

Registration test decision

Application name	Yuwaalaraay/Euahlayi People
Name of applicant	Timothy Knox, William Taylor, Jason Dreise, Jason Wilson and Michael Anderson
NNTT file no.	QC2017/001
Federal Court of Australia file no.	QUD32/2017

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 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 5 May 2017

Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 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 (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth) (Act).

[2] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Yuwaalaraay/Euahlayi People claimant 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] This claim is made on behalf of the Yuwaalaraay/Euahlayi People who claim to hold native title over land and waters, which includes townships, such as Dirranbandi, Hebel, Nee Nee, Noondoo, Yeranbah, Goodooga and Bangate. Parts of the Balonne and Culgoa Rivers are included and these are referred to extensively throughout the applicant's material and it is clear that claimants have an enduring connection with these water sources. They say, and there is information to support this, that their ancestors and predecessors have been in occupation of the claim area since before sovereignty. The Yuwaalaraay/Euahlayi People are closely linked, linguistically and socially, with neighbouring groups and there is evidence consistent with their being a regionally defined society within the area, with the laws and customs supporting the existence of smaller separate landholding groups. In the area of the claim, that landholding group is the Yuwaalaraay/Euahlayi People. The application is supported by historical material and affidavits from three current claimants.

[4] The decision about registration is not the same as a determination of native title. Only the Federal Court makes a determination about whether native title exists and whom the persons holding the native title are. Whilst in relation to some conditions, the Registrar has to be satisfied of particular facts (e.g. that the claim is made on behalf of a native title claim group as that term is defined by s 61(1) and authorised the applicant to make the application over particular land and waters), largely the registration test is about whether the claims are sufficiently supported by clear and cogent evidence such that a *prima facie* case is made out that at least some of the native title rights and interests claimed in the application can be established. It is Federal Court proceedings that ultimately tests and decides whether the native title claimed resides in the native title claim group.

[5] This document sets out my reasons, as the delegate of the Registrar, for the decision to accept the claim for registration pursuant to s 190A of the Act.

Procedural and other conditions: s 190C

Subsection 190C(2)

Information etc. required by ss 61 and 62

[6] In this subsection, there is a requirement that the application contain particular details and other information. These are the details and other information referred to in ss 61 and 62. The condition in s 190C(2) is primarily procedural and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62.

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

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

[9] The application satisfies the condition of s 190C(2), because it does contain all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

Native title claim group: s 61(1)

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

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

[12] The application names five (5) persons as jointly comprising the applicant and states that these persons are authorised to make the application and deal with all matters arising in relation

to it. Schedule A contains a description of the persons on whose behalf the application is made, i.e. the native title claim group.

[13] In my view, the application contains the details and other information that is required by s 61(1).

Name and address for service: s 61(3)

[14] The application contains the name and address for service of the applicant — Part B.

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

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

[16] Section 61(4) requires the persons in the native title claim group be either named (s 61(4)(a)) or described sufficiently clearly (s 61(4)(b)) *in* the application. The task here is essentially limited to considering whether there ‘appears’ to be a description, which may meet the requirements of the Act, whereas at the corresponding merit condition of s 190B(3), I must consider whether the description operates to effectively describe the persons in the native title claim group — *Gudjala* [2007], 123/[32].

[17] As stated above, the application contains a description of the native title claim group, such that the requirement in s 61(4)(b) is relevant. I do not consider the sufficiency of the description for this requirement, but rather consider only whether the application contains the relevant information for me to later undertake an assessment of whether it is described sufficiently clearly. I am satisfied that within the application at Schedule A there is a description of the persons in the native title group which appears to be sufficiently clear for the purpose of s 190C(2).

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

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

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

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

[21] The application is accompanied by an affidavit from each of the five individuals who comprise the applicant. Each of the affidavits contains the statements that are required by s

¹ s 62(1)(a)(i)-(v).

62(1)(a)(i)-(iv). They also set out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. That process is an agreed and adopted process as provided for in s 251B(b).

[22] The application, in my view, is accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

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

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

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

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

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

Searches: s 62(2)(c)

[26] The application should contain details and results of any searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the application area. Schedule D states that the applicant has not conducted any searches.

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

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

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

[28] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii). Schedule F refers to Attachment F/M, which in my view contains a general description of the factual basis. The sufficiency of this factual basis is considered in the merit condition at s 190B(5).

