National Native Title Tribunal

Registration test decision

Application name	Mandandanji People
Name of applicant	Leslie Weribone, Neville Munn, Theresa Manns, Alex Costa, Max MacDonald, Alexandra Combarngo, Leigh Himstedt, Jude Saldanha, Wayne Weribone, Rodney Landers, Tracey Landers, Vincent Anderson
NNTT file no.	QC2008/010
Federal Court of Australia file no.	QUD366/2008

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: 5 April 2017

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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] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Mandandanji People claimant application to the Registrar on 9 August 2016 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] The Mandandanji People application was first accepted for registration pursuant to s 190A(6) and entered onto the Register of Native Title Claims on 30 March 2009. It was amended on 4 July 2013 and accepted for registration by a delegate of the Registrar pursuant to s 190A(6A) on 26 July 2013. It has remained on the Register since this time.

[4] On 14 June 2016, an amended Mandandanji People application was filed in the Federal Court. Prior to a delegate of the Registrar considering that amended application pursuant to s 190A, a further amended application was filed on 8 August 2016. This is the amended application before me.

[5] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. This is because the application has not been amended as a result of a Court order pursuant to s 87A, nor do the amendments to the application fall within the scope of those set out in s 190A(6A)(d).

[6] 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.

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.

[7] 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.

[8] 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?

[9] 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.

[10] 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)

[11] A description of the persons comprising the native title claim group appears at Schedule A. It is only where, on the face of the application itself, it appears that not all the persons comprising the group are included in that description, or where the description is of a sub-group or part-only of the actual native title claim group, that the application will fail to meet this condition.

[12] I have considered the description of the group in Schedule A. There is nothing, in my view, to indicate that persons of the group have been excluded, or that the group described is part-only or a subgroup of the actual native title claim group.

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

Name and address for service: s 61(3)

[14] The name and address for service for the applicant appears in Part B of the Form 1.

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

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

[16] At this condition of the registration test, my concern is only that the application contains information identifying the members of the native title claim group – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. It is not for me to consider the correctness of the information provided, or whether the description provided is 'sufficiently clear' – see *Wakaman* at [34] and *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[17] As above, a description of the persons comprising the native title claim group, pursuant to s 61(4)(b) appears at Schedule A.

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

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

[19] Part A of the Form 1 sets out the names of the 12 applicant persons. The application is accompanied by 12 affidavits, one sworn by each of the persons comprising the applicant. These affidavits are almost identical in terms, except for the second paragraph of each affidavit that sets out the basis of the deponent's membership to the claim group. Paragraph three provides that the deponent makes the affidavit for the purposes of s 62(1)(a).

[20] I have considered the statements contained in the affidavits and it is my view that they speak to all of the matters prescribed by ss 62(1)(a)(i) to (v).

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

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] This information is contained in Attachment B to Schedule B.

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

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

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

[25] This information about searches conducted by the applicant appears in Schedule D.

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

[26] This description appears in Schedule E.

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

[27] Schedule F refers to Attachment F as containing this description.

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

[28] Schedule G contains a list of these activities.

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

[29] Information about other applications appears at Schedule H.

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

[30] Schedule HA contains information about these notices.

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

[31] Schedule I contains information about these notices.

Conclusion

[32] The application contains all 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.

[33] It is only where there is a previous application satisfying all three criteria set out in ss 190C(3)(a), (b) and (c) that the requirement for me to turn my mind to the possibility of common

claimants between the claim group for the previous application and the claim group for the current application, is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[34] 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 accompanying the application (GeoTrack: 2016/1259, dated 19 August 2016) provides that there is one application that completely overlaps the current application. This is the Mandandanji People application, the application I am considering here for registration.

[35] The application I am currently testing is an amended application. Consequently, that application has already been considered by the Registrar pursuant to s 190A, and as a result, entered onto the Register of Native Title Claims. In my view, the Mandandanji People application cannot overlap itself, and therefore the Mandandanji People 'previous application' that appears on the geospatial assessment does not meet the criteria at subsection (a), as it is one-and-the-same as the current application. This is supported by the fact that where my decision is to register this application, the geospatial record relating to the previous underlying application ceases to exist.

[36] Further, in light of the wording of the provision, it is my view that s 190C(3) is aimed at identifying common claim group members for different and/or competing overlapping applications, and not amended applications.

[37] Therefore, it is my view that there is no previous overlapping application that satisfies the criteria at s 190C(3)(a). Subsequently, I have not turned my mind to the remaining criteria of s 190C(3).

[38] 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.

[39] 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.

[40] Schedule R provides that the application is not certified. Therefore, I must be satisfied in the terms prescribed by s 190C(4)(b). That is, 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.

[41] I note that where an application is not certified, I must be satisfied of the fact of authorisation by all members of the native title claim group – *Doepel* at [78]. In this regard, in *Strickland*, French J found that authorisation is 'a matter of considerable importance and fundamental to the legitimacy of native title determination applications' – at [57].

[42] Where an application is not certified, s 190C(5) imposes further requirements, namely that the application contain a particular statement and 'brief' information addressing authorisation. Having considered the information before me in the application, particularly that information contained in Schedule R and in the affidavits sworn by the applicant persons pursuant to s 62(1)(a), I am satisfied that the requirement at s 190C(5) is met.

[43] Noting the reference to the definition of 'authorise' in s 251B of the Act that follows s 190C(4)(b), it is my view that the material must address the requirements of that provision. As set out in the material, it was at a meeting held on 7 May 2016 in Roma that the members of the native title claim group authorised the applicant to make the application and to deal with all matters arising in relation to it. Annexed to each of the s 62(1)(a) affidavits accompanying the application is a 'Summary of Relevant Meeting Outcomes'. That document sets out the resolutions passed at the meeting by those in attendance. The group resolved that there was no traditional decision-making process that must be complied with in relation to dealing with native

title determination applications, and resolved to adopt a process of decision-making involving resolutions carried by a vote by majority. In light of this information before me, I am satisfied that the material addresses the requirement of s 251B.

