National Native Title Tribunal

Registration test decision

Application name	Limbunya Pastoral Lease
Name of applicant	Banjo Ryan Jangala, Billy Hammill Japarta, Robbie Peters Jangari, Timmy Vincent Julama, Violet Wadrill Nanaku
NNTT file no.	DC2017/001
Federal Court of Australia file no.	NTD1/2017
Date application made	19 January 2017

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

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

Date of decision: 4 May 2017

_____

Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 21 December 2016 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the native title determination application (the application) made on behalf of the Jalngarralu, Nawurlala, Parayi-Kakaru and Tjutamalin landholding groups and those persons with rights and interests in the land and waters of northern Limbunya for registration pursuant to s 190A of the *Native Title Act 1993* (Cth) Act.

[2] The application was filed with the Federal Court of Australia (the Court) on 19 January 2017 and the Registrar of the Court gave a copy of the application to the Registrar on 27 January 2017 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] Given that the claimant application was made on 19 January 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s 190A(6B), I must not accept the claim for registration. This is commonly referred to as the registration test.

Requirements of s 190A

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

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

Information considered when making the decision

[7] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;

- the Geospatial Assessment and Overlap Analysis prepared by the Tribunal's Geospatial Services on 1 February 2017 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

Procedural and other conditions: s 190C

Subsection 190C(2)

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

[8] 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.

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

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

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

Native title claim group: s 61(1)

[12] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group — see Schedule A and s 62 affidavits of each of the persons comprising the applicant. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

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

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

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

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

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

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

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

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

Details required by s 62(1)(b)

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

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

[21] Schedule B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B also contains information of areas within those boundaries that are not covered by the application.

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

[22] Attachment A contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[23] Schedule D and Attachments B and C provides details and results of 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 land and waters in the area covered by the application.

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

[24] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[25] Schedule F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[26] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[27] Schedule H states that that the applicant is not aware of any other applications seeking a determination of native title or compensation in relation to native title over part or the whole of the area covered by the application.

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

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

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

[29] Schedule I suggests that the applicant is not aware of any notices issued under s 29 that relate to the whole or part of the application area of which the applicant is aware.

Conclusion

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

Subsection 190C(3)

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

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

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

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

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

[33] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[34] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

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

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

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

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

Subsection 190C(4)

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

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

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

[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 contains the certificate of the representative body. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

The nature of the task at s 190C(4)(a)

[41] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[42] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[43] Schedule R is entitled 'Certification of Native Title Determination Application' (certification). It is dated 18 January 2017 and signed by the Director of Central Land Council (CLC).

[44] The certificate states that CLC is able to certify the application as the representative body responsible for land and waters covered by the application. The certificate also provides that the application has been certified by CLC pursuant to s 203BE of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

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

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

The requirements of s 203BE

[47] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

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

Subsection 203BE(4)(a)

[49] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[50] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[51] The certification contains the statement required by s 203BE(4)(a) — at [3].

Subsection 203BE(4)(b)

[52] Pursuant to s 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s 203BE(4)(a).

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

- The authorisation meeting was held on 6 July 2016 at Kalkarindji and was organised and facilitated by CLC;
- The meeting was attended by claimants, including all senior members of the claim group;

- The persons who attended the meeting made decisions to authorise the persons comprising the applicant to make the application and deal with matters arising in relation to it pursuant to a decision making process which is required to be complied with under the traditional laws and customs of the claim group;
- CLC staff consulted the meeting, as well as the persons authorised as the applicant, about the application and received instructions about its contents;
- CLC has conducted anthropological and historical research in relation to the persons who hold the claimed native title rights and interests in the application area and the research indicates that the members of the claim group, as described in the application, are the only persons who assert and are entitled to claim native title rights and interests in the claim area and this is acknowledged by the wider Aboriginal community — at [4].

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

Subsection 203BE(4)(c)

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

[56] I do not consider that any application currently overlaps the application area — see my reasons at s 190C(3) above. CLC also state in the certificate that they are not aware of any other application or proposed application that partly or wholly covers the application area. Accordingly, in my view, the requirements of s 203BE(3) are not applicable to the area covered by this application.