Activities: s 62(2)(f)

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

Other applications: s 62(2)(g)

[30] The application must include details of any other applications to the Court or recognised State/Territory body that have been made over the application area and of which the applicant is aware. Schedule H states that the applicant is not aware of any other applications that have been made in relation to the whole or part of the area covered by the application.

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

[31] The application must contain details of any notifications under paragraph 24MD(6B)(c) that have been given over the application area and of which the applicant is aware. Schedule HA states that the applicant is not aware of any notifications given in accordance with this paragraph.

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

[32] The application must contain details of any notifications under s 29 of the Act (or under a corresponding State/Territory law) that relate to the application area and of which the applicant is aware. Schedule I states that the applicant is not aware of any notifications given in accordance with this paragraph.

Conclusion

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

Subsection 190C(3)

No common claimants in previous overlapping applications

[34] This section requires the Registrar to consider whether there are common members in the native title claim group for a previous application and this application (i.e. current application).

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

[36] The geospatial assessment and overlap analysis dated 1 February 2017 states that there are no applications on the Register of Native Title Claims that overlap the area of this claim. I have checked that this information is current at the date of this decision (*see overlap analysis dated 5 May 2017*).

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

Subsection 190C(4)

Authorisation/certification

[38] 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. The Registrar must be satisfied that an application is either certified by each representative Aboriginal/ Torres Strait Islander body that could certify (s 190C(4)(a)) or that the applicant is a member of the native title claim group and is authorised to make the application and deal with matters arising in relation to it by all the other persons in the native title claim group (s 190C(4)(b)).

[39] The application is accompanied by a certification from Queensland South Native Title Services (QSNTS), being the only native title service provider for the area covered by the application (*see geospatial assessment and overlap analysis dated 1 February 2017, which identifies QSNTS*). The certification is signed and dated 18 January 2017. Thus, I consider that s 190C(4)(a) contains the relevant condition that is intended to be satisfied.

[40] The certification contains a statement of opinion from QSNTS that the requirements of s 203BE(2)(a) and (b) are met. The statement is that all 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 that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[41] QSNTS's reasons for being of that view are also contained in the certification. These reasons are fairly brief, referring only to the details of authorisation meetings held on 10 December 2016 as was an information session. As noted in *Doepel*, the Registrar's consideration here is confined to identifying the relevant native title representative body and addressing 'the terms of the certificate.' Section 190C(4)(a) 'does not require the Registrar to consider the correctness of the certification by the representative body, but only its compliance with the requirements of s 203BE' — [80]-[82].

[42] Although the body's reasons are focused entirely on providing details of the authorisation meeting held, I consider that the certification contains the relevant statement of opinion and sets out the body's reasons for holding that opinion. I do not consider that I can scrutinise their reasons for the holding of the relevant opinion or their brevity. I am satisfied that the certification contains the statements and information required by s 203BE(4). That is, the certification addresses the matters set out in s 203BE(4)(a) and (b). I do not consider that s 203BE(4)(c) is applicable.

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

Merit conditions: s 190B

Subsection 190B(2)

Identification of area subject to native title

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

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

[46] Schedule B refers to Attachment B as containing a written description of the boundaries of the area covered by the application. This is a metes and bounds description referencing rivers and creeks and other watercourse. It specifically excludes from the external boundary areas that are covered by abutting native title determination applications.

[47] Attachment C contains a map showing the external boundaries of the area covered by the claim. The application area is clearly identified by a blue outline and stipple effect.

[48] I have considered the geospatial assessment and overlap analysis dated 1 February 2017. This assessment is provided by the Tribunal's Geospatial Services and assesses whether there is reasonable certainty in relation to the areas covered. It states that there is. I agree with this assessment and consider that the external boundaries of the area are sufficiently identified.

[49] Schedule B contains general exclusions within the external boundaries of the area. For instance, Schedule B excludes a number of areas within the boundary where there are specific interests and title that is inconsistent with the continued existence of native title rights and interests. The more general or generic exclusions are provided for the purpose of s 62(2)(a)(ii), being information that enables the identification of any areas within the external boundaries that are not covered by the application. The use of general exclusions may be considered appropriate given that issues of tenure are often not settled until the application is well advanced. In my view, it seems the appropriate level of detail in these circumstance.