[44] Where an agreed to and adopted decision-making process at a meeting of the claim group is asserted as the basis for the applicant's authority, despite the wording of s 190C(4)(b), I note that there is no requirement that all the persons comprising the native title claim group are involved in the decision-making process. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate – *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation NSW* [2002] FCA 1517 at [25].

[45] Regarding the way in which the authorisation meeting held on 7 May 2016 was notified, the information within the application and accompanying documents provides:

- there were two meetings convened by Queensland South Native Title Services (QSNTS) for the authorisation of the applicant, to be held in Roma on 7 May 2016;
- information about both meetings was contained in a notice which appeared in four newspapers circulating in the region where the claim area is situated, approximately three weeks prior to the scheduled authorisation meeting;
- the notice included the date, time, venue and registration details for the two meetings, and noted that travel and accommodation assistance could not be provided but that meals would be available for all attendees across the day;
- regarding the first meeting scheduled for 7 May 2016, the notice invited all persons of the current Mandandanji People native title claim group, and set out the description of those persons;
- the purposes of the first meeting were set out in the notice as being: to consider reducing the area of the claim, and to consider amending the description of the claim group;
- the notice includes a statement that where the description of the claim group is not authorised to be amended, there will be no need for the second meeting;
- regarding the second meeting, the notice invited all the members of the 'newly-described claim group' (defined in the notice) to attend;
- the purposes of the second meeting are set out in the notice, including to authorise an applicant to make a s 66B application where required, and to make the proposed amended application on behalf of the newly-described claim group;
- the notice also advertised two information sessions scheduled for 30 April 2016 and 6 May 2016 in Roma, providing that all descendants of people named in the notice could attend, and that the sessions would inform such persons about the upcoming authorisation meetings;
- public notice of the upcoming authorisation meetings was also provided by way of a posting on the QSNTS website and on QSNTS's social network pages;
- personal notice was given to more than 200 Mandandanji persons whose details are kept in a register maintained and regularly updated by QSNTS;
- personal notice included a mail out on 11 April 2016 and 3 May 2016 of information about the authorisation meetings, SMS messages containing details of the meetings, and phone calls

from Community Relations Officers of QSNTS informing Mandandanji persons about the meetings.

[46] In light of this information before me, I have formed the view that the members of the native title group were given every reasonable opportunity to attend the meeting. Both public and personal notice was provided to the members of the group, that is, persons identified and known by QSNTS from records maintained and updated by the representative body, presumably since the claim was first filed in 2008 and/or earlier.

[47] Notice was provided through various mediums, thereby increasing the coverage of persons who were made aware of the meetings. The notice given clearly set out the purpose for each of the meetings, and it was given well in advance of the meetings (some three weeks) such that I consider claimants were able to consider whether their attendance at the meetings was required, and if so, to make necessary arrangements to attend. In addition to this, the information sessions held prior to the authorisation meetings, in my view, provided a further opportunity for claimants to become aware of, and become informed about, the authorisation meetings.

[48] I note that some 200 people were personally notified by QSNTS, that 95 persons attended the first meeting on 7 May 2016, and 85 persons attended the second meeting. In my view, therefore, the meetings were relatively well attended by the Mandandanji persons.

[49] Turning then to whether I can be satisfied of the fact of authorisation, the affidavit sworn by a Solicitor of QSNTS and provided directly to the Registrar as additional material, provides that at the commencement of the first meeting, attendees were required to sign attendance sheets, including identification of the apical ancestor from whom they are descended. The information provides that no descendants of any of the ancestors who were proposed to be added to the claim group description attended that first meeting. Following a resolution regarding an appropriate chair for the meeting, the group resolved firstly that there was no mandatory traditional decision-making process to be used in relation to authorising applicants for claimant applications, and secondly, to adopt another decision-making process involving majority vote. As set out in the affidavit, at the close of the first meeting, the group had resolved to reduce the claim area, and further, that there would be no change to the claim group description.

[50] The affidavit provides that as a result of the first meeting, the second meeting was not required, however, 'for the purposes of completeness, best practice and transparency, given the decision to reduce the claim area', the group did meet again, 'to decide whether the Applicant's authority to bring a further amended claim was confirmed' – at [31].

[51] The information describes how at the second meeting, those in attendance resolved to adopt the same decision-making process used at the first meeting, and then resolved to confirm the

authority of the applicant to make the amended application and deal with all matters arising in relation to it.

[52] In *Ward v Northern Territory* [2002] FCA 171 (*Ward v NT*), O'Loughlin J posed a number of hypothetical questions of material before him relating to an asserted authorisation meeting, which he found to be 'wholly deficient' (at [24]):

> …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]

[53] His Honour held that while these questions need not be answered on any formal basis, the material should address their substance – at [25]. In my view, the material before me about the authorisation meetings held on 7 May 2016 is relatively extensive. In addition to the information in the application and additional material discussed above, I have before me copies of the notices and information sent out to claimants, copies of attendance sheets from the meetings, and a summary of outcomes from each of the meetings. Therefore, I am satisfied that the material addresses the substance of the questions posed by O'Loughlin J in *Ward v NT*.

[54] Having considered the extent of that material, I am also satisfied of the fact of authorisation, that is, that the applicant is a member of the native title claim group and is authorised to make the application and to deal with all matters arising in relation to it by all the other persons in the native title claim group.

[55] For the reasons set out above, I am satisfied that the requirements 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.

[56] The wording of the condition directs my attention to the written description of the external boundary of the claim area, and the map showing that external boundary contained in the application pursuant to ss 62(2)(a) and (b).