[57] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied.

[58] For the reasons set out above, I am satisfied that requirements of s 190C(4)(a) are met.

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

Merit conditions: s 190B

Subsection 190B(2)

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

[60] Schedule B describes the application area as NT portion 2092 comprising an area held under Perpetual Pastoral Lease No 1136 and lists specific and general exclusions.

[61] Attachment A is a copy of a map titled 'Limbunya PPL Native Title Determination Application' prepared by CLC on 12 August 2016. The map includes:

- the application area depicted by a bold outline;
- land parcels and selected roads and localities;
- scalebar, northpoint, coordinate grid, legend and inset map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[62] The geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

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

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

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

Subsection 190B(3)

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

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

- persons who are biological descendants, including by adoption, of a list of apical ancestors;
- persons who are accepted as members of one or more landholding groups by senior descent based members on the basis of their non-descent connections through birth, long-

term association and possession of secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology; and

- named persons who have rights and interests in the land and waters of northern Limbunya by virtue of succession and their descendants by birth or adoption.

[67] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Nature of the task at s 190B(3)(b)

[68] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[69] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[70] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described' — at [67].

Consideration

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

[72] I understand from the claim group description that the native title claim group is comprised of the Jalngarralu, Nawurlala, Parayi-Kakaru and Tjutamalin landholding groups and those persons with rights and interests in the land and waters of northern Limbunya — Schedule A at [1]. The four landholding groups and the persons with rights and interests in northern Limbunya together comprise the native title claim group and constitute a community or group whose members hold the common or group rights comprising the native title over the application area as a whole — at [2]. The four landholding groups are named after their respective estate areas and are comprised of all the persons descended from the ancestors identified in [7(a)] respectively or are accepted as members based on their non-descent connections. Paragraph (1)(a) provides the rules of descent by which a person may be related to the identified ancestor. I am of the view that this part of the description is to be read as a discrete whole — *Gudjala 2007* at [34].

[73] The approach of identifying members of the native title claim group by biological descendants, including by adoption, of named people has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

[74] I consider that describing membership this way provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the estate group.

[75] In my view, descent from a named ancestor provides the fundamental basis for membership to the landholding groups — at [11]. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the primary native title holders.

[76] In relation to the persons who have been accepted as members by senior descent based members, I note that this part of the description of membership is not one with an external and objective point of reference from which to commence an inquiry.

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

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

[78] Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J, at [820], stated that identification as a member involved an internal perspective of the group — *Aplin* at [258]. The decision of French J was appealed and the Full Court stated that:

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

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

[80] I understand from the factual basis material that the members of the claim group observe and acknowledge a common body of traditional laws and customs that governs how lands are acquired and who holds them in particular parts of country — at [2]. A person can be a member through descent, succession or though acceptance as a member of a landholding group by a

senior descent based member if they are born in the estate area, have long-term association to the estate, and possess secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country, in particular knowledge of sites and their mythology — at [9].

[81] Having regard to the above information, it is my view that acceptance as a member of an estate group is linked to their connection to the land. I understand that a person may be connected to an area by birth, long-term association and possession of possess secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country. It is through the nature and extent of these connections that senior descent based members accept and recognise whether a person is a member of their claim group.

In making this assessment I have had regard to the comments of the Court in *Kanak v National Native Title Tribunal* [1995] FCA 1624 that the Act 'is clearly remedial in character and thus should be construed beneficially' — at [73]. I also consider the comments of Dowsett J to be of assistance in that s '190B(3) requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — *Gudjala 2007* at [33].

[82] In relation to the persons who have rights and interests in northern Limbunya through succession, I note that these persons have been named and their descendants are also considered members. The rules in which succession may take place have been set out in Schedule F — at [15] – [16]. I understand that s 190B(3) does not require any 'cogent explanation' as to the basis upon which members qualify for their inclusion into the group — *Gudjala 2007* at [33]. In light of this, I am satisfied that this part of the description is described sufficiently clearly in order to ascertain whether such persons are members of the group.