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

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

Subsection 190B(3)

Identification of the native title claim group

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

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

[54] Schedule A describes the native title group as being the descendants of named ancestors. Descent from one of the persons named in Schedule A is the only criterion of membership.

[55] The criterion of descent is a relatively common method of description used in such applications and, in my view it provides an objective criterion by which to ascertain whether a particular person is a member of the group. The Court has held that this type of criterion of membership is sufficient for this purpose — *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v NTR*).

[56] 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. The native title claim group is described sufficiently clearly so that it is possible to ascertain whether a person is a member of the group.

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

Subsection 190B(4)

Native title rights and interests identifiable

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

[59] As stated above, the native title rights and interests claimed are described in Schedule E. This includes the claim to the exclusive right to possess, occupy, use and enjoy the land and waters covered by the application to the exclusion of all others, where such a right is claimable. Where this exclusive right is not claimable, Schedule E contains the details of non-exclusive

native title rights and interests. These generally include the right to access the area and conduct other cultural activities within the area.

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

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

Subsection 190B(5)

Factual basis for claimed native title

[62] The factual basis of the claim must be sufficient to support the three assertions contained in s 190B(5)(a)-(c). These assertions broadly relate to the association with the claim area, the traditional laws and customs of the original society and their continuity over the period since sovereignty — ss 190B(5)(a)-(c).

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

[64] Broad statements and assertions do not provide a sufficient factual basis for the purpose of s 190B(5). There must be enough detail, including specific facts about the native title claim group, their association with the claim area and the traditional laws and customs of their predecessors that have continued since the time of sovereignty or contact. The factual basis must also explain how it is the identified native title claim group possess the claimed native title rights and interests through their acknowledgement and observance of those traditional laws and customs — *Gudjala* [2007], [39]-[41].

[65] It must be expected that it will be impossible for the factual basis to completely outline a group's 'continuous post-sovereignty history' and also that there will often be little known about the situation of the claim group's predecessors at the time of sovereignty. However, as Dowsett J observed in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala* [2009]) '[s]ufficient may be known of circumstances before, or shortly after, first European contact (assuming that event occurred after the date of assertion of British sovereignty) to permit an inference that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society.' His Honour notes that even where recorded history of a group begins after settlement, 'it may be reasonable to assume that such a stable society was unlikely to have arisen in the period between contact and the commencement of historical records' — [31]-[32].

[66] As obvious from the material outlined below, there is not much known or recorded about the pre-sovereignty society, but there are some snapshots of what the situation was at the time

around contact and there is evidence of continuity since that time. Whilst the snapshots are not a complete picture, in my view overall there is sufficient information to support the assertions at s 190B(5) as explained in my reasons below.

Section 190B(5)(a)

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

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

Claimant's factual basis about their, and their predecessor's, association with the claim area

[69] The Yuwaalaraay People are said to be closely linked linguistically to the Wirraay Wirraay and the Gamilaraay, but area also linked socially to their neighbours the Guamu, Gunggari, Mandandanji and Bigambul, who share laws and customs. The factual basis material describes the country of the Yuwaalaraay People as:

An area of land bounded in the West by the Balonne and Culgoa Rivers, just north of Birch Lagoon, including the tributaries of the Narran, Ballandool and Bokhara Rivers and West towards the Moonie River. This area includes the townships of Dirrandbandi, Hebel, Nee Nee, Noondoo and Yeranbah as well as Angledool, Goodooga and Bangagte, which are just south of the Qld/NSW border (Attachment F/M, page 4).

[70] Historical sources contain evidence of the association of the group's predecessors with the area dating back to the time of sustained contact. Those sources record that the application area was occupied and used by people who spoke languages cognate with the langue that is now called Yuwaalaraay. In 1845-46, Thomas Mitchell is said to have found many indications of occupation of Yuwaalaraay speakers along the Narran from the current Queensland and New South Wales border to the junction of the Balonne in the north.

[71] In 1855, Ridley (source: 1861) travelled down the Balonne as far as Dirranbandi where he met about one hundred persons who understood Kamilaroi (Yuwaalaraay is a cognate of Gomeroi/Kalmilaroi).