[57] The written description is contained in Attachment B to Schedule B. It has been prepared by QSNTS and describes the external boundary by metes and bounds, referencing Native Title Determination Applications, land parcels, topographic features and coordinate points.

[58] Schedule B of the Form 1 sets out two general exclusion clauses. In my view there is nothing problematic with this approach in identifying excluded areas for the purposes of s 190B(2) – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50 to [55].

[59] The map showing the external boundary is contained in Attachment C to Schedule C. Attachment C contains a colour copy of an A4 map, also prepared by QSNTS, titled 'Mandandanji People and dated 15 May 2016. The map includes:

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

[60] The geospatial assessment prepared by the Tribunal's Geospatial Services in relation to the map and description concludes that they are consistent and identify the application area with reasonable certainty. I have considered the information before me about the application area and agree with the assessment. That is, I consider that the information allows for the boundaries of the area to be identified on the earth's surface.

[61] It follows, therefore, that I am satisfied that the information and map contained in the application 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.

[62] 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.

[63] A description of the persons comprising the native title claim group appears at Schedule A of the application. That description appears as follows:

> The native title claim group (hereafter the 'claim group') on whose behalf the claim is made is the Mandandanji People.
>
> The Mandandanji People are the biological descendants of the following people:
>
> Nellie Edwards
> Combarngo Bill
> Weribone Jack Senior
> Mary Weribone

[64] The focus of my consideration at this condition is 'whether the application enables the reliable identification of the persons in the native title claim group' – *Doepel* at [51]. I am not to consider the correctness of the description provided, or whether the persons described do in fact qualify as members of the native title claim group – at [37].

[65] I accept that identification of the claim group members at any one point in time would require some factual inquiry. However I do not consider that fact alone prevents the description from being 'sufficiently clear' for the purposes of s 190B(3) – *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67]. From the description, it is my understanding that there is only one criterion to be met, that is, any individual asserting membership of the claim group must demonstrate that they are a biological descendant of one of the named apical ancestors, set out above.

[66] Consequently, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[67] 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.

[68] The description of the native title rights and interests claimed by the group appears at Schedule E. Paragraph one includes a claim to a right of exclusive possession, and paragraph two sets out a list of non-exclusive rights and interests. Paragraph three of the Schedule provides that the rights and interests claimed are subject to valid laws of the State of Queensland and of the Commonwealth, and any rights conferred under those laws.

[69] The test of identifiability is whether the claimed rights and interests are 'understandable and have meaning' – *Doepel* at [99]. In considering whether the rights and interests claimed are understandable and have meaning, I have also turned my mind to the definition of 'native title rights and interests' in s 223(1) of the Act. I have not, however, considered whether each of those individual rights and interests satisfy the requirements of that definition, as it is my view that this is the more appropriate task for the condition at s 190B(6) as to whether rights and interests can be prima facie established. Consequently, I have addressed that matter in my reasons below at that condition.

[70] In *Doepel*, Mansfield J held that s 190B(4) was 'a matter for the Registrar to exercise his judgement upon the expression of the native title rights and interests claimed', and that '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' in the Schedule – at [123].

[71] I have considered the description before me, including the stated qualifications, and it is my view that the rights and interests claimed are understandable and have meaning as native title rights and interests. Regarding the claim to a right of possession, occupation, use and enjoyment as against the whole world, in paragraph one of Schedule E, I do not consider that there is anything problematic in such a broad claim – *Strickland* at [60].

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

[73] 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.

[74] 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].

[75] 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].

[76] 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].

[77] 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].

[78] 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)

[79] 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 association 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 unlikely to satisfy the condition at s 190B(5)(a) – *Martin* at [26].

[80] 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)

[81] I have summarised and set out below the information before me that in my view addresses the requirement at s 190B(5)(a):

- archaeological evidence, including scarred trees, native wells and campsites, found within the application area, demonstrates the presence of Aboriginal people in the area prior to sovereignty – Attachment F at p 26;
- the first exploration of the area was in 1846 by Sir Thomas Mitchell – he recorded a brief description of the Aboriginal people he encountered in the area on his travels – Attachment F at p 26;
- settlement in the area took place in the late 1840s with the establishment of various pastoral stations – Attachment F at p 27;
- the sub-drainage area surrounding Surat was considered from early settlement days to be the land of a single group, first named as Mandanybarra in the 1880s – Attachment F at p 26;
- later sources identified the Mandandanji as the particular landholding group whose country centred on the claim area, specifically around Surat and Roma – Attachment F at p 26;
- the Mandandanji are considered to be the traditional owners of the area from the beginning of settlement – Attachment F at 27;
- settlement began with a hostile period involving attacks on pastoral stations by local Indigenous people, however from the early 1950s onwards, many Mandandanji worked for, and lived on the pastoral properties within the claim area – Attachment F at p 27;
- apical ancestor Billy Combarngo is recorded as being born on Blythdale station in 1863, and having lived on and worked on other stations throughout the region including Warkon and Telgazlie during the course of his life – all of these stations are located within the application area – Attachment F at p 27;
- Billy is buried in Surat cemetery – Attachment F at p 27;
- descendants of apical ancestors Weribone Jack Senior and Mary Weribone are recorded through oral history and government documentation as living and working on pastoral stations within the application area – Attachment F at p 27;
- claimants have spoken about how they continue to practise their traditional society on the application area – this includes activities such as taking younger Mandandanji people out on country to teach them about natural resources found in the area and how to use them and prepare them, fishing and hunting and camping on the area, and meetings on country to check on significant sites – Attachment F at pp 30, 34;
- there are many places of importance within the application area for the Mandandanji and members of the native title claim group continue to play an active role in ensuring those places are protected – Attachment F at p 38;

- there are examples of Mandandanji families building and living in humpies on the application area in recent times, in particular at Surat and at one camp called Goodooga – Attachment F at p 32.