Conclusion

[83] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

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

Subsection 190B(4)

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

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

[86] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law …

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

Consideration

[88] Schedule E contains a description of the claimed native title rights and interests. In respect of the right at paragraph (1)(l), I understand that this right ensures that members of the native title claim group are not prevented from carrying out any activity that is undertaken as part of, or in connection with exercising one of the rights at paragraphs (1)(a) to (k). However, I am unable to understand how this right has meaning specifically as a native title right or interest. The information within the application and accompanying documents, in my view, do not elucidate its meaning for the purposes of s 190B(4).

[89] In my view, the right and interest at paragraph (1)(l) is not understandable nor has meaning. This does not mean that this right does not exist. I am however unable to understand how this right and interest is claimed in relation to the land and waters of the application area and the material within the application does not provide any clarification. For the purposes of s 190B(4), I am not satisfied that this right and interest is readily identifiable.

[90] In respect of the remaining rights and interests, I am satisfied that they are understandable and have meaning.

[91] I have considered the description of the native title rights and interests claimed and find that, with the exception of (1)(l), the rights and interests claimed are sufficient to fall within the scope of s 223 and are readily identifiable as native title rights and interests.

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

Subsection 190B(5)

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

The requirements of s 190B(5) generally

[94] While assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[95] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimants' factual basis material — see *Gudjala FC* at [92].

[96] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[97] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[98] The factual basis is contained in Schedule F and the affidavits accompanying the application.

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

Reasons for s 190B(5)(a)

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

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

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

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

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

- The application area is located in the northwestern region of the Northern Territory and is approximately 5,200 sq kilometres in area.
- Ethnographic sources confirm that at the time of contact and settlement of the region, people affiliated with a dialect of the Arrernte or Luritja languages, including members of the native title claim group and their ancestors, maintained physical, spiritual and other cultural associations with their country, including occupation and use of the application area — Schedule F at [19].
- Claim group members and their predecessors have maintained their connection with the application area notwithstanding the presence and activities of non-Aboriginal people in the region — at [20].
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
    - Kurrangan Janama grew up living on his traditional country in the central, south and southwestern regions, and his children were born in the application area, around the central region, before the station was established there — Schedule M and Schedule A at [3]. He would camp, hunt and live there in the bush —affidavit of 3 November 2016 at [8]. His son lived a traditional life living in humpies and getting food, water and resources from the application area and went through Ceremony there — at [9] and Schedule M. His son went to work on other stations but always returned to his country to camp, hunt, fulfil his religious responsibilities and make spears and boomerangs from the wood on the country there. His son later worked on the application area. His granddaughter was born in 1942 and she would visit the application area when she was young — affidavit of 3 November 2016 at [13]. They would camp and fish there and she was told Dreaming stories and shown the associated sites — at [13]. His granddaughter continues to take her children camping and hunting on the application area as well as teaching them about country — Schedule M. His granddaughter also takes younger women to the women's sites on the application area and teaches them the stories and rituals associated with the sites as well as the Dreaming for which she is responsible for.
    - Jerry Jiwaljawung Jangala grew up walking between the application area and areas east of the application area — Schedule M. He lived a traditional life on his country camping in humpies, hunting for food and getting water from the river. He would bring his daughter back to visit country as well as hunt, fish, camp and maintain their responsibilities to the land, caring for their sacred sites and maintaining ceremonial responsibilities.
    - Jimmy Mangayarri was the *ngurramarla* (boss/owner) for the central, western and southwestern regions of the application area — affidavit of 23 November 2016 at [8]. He grew up walking around the application area, camping in humpies, hunting for bush food and taking water from the rockholes there — at [9]. His father was working in the application area and passed away there. He worked on the station in the application area and lived in the stock camp in a humpy made from spinifex — at [10]. He looked after the site on country. His adopted son was born on the application area

and he taught his adopted son about the country, showing him all the sites and taking him camping, hunting and fishing — at [10] – [12].

