

12. a right to control access to and use of the area by other Aboriginal people who seek access in accordance with traditional laws and customs;
13. a right of access to the area;
14. a right to live within the area;
15. a right to erect shelters upon or within the area;
16. a right to camp upon or within the area;
17. a right to move about the area;
18. a right to engage in cultural activities within the area;
19. a right to conduct and participate in ceremonies and meetings within the area;
20. [not recognised];
21. a right to visit, care for and maintain places of importance and protect them from physical harm;
22. a right to transmit cultural heritage of the native title claim group related to the area, including knowledge of significant sites and places;
23. a right to take flora (including timber);
24. a right to take soil;
25. a right to take sand;
26. a right to take stone and/or flint;
27. a right to take clay;
28. a right to take gravel;
29. a right to take ochre;
30. a right to have access to water;
31. a right to take water;
32. a right to take shells;
33. a right to trade in shells;
34. a right to manufacture traditional items from the resources of the area;
35. a right to trade in the resources of the area; and
36. a right to maintain, conserve and protect significant places and objects located within the area.