My consideration – s 190B(5)(a)

[82] The requirement at s 190B(5)(a) is that I am satisfied 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. From the information before me, I consider the factual basis is sufficient to support an association of the predecessors of the native title claim group with the area at and prior to settlement. The material speaks of historical and anthropological records that identify the Mandandanji as having occupied the sub-drainage area around Surat. I note that Surat is roughly in the centre of the claim area. The material also refers to observations recorded by the first explorer to the area in 1846, confirming the presence of Indigenous people in the area at that time, and, to archaeological records demonstrating Indigenous occupation of the area some 10,000 years before the present. I consider, therefore, the material sufficient to support an assertion that prior to and at the time of settlement in the area, the Mandandanji predecessors had an association with the area.

[83] Regarding an association of the apical ancestors of the native title claim group and their descendants with the area, the material provides that Billy Combarngo was born on Blythdale station in 1863, in the decade or so following settlement. The material further provides that Billy is recorded as having worked on Warkon and Telgazlie stations, both of which are within the application area, and that he is buried in Surat cemetery. From this information, I understand that Billy spent all of his life within the application area, and therefore had the requisite association. The material notes that apical ancestor King Jack Weribone was known as 'King Jack of Roma', in my view, supporting an association of the apical ancestor with the application area – Mandandanji Application Report (2008) at [36]. Elsewhere within the material, there is reference to various government records placing apical ancestors and their descendants in the region surrounding the Balonne River (within the application area), and reference to claimants possessing photographs of their predecessors on particular pastoral stations within the area, working, fishing, hunting and camping – at [36]. The material also speaks to certain predecessors living in humpies along the Balonne River in the application area – Attachment F at p 32. Consequently, in light of this material before me, I consider the factual basis sufficient to support an assertion of an association of the apical ancestors of the native title claim group and their descendants with the area.

[84] It is also a requirement that the factual basis address an association of the members of the group presently with the area. Attachment F contains numerous quotes and recitals from members of the claim group talking about the time they have spent and continue to spend on the application area. For example, the material refers to two claimants who describe a humpy built

with traditional materials by the Combarngo family in Surat in recent times – Attachment F at p 32. The material also provides one claimants' explanation of a rock art site in caves along the Roma-Surat Road, where the Mandandanji have now stopped allowing people into the caves in order to protect the area – Attachment F at [38]. In this way, therefore, I consider the factual basis sufficient to support an association of the native title claim group presently with the area.

[85] I note that I must be satisfied the material is sufficient to support an assertion of an association with the entirety of the area claimed – *Martin* at [26]. There are numerous place names included within the material. Using the Tribunal's mapping database, I have considered these locations in relation to the external boundary of the application area. From this research, I am aware that the places named fall across the whole of the application area, such that I can consider the association asserted by the material to be with the entirety of the application area.

[86] 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.

[87] The requirement at s 190B(5)(a) is met.

Reasons for s 190B(5)(b)

[88] 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 with regard to the definition of 'native title rights and interests' at s 223(1).

[89] 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 have regard 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*).

[90] 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].

[91] 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 requirements of the condition 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 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)

[92] I have summarised below the information before me that I consider addresses the assertion at s 190B(5)(b):

- the sub-drainage area around Surat was considered from the very early days of pastoral settlement to be the land of a single, defined Aboriginal group, first named Mandanybarra by a source in the 1880s, and later identified as Mandandanji by Tindale – Attachment F at p 26;
- 'Mandandanji' as used by the native title claim group refers to a minor dialect variant of the Gugayi language group, which occupied the Maranoa-Balonne River drainage and adjacent streams, extending to the Denham Range – Attachment F at p 28;
- available anthropological and historical sources demonstrate that there were traditional laws and customs operating at the time of European contact in the area – Attachment F at p 27;
- archaeological evidence in the area, including scarred trees, campsites, native wells and fish traps indicate certain patterns of use of the area by the Aboriginal inhabitants prior to sovereignty – Attachment F at p 26;

- the apical ancestors of the claim group are persons who were born in or living on the claim area at settlement – Attachment F at p 33;
- literary sources have considered the substantial resistance faced by the pastoralists during the 'Mandandanji Land War' of 1842 to 1852 demonstrates the existence of a substantial social order working throughout the area of which the Mandandanji predecessors were a part – Attachment F at p 27;
- historical sources noted inherited relationships and totems to be of particular importance to the Aboriginal inhabitants of the area – Attachment F at p 27;
- historical sources describe various uses of the area by the Mandandanji in early settlement times, including camping by waterways in groups, fishing, and hunting – Attachment F at pp 31, 34;
- claimants possess a living memory of laws and customs acknowledged, observed and taught by their predecessors, including the apical ancestors – Attachment F at p 30;
- today, claimants consider certain sites where their ancestors camped to be of significance, and they continue to use those places for camping – Attachment F at p 31;
- claimants recite numerous examples of ways in which the laws and customs passed down to them by their predecessors are acknowledged and observed in relation to the application area by the native title claim group today – Attachment F at pp 30, 32.

My consideration – s 190B(5)(b)

[93] The assertion at s 190B(5)(b) is that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group giving rise to the claim to native title. From the material, as referred to at s 190B(5)(a) above, I understand that settlement in the area occurred around the late 1840s, with the establishment of a number of pastoral stations. It is also my understanding that the material asserts the apical ancestors to have been persons who occupied the area around the time of settlement, or who were born in the area in the period that followed. In my view, this accords with other information before me, such as that which states apical ancestor Billy Combarngo to have been born at Blythdale station in the application area in 1868. In this way, I consider the material to assert that there is a link between the apical ancestors and any society in the area at settlement, namely that the apical ancestors were part of that society. In turn, I consider the material sufficient to support a link between the native title claim group described in Schedule A and the application area.