- Jutuju was *ngurramarla* of the southeastern region of the application area — affidavit of 1 November 2016 at [7]. He grew up walking around the application area, lived in the old station and then started working there — at [8]. They lived in a humpy in a camp near a rockhole near the old station. They hunted for food and cooked using fires. His son was born on the application area and grew up walking around it — at [9]. His grandson was born in 1954 and after going through men's business as a young man, went to work on the application area — at [10]. His son and other old men showed his grandson around country and told him stories. They would camp near waterholes, hunt, fish and collect bush medicine. His grandson continues to go camping, hunting and fishing on the application area on the weekends and continues to look after country — at [12].
- Frank Nakurrji/Kumparijum Jangari used to always visit the application area and was *ngurramarla* for the central, south and southeastern region — affidavit of 22 November 2016 at [11]. He used to look after that country. His daughter started living on the application area after she got married and they would camp in humpies — at [9]. She would go with her husband and children hunting and fishing around the application area. They used to get water from the rockhole and sometimes soakages in the river. Her husband used to go and cut wood to make boomerangs and spears. Her husband worked on the station all his life and always camped near the old station so he could look after his country near the central, western and southeastern regions — at [7] and [11]. Her husband used to look after sites as they were *ngurramarla* for that place and the Dreamings — at [9]. His grandson was born in 1951 and is now *ngurramarla* of his father's country and manager/worker (*kurtungurlu*) for his mother's country — at [7] and [12]. His grandsons grew up on that country, walking around the application area and hunting, camping and gathering bush resources, and they later worked on the station — at [12].

- Certain members of the native title claim group have succeeded to being the owners of the northern region of the application area pursuant to traditional laws and customs in order for association with that area where a patriline is severely depleted or extinct in order for that area to be taken care of and not 'left empty' — Schedule F at [15] – [16].
- The claimants continue to have a spiritual association with the application area through observance of customary secular and spiritual practices often relating to Dreaming tracks and associated sites of significance within the application area — at [19]. The claimants speak of holding ceremonies for men's and women's business and passing on stories and knowledge of particular dreamings — at [18] – [20]. They also continue to perform ceremonies on country when outsiders visit and have knowledge of the avoidance places — see for instance affidavit of 22 November 2016 at [16] – [18] and my reasons at s 190B(5)(b) below.
- Current claimants continue to have knowledge of the boundaries of their country and particular estates or areas of land and water, and have knowledge of the members who

are either *ngurramarla* of a particular estate or are *kurtungurlu* of the estate — see for instance affidavit of 22 November 2016 at [19] and my reasons at s 190B(5)(b) below.

- The claim group members continue to visit the application area. They camp, hunt, fish, gather resources and look after sites on the application area — see for instance affidavit of 4 November 2016 at [10] – [13]. They know how to make spears and boomerangs which they use for hunting and for ceremonies — at [11]. The claimants are taught and shown these rights in the bush, the proper way, from their parents, other predecessors and the old people — at [14] and affidavit of 23 November 2016 at [13] and [16].

Consideration

[102] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimants' factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the native title claim group has with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of their traditional land and waters, including sacred sites such as those associated with dreamings, as well as the estates that the different landholding groups are connected to within the claim area.

[103] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European settlement, which I understand to have occurred around the mid-1800s. For instance, I understand from my recounting of the history that apical ancestors Kurrangan Janama, Frank Nakurrji/Kumparijum Jangari and Jutuju were likely to have been born around the late 1800s and were associated with the application area by either living, working or using the land for traditional purposes and therefore their immediate predecessors were likely to have been associated with the area around European settlement. Their children, grandchildren and other descendants were also born, lived, or used country for traditional purposes and they have all been present on the application area at various times. They continue to visit, hunt, fish, camp in and around the application area.

[104] The factual basis is also sufficient to support the assertion that the native title claim group have a spiritual association with the application area and is sufficient to show the history of that association. The native title claim group have knowledge of the dreaming beings and the associated sites created by them as well as other sacred places in and around the application area. They continue to hold ceremonies about men's and women's business and pass on the stories and traditions associated with them. The claimants are taught traditional laws and customs from their

immediate predecessors through oral transmission and other traditional teaching so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the native title claim group have with the application area.

[105] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The factual basis provides that apical ancestor Kurrangan Janama grew up living in the central, southern and southwestern regions and Frank Nakurrji/Kumparijum Jangari was *ngurramarla* of these regions, Jimmy Mangayarri was *ngurramarla* for the central, western and southwestern regions of the application area, Jutuju was *ngurramarla* of the southeastern region of the application area and Jerry Jiwaljawung Jangala grew up walking between the application area and areas east of the application area. Their descendants continue to be associated with these areas. Certain members are also associated with the northern region of the application area through succession in order to continue the association with this area.

[106] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[107] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

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

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

[109] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];

- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[110] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

[111] The identification of a pre-sovereignty society or a society that existed prior to European settlement of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The application area is part of the Malgnin territory and affiliated with the Jalngarralu, Nawurlala, Parayi-Kakaru and Tjutamalin landholding groups and the persons with rights and interests in the land and waters of northern Limbunya — Schedule F at [19]. The application area is identified with the Malgnin language, however under the traditional laws and customs observed by members of the native title claim group, rights in land are not acquired through membership of a language group and thus linguistic affiliation or language group identity is not necessarily indicative of a person's connection to particular land and waters — at [19] and Schedule A at [4].
- The members of the four landholding groups and those persons with rights and interests in northern Limbunya who together comprise the native title claim group are part of a regional society which includes members of neighbouring Gurindji and Ngarinyman landholding groups and Warlpiri and Warlmanpa peoples — Schedule F at [3]. These groups are associated through intermarriage, ceremonial connections and mutual estate recognitions.
- Members of this society acknowledge and observe a common body of traditional laws and customs about the physical and cultural landscape, the legal, social, kinship and religious systems, and the conditions for their continuity — at [5]. It is believed that these

were established by spiritual ancestors who travelled on, above or below the land in the *ngarranakarni* (Dreamtime) — at [5]. The claimants' system of traditional laws and customs has its foundation in the *Altyerre* and is held to be unchanged from the time of its creation and to have been transmitted unchanged to each succeeding generation by the owners.

Traditional laws and customs

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

[113] The native title claim group continue to observe a kinship system which incorporates actual and classificatory kin relations between people as well as metaphoric relationships between people, their ancestral country and the *ngarranakarni* — at [8]. Key features of the system include recognition of common spiritual and human ancestors, common and interdependent familial ties, kin terms, classification of relatives into lines of descent from each grandparent, recognition of sanctions relating to relationships, recognition of group and individual connections/responsibilities to the country associated with particular landholding groups, and affiliation, on a group and individual basis, with Dreaming beings associated with particular landholding groups — at [9]. Claim group members continue to follow social classifications based on sections, subsection and moieties and they continue to have personal names denoting their affiliation with a section/subsection — at [10] and see also affidavits accompanying the application.

[114] Current claimants follow a system of local organisation based on descent from ancestors or conferral on the basis of birth on the estate, long-term association with the estate and possession of secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology — Schedule A at [9] and Schedule F at [11] – [12]. Persons who are affiliated with a landholding group and its country through their father's father are the owners or bosses (*ngurramarla*) of the Dreaming and ritual associated with the country. Persons who are affiliated through another grandparent are the managers or workers (*kurtungurlu*) of that country. Any persons who are affiliated with a particular country, are responsible for looking after the country. Performance of these complementary roles in relation to ceremonies and land management is based on factors such as age, gender, residence and seniority — at [13]. One claimant says that he has rights and interests on a particular estate through his father and his father's father — affidavit of 22 November 2016 — at [7]. His grandfather and father were *ngurramarla* of that estate. He also speaks of being a *kurtungurlu* of another estate in which he has rights and interests through his mother's father. He speaks of going on the estate for which he is the *ngurramarla* and looking after and protecting the sacred sites — at [18]. He says that some of the Dreamings are dangerous if you do not know the appropriate protocols and ceremony.