[94] I note that the starting point of my consideration must be the identification at settlement in the area, of a society of people living according to normative laws and customs – see *Gudjala 2007* at [65] – [66]. The material provides that these people were a landholding group occupying the sub-drainage area around Surat, and speaking a dialect variant of the Gugayi language. According to the material, this group was identified as the Mandandanji by Tindale in 1974, however since early settlement times, these people have been considered to be the traditional owners of the application area.

[95] The material gives a number of examples from historical and anthropological sources regarding laws and customs acknowledged and observed by the Mandandanji society at settlement, including that these persons camped by waterways in the area, and freely used the natural resources available to them in the area for food and shelter. Another example is where the material speaks to the social organisation reflected in Mandandanji attacks on pastoral stations in early settlement times, and the fact that inherited relationships and totems are noted in historical sources as being of particular importance to the persons in the area – Attachment F at p 27.

[96] In my view, noting that the apical ancestors were persons who were part of the society at settlement, further insight into the laws and customs of that society is given in the material before me in claimants' descriptions of their memories of the apical ancestors, and information those persons passed onto them. For example, one claimant talks about how her great grandmother, 'Grannie Nellie' (apical ancestor Nellie Edwards), 'told her things like: "You're Mandanji (her pronunciation of the tribal name) and don't you forget it", and how the white kangaroo is the "spirit of our ancestors"' – Attachment F at p 29. Later, the material provides that this same claimant knew her mother and her great grandmother, Nellie, to be of the kangaroo meat – Attachment F at pp 29-30. The material sets out another claimant's explanation of how his grandfather told him that his great grandfather, apical ancestor Weribone Jack, performed traditional ceremonies at Nindigully, within the claim area – Attachment F at p 30.

[97] In light of this material, I consider the factual basis is sufficient to support an assertion of a society at settlement in the area, acknowledging and observing laws and customs of a normative character. It is my understanding that those laws and customs addressed matters such as living within the application area, the use of natural resources from the area, totems, passing on knowledge about laws and customs and culture to younger generations, and ceremonies.

[98] Section 190B(5)(b) requires the factual basis to be sufficient to support an assertion of 'traditional' laws and customs of the native title claim group, that is, laws and customs rooted in those of a pre-sovereignty society. Having considered the material before me, for the reasons set out below, I have formed the view that this requirement is met.

[99] Firstly, from the information before me, it is my view that there are substantial similarities between the laws and customs acknowledged and observed by the claim group today, and those set out in the material as acknowledged and observed by the society at settlement. For example, Attachment F includes claimants' explanations of how they take younger generations out on country today, to fishing holes for fishing, to camp by waterholes in the area, and to follow traditional Dreaming Paths through the area. Elsewhere the material provides that there is a waterhole within the claim area that is known by claimants to have been a major camp site for their ancestors, and that the area continues to be used today for camping – Attachment F at p 31.

[100] Another example is where the material speaks about gatherings of Mandandanji people on country around the time of settlement, and ceremonies that those persons participated in – see Attachment F at p 34. Following this information, Attachment F sets out two claimants' explanation of the importance of gatherings on country today for the Mandandanji. Specifically, according to the material, these claimants state that members of the claim group meet on the area at least once a month, and that during these meetings they go out on the land and check on the cemeteries and waterholes and other cultural sites – Attachment F at p 34. In light of these examples, therefore, I consider the material to assert laws and customs today that are substantially similar to those acknowledged and observed by the society at settlement.

[101] Secondly, in forming a view that the factual basis is sufficient to support an assertion of traditional laws and customs, the material provides that members of the native title claim group possess a living memory of the Mandandanji apical ancestors, and the way those individuals acknowledged and observed certain laws and customs. This can be seen in the examples taken from Attachment F at [96] above. From the material, it is my understanding that there are only three generations separating the claimants today and those apical ancestors who were part of the society at settlement. It is also my understanding of the material that the passing on of knowledge about laws and customs, and culture, is an aspect of the system of laws and customs acknowledged and observed by the society at settlement, and an aspect of the laws and customs of the claim group today. Regarding the society at settlement, I consider this fact can be seen in the material about how Nellie Edwards passed on information to her great granddaughter about her Mandandanji identity and totem – Attachment F at p 29. According to the material, today, claimants uphold the importance of taking younger generations out on country to teach them about Mandandanji laws and customs, and culture – Attachment F at p 30.

[102] In light of this, I consider it reasonable to infer that the laws and customs of the Mandandanji society at settlement have been passed down through those three or so generations to the members of the native title claim group, such that the laws and customs have undergone little change. In this way, I consider the material sufficient to support an assertion of laws and customs today that are rooted in those of the society at settlement.

[103] Consequently, 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.

[104] The requirement at s 190B(5)(b) is met.

Reasons for s 190B(5)(c)

[105] The assertion at s 190B(5)(c) is that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'. It is my understanding that the phrase 'those traditional laws and customs' is a direct reference to the laws and customs that

the factual basis was required to address in answering the assertion at s 190B(5)(b) – see *Martin* at [29]. Consequently, where the factual basis is not sufficient for the purposes of s 190B(5)(b), I am of the view that it cannot be sufficient to meet the requirement at s 190B(5)(c).

[106] In dealing with continuity of native title, I consider that the requirement at s 190B(5)(c) can be equated with the second element of the meaning given to the term 'traditional laws and customs' by the High Court in *Yorta Yorta*. The requirement, therefore, is for the factual basis to address the way in which 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].

[107] In *Gudjala 2007*, Dowsett J's comments suggest the factual basis may need to address the following in order to satisfy the requirement at s 190B(5)(c):

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

[108] I have discussed above at s 190B(5)(b) the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the area, acknowledging laws and customs from which the claim group's present laws and customs are derived. I have also addressed above the way in which the passing on of knowledge about laws and customs is a fundamental aspect of that system, and has facilitated the transmission of Mandandanji traditional laws and customs to the claim group.

[109] In my view, the material also addresses the matter of continuity in the observance of traditional law and custom by the group and its predecessors. For example, the material provides that certain apical ancestors continued to remain on the application area throughout their lives, working on pastoral stations throughout the area and living in camps on the outskirts of white settlement or on the properties – see Attachment F at p 27. According to the material, the descendants of these persons also spent their lives in the area working on stations and living in humpies, often along the Balonne River near Surat – Attachment F at p 27. Elsewhere, it is stated that families today continue to live in these dwellings in that same area on the Balonne River – Attachment F at p 32. I consider that this information allows me to reasonably infer the material to assert that the predecessors of the native title claim group, despite settlement, have continued to occupy the application area, and continued to acknowledge and observe their laws and customs in relation to the area. There is also information before me indicating that members of the claim group continue to live within the claim area, on their traditional country.

[110] The oral history of claimants regarding the acknowledgement and observance of laws and customs throughout the generations back to settlement is another aspect of the material that, in my view, supports an assertion of continuity. For example, the Mandandanji Application Report (2008) describes the way claimants possess a comprehensive knowledge of the totems of the group under their laws and customs, and the distribution of these totems among the members of their family, including the generations before them, now deceased, and back to the apical ancestors – at [38]; see also Attachment F at p 30.

[111] In light of this material, therefore, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with traditional Mandandanji laws and customs.

[112] The requirement at s 190B(5)(c) is met.

Conclusion

[113] 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.

[114] The standard which forms the basis of the test at s 190B(6) is 'prima facie'. Consequently, I consider that the meaning to be applied to that phrase is central to my understanding of the task at this condition of the registration test. In *Doepel*, Mansfield J approved the meaning that the High Court had adopted in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, being the ordinary meaning of the phrase, 'at first sight; on the face of it; as appears at first sight without investigation' – see *Doepel* at [134]. Further to this, Mansfield J 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].

[115] Noting that the focus of s 190B(6) is 'native title rights and interests', it is my view that in my consideration, I must have regard to the definition of that term in s 223(1). That definition provides that:

> (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.

[116] In light of this definition, I consider that the material must demonstrate how the rights and interests claimed are rights and interests held pursuant to traditional laws and customs, are rights and interests held in relation to land and waters, and that they are rights and interests that have not been extinguished over the entirety of the application area.

[117] I note that the wording of s 190B(6) makes it clear that it is not a barrier to the application satisfying the condition where not all of the rights and interests can be, prima facie, established – see *Doepel* at [16].

[118] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. In some instances, I have considered a particular right claimed to be considerably similar in substance to another of the right claimed, or otherwise, that the two rights are interrelated and/or closely associated. In those instances, I have grouped the rights together in my consideration of whether they are prima facie, established.

Consideration

Right to exclusive possession

[119] The nature of a native title right to exclusive possession was discussed in *Western Australia v Ward* [2002] HCA 28 (*Ward*), where 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].

[120] Since *Ward*, there have been a number of cases that have also considered the substance of such a right. From these cases, the following principles have emerged:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others – *Sampi v State of Western Australia* [2005] FCA 777 at [1072];
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom – *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [71];
- the material must speak to how, pursuant to their laws and customs, the group is able to 'exclude from their country people not of their community', acting as 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – *Griffiths* at [127].

[121] The information before me that I consider addresses these aspects of the native title right to exclusive possession is summarised below:

- present members of the Mandandanji People consider one of their basic rights to be the right to be consulted on, and to make decisions regarding, Aboriginal matters and material relevant to the area – Attachment F at p 28;
- historical sources demonstrate that the Mandandanji have been considered to be the Traditional Owners of the application area since the very beginning of settlement – Attachment F at p 29;
- present members of the group have openly contested and ignored 'Keep Out' signs posted by pastoralists on the application area, stating: 'These signs don't apply to us, we have been coming here for generations' – Attachment F at p 31;
- claimants know the boundaries between their country and neighbouring groups' country, explaining that they were required to get permission to cross any boundary into other people's country – Attachment F at p 33;
- historical sources from settlement times record events where the Mandandanji predecessors sought to defend their territory from encroaching Europeans, attacking these non-Indigenous persons and forcing them to leave the area – Attachment F at p 38;
- today there are decision-making processes in place within the native title claim group that provide for the making of decisions around matters relating to the application area and its use – Attachment F at p 40;
- the Mandandanji People prevent the access of non-Mandandanji persons to tribal paintings contained in caves along the Roma-Surat Road – Attachment M at p 45.

[122] In my view, the material clearly asserts a right of the claimants to be consulted about the use of their country, and provides examples of recent times where members of the group have exercised some authority in decisions about development proposed for the application area – see Attachment F at p 38. Further, the material sets out the specific decision-making structures pursuant to the group's traditional laws and customs that facilitate the making of decisions about country. In this way, I consider the information before me to address a right of the claim group to speak for their traditional country.

[123] I note that there is a lack of information addressing the right of the native title claim group to be 'asked permission' to access the application area. While the material speaks to claimants' understanding that they must seek the permission of other groups to access the territory of those other groups, there is no information indicating that other groups were similarly required to seek the permission of the Mandandanji predecessors to access their own traditional country. Despite this, however, the reference to historical sources that document the way the Mandandanji predecessors defended their territory from outsiders, and the example of the rock art site where claimants more recently have taken action to control, namely prevent, access to the area by non-Mandandanji persons, in my view, is sufficient to allow me to consider the right, prima facie, established.

[124] Therefore, I consider the right to exclusive possession is, prima facie, established.