[115] Other important features of the land tenure system include fulfilment, on a group and individual basis, of spiritual obligations towards the land and waters, the observation of restrictions imposed by gender, age, ritual experience and other status, the observation of restrictions imposed by the presence of Dreamings and/or sites of significance on the land and waters, and the recognition of traditional processes of succession — at [14]. So that knowledge about and the spiritual properties of the land are maintained, succession processes are set in

motion to ensure that country is 'looked after' — at [15]. In the Victorian River District regionally-recognised elders have the responsibility to acknowledge that succession has taken place based on their assessment of whether the succession process has the assent and approval of the Aboriginal jural public for the region. For instance, certain senior men have been accepted as having the right to speak for the northern part of the application area and thus have succeeded to rights of ownership of that area in the absence of any members of the original patriline — at [16]. The current claimants continue to speak of their country and how they have the responsibility to take care of it and fulfil their religious responsibilities in relation to it — Schedule M.

[116] Knowledge of traditional laws and customs have been passed from generation to generation by traditional modes of oral transmission, teaching and common practice — Schedule F at [17]. Knowledge of descent connections is transmitted orally. The current claimants continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors.

[117] The claimants continue to have spiritual and ancestral connections to the application area and continue to believe that spiritual ancestors created both the land and ongoing human relationships with it — at [19]. By observing customary secular and spiritual practices, claimants reaffirm their connection with the perceived spiritual properties of the land and waters in the application area. Such practices often relate to Dreaming tracks and associated sites of significance. For instance, the claimants continue to have knowledge of sites of avoidance, such as gender specific sites, and continue to hold ceremonies such as for men's or women's business and making decisions about country — see for instance affidavit of 23 November 2016 at [15] – [19]. The claimants go through young men's business and learn the Law by being taught about and shown country and all the sites in the proper way. They also learn the songs and stories on the country and learn about the dreamings — affidavit of 1 November 2016 at [13]. The women are taken to women's sites and learn ceremonies, stories and songs about country and the Dreaming — affidavit of 3 November 2016 at [20].

[118] The claimants continue to camp in humpies made from spinifex and in windbreaks, hunt, fish, gather bush food and medicine in the application area — see for instance affidavit of 23 November 2016 at [9] – [14] and [17] and affidavit of 4 November 2016 at [10] – [13]. They get water from the river, rockholes and billabongs — affidavit of 23 November 2016 at [11] and [13]. They know how to make spears and boomerangs which they hunt with — affidavit of 4 November 2016 at [11]. The claimants are taught and shown these rights in the bush, the proper way, from their parents, other predecessors and the old people — affidavit of 23 November 2016 at [13] and [16].

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

Consideration

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

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

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

[122] My understanding of the factual basis material is that the pre-sovereignty society, being the Malgnin-linguistic society, encompasses a wide area of land which is held at a localised level by various landholding groups, including the Jalngarralu, Nawurlala, Parayi-Kakaru and Tjutamalin estate groups. I understand that these landholding groups hold distinct territories, although may be overlapping depending on the connection to particular land and waters, but share common spiritual beliefs, religious institutions, social organisation and classificatory kinship systems, have common laws and customs and interact for cultural and social purposes.

[123] In my view, the factual basis indicates that the application area is situated within this society and the traditional laws and customs of the native title claim group are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the landholding groups and certain persons in northern Limbunya are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[124] The factual basis reveals that the laws and customs currently observed and acknowledged by the native title claim group are based on common principles of kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.

[125] In my view, the factual basis demonstrates that some of the ancestors were living within the application area, or were amongst the generation born to those who were living within the application area, at the time of European settlement. In this sense, I understand that the information supports the assertion that some of the apical ancestors were born into the claim group of the Malgnin-linguistic society that existed at and prior to European settlement — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of these ancestors or are members through other non-descent based connections.

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

[127] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The claim members continue to follow a system of social organisation and kinship which governs kin relations between people as well as metaphoric relationships.