Right to access the area; right to exist on the area; right to move about the area
[125] An example of the information before me addressing these three rights is in Attachment F where it speaks of apical ancestors having lived and worked on the application area, and the archaeological evidence in the area such as scarred trees, campsites and fish traps which, in my view, indicate the presence of Indigenous people in the area prior to settlement – Attachment F at pp 29, 32. Attachment F asserts that the apical ancestors were persons born into or living in the application area at settlement, and based on the descent of the claimants from these persons, they consider it 'their inalienable right to exist on the application area' – at p 33. The material also speaks of Dreaming Paths on the claim area that have been passed down through the generations to the claimants, and the way these paths continue to be followed by claimants across the area today – see Attachment F at p 34.

[126] In my view, this information is sufficient to allow me to consider the rights to access, exist on and move about the application area, prima facie, established, and that those rights are held pursuant to the traditional laws and customs of the Mandandanji People, having been handed down to them by their predecessors.

Right to camp on the area; right to erect shelters on the area
[127] The right to camp in the area, and to erect shelters, is addressed in the material in Attachment F, where it speaks about claimants' knowledge of traditional sites within the application area, including a waterhole, which was 'a major camp site for the Mandandanji ancestors', and is still used today – at p 31. Attachment F also refers to claimants telling of their recent observations of the construction of a humpy in the application area by a Mandandanji family – at p 32.

[128] In light of this material, therefore, I consider the right to camp on the area, and the right to erect shelters on the area, prima facie, established.

Right to hold meetings on the area
[129] Attachment F includes claimants recitals of gatherings their ancestors were involved in on the application area, such as ceremonies and dances – Attachment F at pp 30, 34. In addition to this, it includes claimants' descriptions of meetings that the members of the claim group hold on the area today, as frequently as once a month, to share food and 'sort things out', as well as to check on significant sites in the area – at p 34.

[130] In light of this information before me, therefore, I consider the right to hold meetings on the area, prima facie, established.

Right to hunt on the area

[131] Attachment F includes excerpts from historical sources of the decades following settlement describing the animals hunted by the Mandandanji for food and other purposes – at p 34. Elsewhere, Attachment F refers to claimants' stories of how they continue to take younger generations out on country to hunt, among other activities – at p 30. The material also states that the '[c]urrent Mandandanji consider it a traditional Mandandanji right to exploit the fauna contained within the subject area' – at p 34.

[132] In light of this material before me, therefore, I consider the right to hunt on the area, prima facie, established.

Right to fish on the area

[133] Again, the historical sources referenced in Attachment F speak to the way in which the predecessors of the claim group fished throughout the application area as a source of sustenance – at p 35. And again, Attachment F includes claimants' stories of how they continue to take younger generations to fishing holes used by their predecessors to catch fish – at p 30.

[134] Therefore, there is information before me that in my view allows me to consider the right to fish, prima facie, established.

Right to use the natural water resources of the area

[135] The material contains numerous references to the importance of waterways within the claim area for the claim group and their predecessors – see for example Attachment F at p 31. Attachment F provides that archaeological evidence in the area includes constructed wells, used by the inhabitants of the area prior to sovereignty – at p 28. Attachment F further provides that today, claimants continue to spend time on country, both checking the condition of waterholes within the area, and camping at waterholes where their ancestors also camped – at pp 31, 34.

[136] From this information, I consider the right to use the natural water resources of the area, prima facie, established.

Right to gather the natural products of the area

[137] Claimants' stories of the way their predecessors taught them about different plants within the claim area and their uses are set out in Attachment F – at p 30. Elsewhere, there is information about how today, one claimant who is an artist often returns to the application area to collect ochre and wood for making digeridoos – at p 37.

[138] In light of this material, therefore, I consider the right to gather the natural products of the area, prima facie, established.

Right to conduct ceremony on the area; right to participate in cultural activities on the area

[139] In my view, the activities associated with each of these rights are substantially similar, in that they both involve the claimants gathering together on the application area for purposes relevant to Mandandanji customs and culture. It's my view that a ceremony can be considered a cultural activity for the purposes of s 190B(6).

[140] Therefore, the material speaks to these rights where it sets out one claimants' memory of being told about traditional ceremonies that his great grandfather participated in, in the application area – Attachment F at p 30. Today, according to the material, cultural activities involve taking younger generations out into the bush to teach them traditional activities such as fishing, hunting, gathering plants, as well as teaching them where dreaming paths lie and what activities can and can't be done in certain areas – Attachment F at p 37. Elsewhere it is explained that claimants' predecessors similarly took them out onto country for these same activities – Attachment F at p 30.

[141] Consequently, I consider the rights to conduct ceremony and to participate in cultural activities on the area, prima facie, established.

Right to maintain places of importance in the area; right to protect places of importance in the area

[142] Again, I consider that these two rights are substantially similar, that is, the exercise of each of the rights involves the members of the native title claim group carrying out the same or similar activities. The material provides that historical sources have recorded the way in which the Mandandanji predecessors in early settlement times sought to prevent the encroachment of Europeans onto particular places within the application area – Attachment F at p 38. Regarding the way in which this right is exercised today, the material includes a description of certain events where particular claimants have acted to prevent development interfering with significant sites – Attachment F at p 38. In addition to this, Attachment F sets out a claimants' explanation of the way in which meetings of the claim group on country often involve time spent inspecting sites, to ensure they have not come to any harm – at p 34.

[143] In my view, this material is sufficient for me to consider the right to maintain and the right to protect places of importance, prima facie, established.

Right to conduct burials on the area

[144] Attachment F provides two claimants' explanation of the importance of being buried on traditional Mandandanji country – at p 33. Elsewhere the material states that oral history from claimants tell of a number of Aboriginal burials in the campsites around Surat, and that knowledge about these burial sites has been passed down to the claimants by their predecessors – Attachment F at 39. A description of claimants living memories of traditional burials in the area is also provided in Attachment F – at p 39.

[145] Therefore, in light of this material, I consider the right to conduct burials on the area, prima facie, established.

Right to speak for and make non-exclusive decisions about the area

[146] As discussed in my reasons above, regarding the right to exclusive possession, the Court has considered that a right to speak for country, and a right to make decisions about country, inherent aspects of an exclusive native title right. For that reason, it is my view that the right to speak for and make non-exclusive decisions about country is an exclusive right and cannot be expressed in non-exclusive terms – see *Ward* at [52].

[147] Consequently, I do not consider the right to speak for and make non-exclusive decisions about the area, prima facie, established.

Right to cultivate and harvest native flora according to traditional laws and customs

[148] The material speaks to this right in Attachment F where it provides claimants recitals of trips out on the application area where their predecessors taught them about plants found in the area and the uses associated with each of those resources – at p 30. It states that one claimant explains how her father used the seeds of the Gambi Gambi plant for its medicinal qualities, and that today claimants continue to collect Gambi Gambi for use as a bush medicine – at p 40.

[149] Consequently, I consider the right to cultivate and harvest native flora according to traditional laws and customs, prima facie, established.

Conclusion

[150] 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.

[151] In *Gudjala 2007*, Dowsett J commented on the approach of the delegate at s 190B(7) in the case before him in the following way:

> The delegate considered that the reference to 'traditional physical connection' should be understood 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. This seems to be consistent with the approach taken in Yorta Yorta. As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7) – at [89].

[152] Consequently, it is my understanding that the material addressing the requirement at s 190B(7) must show how the physical connection asserted is in accordance with the laws and customs of the group which have their origin in the laws and customs of a pre-sovereignty society. It flows from this, that where the factual basis is insufficient to support the assertion at s 190B(5)(b), it may be that the material is unable to show the traditional physical connection required at s 190B(7).

[153] In *Yorta Yorta* (at [184]), the High Court indicated that an actual presence on land may be required at s 190B(7), and I note that this is supported by the explanatory memorandum to the Native Title Amendment Bill 1997, which provides that the connection 'must amount to more than a transitory access or intermittent non-native title access' – at [29.19].

[154] Mansfield J, in *Doepel*, gave further guidance to the task of the Registrar's delegate at 190B(7) when His Honour held that '[s]ection 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar' – at [18]. Further, His Honour held that such material was not to be approached as evidence at a hearing, but merely that the condition requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration' – at [18].

[155] Noting that the focus of the condition is to be upon the relationship of at least one member of the native title claim group with some part of the application area, I have turned my mind to the material in support of the connection of a particular claim group member with the application area, being [Name deleted].

[156] The material provides the following information about [Name deleted]:

- she takes younger generations of Mandandanji out on country, teaching them about plants in the area for food and medicine, taking them camping and fishing, and showing them traditional Dreaming Paths – Attachment F at p 30;
- she recently walked a Dreaming Path from Chinatown to Minmi Creek just north of Roma that is restricted to women – Attachment F at p 33;
- in recent years she observed members of the [Name deleted] family living in a humpy near Surat – Attachment F at p 32;
- she has worked all over stations within the Balonne drainage area between Roma and Surat – Mandandanji Application Report (2008) at [62];

- her grandmother used to take her along the cemetery on Bungil Creek [near Roma] telling her, '"this is where Granny so and so is buried, and this is Auntie…"' - Mandandanji Application Report (2008) at [70];
- she explains how when she was younger she and her family, and other Aboriginal families of the Balonne region, weren't prohibited from going onto any of the pastoral stations in the area to hunt and fish – Mandandanji Application Report (2008) at [76].

[157] From this material, therefore, I understand that [Name deleted] has spent considerable time on the application area throughout her life. During these periods, I understand that [Name deleted] has undertaken activities including following traditional Dreaming Paths, fishing, gathering plants from the area, and teaching younger generations about their country and its resources. I further understand that she was employed on a number of pastoral stations within the area. In this way, I am satisfied that she has a physical connection with parts of the claim area.

[158] I have set out above at s 190B(5)(b), the reasons for which I consider the material sufficient to support an assertion of traditional laws and customs acknowledged and observed by the native title claim group. In those reasons, I noted that one aspect of that system of laws and customs was the passing on of knowledge about country, including taking younger generations out into the bush to teach them to fish, hunt and to show them Dreaming Paths and important places – see above at [99] and [101].

[159] In my view, from the material about [Name deleted], it is clear that this is one activity, or one aspect of Mandandanji laws and customs, that [Name deleted] has engaged in while on country. Consequently, I am satisfied that the physical connection she has, and has previously had, with the area is in accordance with the traditional laws and customs of the native title claim group.

[160] Therefore, I am satisfied that at least one member of the native title claim group has or previously had, a traditional physical connection with the land and waters of the application area.

[161] 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.

[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 the application should not have been made.

Section 61A(1)

[163] 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 confirms that there is no determination of native title in relation to the amended application area.

Section 61A(2)

[164] 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. Schedule B of the application states that the application does not cover any area where a previous exclusive possession act was done.

Section 61A(3)

[165] 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 sets out the native title rights and interests claimed by the native title claim group includes a claim to a right of exclusive possession. From the way that right is phrased, I am satisfied that exclusive possession is only claimed over areas

where such a right can be recognised, and therefore, that it is not claimed in relation to any area subject to a previous non-exclusive possession act.

Conclusion

[166] 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.

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

Section 190B(9)(a)

[168] Schedule Q states that no claim is made by the native title claim group to the ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[169] Schedule P provides that the group does not make a claim to exclusive possession over any offshore place.

Section 190B(9)(c)

[170] There is nothing within the application or accompanying documents to indicate that the native title rights and interests claimed have been otherwise extinguished.

Conclusion

[171] 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*]