[128] The native title claim group observe a landholding system which is based on descent and factors such as birth on the estate, long-term association with the estate and possession of secular and traditional spiritual knowledge, authority, status and responsibility for an estate or surrounding country, in particular, knowledge of sites and their mythology. Claimants can be connected to certain areas and they can be *ngurramarla* or *kurtungurlu* depending on how they are connected to land. The claimants learn about laws and customs which define country that must be protected or avoided and continue to protect and manage country and fulfil their spiritual obligations to land and waters.

[129] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as hunting, fishing and gathering natural resources for various purposes including for bush medicine or for making boomerangs and spears for hunting. This in my view demonstrates that the laws and customs currently observed by the claimants are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[130] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have a spiritual relationship to country and continue to hold ceremonies for men's and women's business and learn about dreamings and sacred sites in the proper way. The claim members also speak of performing appropriate protocols and ceremony on country, while taking outsiders onto country as some dreaming sites can be dangerous.

[131] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by oral transmission, teaching and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption. The asserted facts state, for instance, that claimants continue to have personal names denoting a section/subsection, protect sacred places, hunt, fish and gather bush medicine and make spears and boomerangs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed on by the children of the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of sustained European settlement.

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

Reasons for s 190B(5)(c)

[133] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[134] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the

> traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[135] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[136] In addressing this aspect of the test, in *Gudjala 2009*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

> [c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity' — at [33].

Consideration

[137] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[138] The factual basis states that knowledge of traditional laws and customs has been passed from generation to generation by traditional modes of oral transmission, teaching and common practice — Schedule F at [17]. For instance, a claimant says:

> I went through Young Men's Business at Limbunya. The ceremony ground was near the old station there. [His father] was there and helped me learn that Law. He gave me that Law. After the ceremony [my father and grandfather] took me all over that country and taught me and showed me all the country and sites. The old men took me around … to all the important places on my country and taught me the Law and they taught me the songs and stories right there on that country. They took me to sacred sites on the application area and taught me the proper way.
>
> I got all that knowledge right there in the bush. I learnt in the bush on the country with the old men. Proper way. No women and only the men who know and can teach me are there. When young men learn about those sites, songs, designs and the stories they have to go back and learn there and look around. That's how I learnt and we still teach young men the same way, on their country. We need to teach young people on their country so they know — affidavit of 23 November 2016 at [15] – [16].

[139] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of the native title claim group in relation to the application area;

- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

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

Subsection 190B(6)

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

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

The requirements of s 190B(6)

[143] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

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

[145] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[146] I also understand that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group — *Yorta Yorta* at [86] and *Gudjala 2007* at [86].

[147] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights

and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

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

[149] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

Rights prima facie established

1. The native title rights and interests claimed are the non-exclusive native title rights and interests possessed under and exercisable in accordance with traditional laws acknowledged and traditional customs observed, being:

(a) the right to access and travel over any part of the land and waters;

(b) the right to live on the land, and for that purpose, to camp, erect shelters and other structures;

(c) the right to hunt, gather and fish on the land and waters;

(d) the right to take and use the natural resources of the land and waters;

(e) the right to access, take and use natural water on or in the land, except water captured by the holder of Perpetual Pastoral Lease 1136;

(f) the right to light fires for domestic purposes, but not for the clearance of vegetation;

(g) the right to share or exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources;

(h) the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;

[150] The claim group members speak of their, and their predecessors, regular use of country. For instance, they work on country, camp in humpies made from spinifex and in the windbreaks, visit country, look after country, reside on and travel over the application area for cultural purposes and hunt for bush food within it and gather bush medicine — see for instance affidavit of 23 November 2016 at [9] – [14] and [17] and affidavit of 4 November 2016 at [10] – [13]. They fish in the river and get water from the river, rockholes and billabongs — affidavit of 23 November 2016 at [11] and [13]. They also take the wood from the river to make spears and boomerangs which they would hunt with — affidavit of 4 November 2016 at [11]. They make a fire, cook the food and eat it while camping on country — at [13]. The claimants would sometimes share the food they hunted or bush medicine they gathered with others — affidavit of 23 November 2016 at [12] – [13] and affidavit of 3 November 2016 at [14]. The factual basis indicates that the claimants are taught and shown these rights in the bush, the proper way, from their parents, other predecessors and the old people — affidavit of 23 November 2016 at [13] and [16].

[151] It is my view that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

(i) the right to conduct and participate in the following activities on the land and waters:

(i) cultural activities;

(ii) ceremonies;

(iii) meetings;

(iv) cultural practices relating to birth and death including burial rites; and

(v) teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs;

[152] The factual basis indicates that claimants go through Young Men's Business and learn the Law in the application area — affidavit of 23 November 2016 at [15]. They are taught about and shown country and all the sites in the proper way, and also learn the songs and stories on the country — at [15] – [16]. They also learn about the Dreamings — affidavit of 1 November 2016 at [13]. The women are also taken to sites and taught ceremonies, stories and songs about country — affidavit of 3 November 2016 at [20].

[153] I consider this right is prima facie established under traditional laws and customs.

(j) the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders provided that the right does not extend to making any decision that purports to control the access of such persons to the determination area;

[154] The factual basis contains references to sites of avoidance, such as gender specific sites, and to claim group members holding ceremonies and making decisions about country — see for instance affidavit of 23 November 2016 at [16] – [19].

[155] In my opinion, this right is prima facie established under traditional laws and customs.

(k) the right to be accompanied on the land and waters by persons who, though not native title holders, are:

(i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the land and waters;

(ii) people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders;

(iii) people required by the native title holders to assist in, observe, or record traditional activities on the areas.

[156] I note that the Court allowed by consent a similarly worded right in *King v Northern Territory* [2011] FCA 582 (*King*) — see order [8].

[157] The factual basis indicates that this right is observed by members of the claim group. For instance, there are references to spouses of claim group members, namely persons who married into the claim group, being taken onto country for hunting — affidavit of 3 November 2016 at [24]. There are also references to outsiders being taken onto country by claim group members if they visit for ceremony or for research and being shown around as something may happen to them if they were to go by themselves — at [23] – [24].

[158] In my view, this right is prima facie established pursuant to traditional laws and customs.

Rights not prima facie established

(l) the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

[159] I refer to my reasons under s 190B(4) above and consider that as this right and interest is not readily identifiable, it follows that it cannot be prima facie established.

Conclusion

[160] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, the application **satisfies** the condition of s 190B(6).

Subsection 190B(7)

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

[161] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

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

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

[164] I note that the factual basis contains relevant information that describe a traditional physical association of the claim group with the application area, including travelling, residing on, hunting, fishing, gathering resources and camping on country — see for instance Schedule M.

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

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

Subsection 190B(8)

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss 47, 47A or 47B, as the case may be, applies to it.

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

Reasons for s 61A(1)

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

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

Reasons for s 61A(2)

[170] Schedule B states that areas which are subject to a previous exclusive possession act are excluded from the application — at [9].

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

Reasons for s 61A(3)

[172] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act — Schedule E at [3].

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

Conclusion

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

Subsection 190B(9)

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

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

Reasons for s 190B(9)(a)

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

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

Reasons for s 190B(9)(b)

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

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

Reasons for s 190B(9)(c)

[180] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

Conclusion

[181] The application **satisfies** the condition of s 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Limbunya Pastoral Lease
NNTT file no.	DC2017/001
Federal Court of Australia file no.	NTD1/2017

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:

19 January 2017

Date application entered on Register:

4 May 2017

Applicant:

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

Applicant's address for service:

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

Area covered by application:

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

Persons claiming to hold native title:

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

Registered native title rights and interests:

As appears on the extract from the Schedule of Native Title Applications except remove the right at paragraph (1)(l) and change paragraph (5) to the following:

> 5. The common or group rights and interests comprising the native title are held by the members of the landholding groups that together comprise the native title claim group over the application area as a whole. However, the distribution of rights and interests within the group and in respect of different parts of the application area is governed by the claimants' system of traditional laws and customs, including:
>
> (a) the particular association that members of the native title claim group have with one or more of the landholding groups and their respective estate areas; and
>
> (b) individual circumstances, including age, gender, knowledge, and physical and mental capacity.

[End of document]