[72] Attachment F/M contains details relating to the association of the group's identified ancestors. The claim group is described in reference to these persons. For instance, the ancestor Kitty Bootha is identified as being born in 1835-1845 at Angledool. Her husband, Thomas Murray is also identified with the Angledool and Narran River areas. Biddy Martha was born in 1870 and is associated with the area of Yeranbah (near Angledool). Kitty Hibbett was born in Dirranbandi in approximately 1867. Albert Murray is identified as a 'Jualrai' man from Dirranbandi and the Balonne River. Eliza McCrae was born at Bangate Station in 1850-1860. She was also associated with Mogila and Currawillinghi Stations and the town of Hebel. Mary Murray was born on the Balonne River (1879) and identified as Yuwaalaraay/Gamilaraay woman from St George to Hebel. Susannah McCauley was born in 1879 at Woollerina Station in the Bollon District and is known to have been associated with Dirranbandi and Hebel.

[73] Many present day claimants and previous generations are said to have maintained their connection to country. This succession of connection is demonstrated through the affidavit material that accompanies the application.

[74] [Name deleted] was born in [text deleted]. He is a descendant of Jack Simpson, who is an identified ancestor of the Yuwaalaraay/Euahlayi People. Attachment F/M records John (Jack) Simpson as having strong associations with Nee Nee Station and Dirranbandi (in the application area) and as the forebear of the Simpson family. [Name deleted] recalls that his grandmother ([name deleted], the daughter of John Simpson) grew up at the Angaldool Mission, which he says is 'where most of them grew up back then' ([6]). His parents also maintained their association with the claim area. He describes that they married at Angledool and lived there. They also knew Angledool, Carrawillinghi and to Hebel and around Dirranbandi, Doondi, Kurray and St George. He describes memories of growing up within the application area:

Growing up it was all about the river and the fish, that's what we mostly did. It was never about much else. Balonne River that was, and the Culgoa comes off the lower Balonne. When I was really young we camped on the river near Birch Lagoon many times. Mum took me fishing all the time and taught me how to gut a fish, but as kids we probably went cray fishing more often. West of Dirranbandi on the Culgoa there is a good fishing hole where people often go to fish. I have been there often before. There is also one on the Balonne River. Rock formations would form weirs, so when it floods those rock formations it [sic] would catch the fish. I went to these rock formations when I was about 10 years old, [name deleted] showed me these ([16]).

[75] Even though [name deleted] does not continue to live in the application area, he retains knowledge of significant places and continues to visit. He says that:

As well as going back to Dirranbandi regularly I also like to go back to Angadool which is in New South Wales just below our current claim area, it's also country for us. I have also taken Mum back to Angadool, she wanted to go back to the mission where her mother grew up ([27]).

There is also a burial tree in Dirranbandi. Years ago I stopped the rest of it being cut down. I took students and teachers from Thallon and Dirranbandi schools to teach them the significance of the trees...([31]).

I also often go to Hebel which is just on the southern border of our claim area, it's on the way back home and in between Angaldool and Dirranbandi. There is a nice tribute to the Yuwaalaraay people there ([32]).

[76] [Name deleted] is also a member of the Yuwaalaraay People, as a descendant of Kitty Bootha (an identified ancestor of the group). He was born on Yuwaalaraay country at Dirranbandi. [Name deleted] describes his physical and spiritual relationship with the country. He records that:

I was born in Dirranbandi and lived in town with Mum and Dad, but we would always go down to the camp along the river to see family like Uncle [name deleted] and I remember Mum would go down to play cards. There were about six or seven families down there like the Taylors and the Halls ([12]).

Growing up we were always on the river, every week we'd be out fishing in all the rivers around Dirranbandi, such as the Narran, Bokhara, Ballandool, Culgoa and Balonne rivers. There are lots of waterholes in the Narran river, the main one we used to go to was the donigurah, there was like a little weir there and the fish wouldn't be able to get over so they'd get stuck. There was also another waterhole called the tea-tree hole. I've taken my kids to all these places and taught them how to get the fish like I learnt from my Mum and my aunties and uncles growing up ([16]).

Dad also told me about two Rockwells on [text deleted] station which is just south of Dirranbandi, he told me where they were and I went out looking for one of them. While I was out there I also found stone artefacts. It was important for me to go back and find these rockwells as I have responsibility as a Yuwaalaraay man to make sure things on country are being looked after, and I had heard they may have been dug up. When I found them unfortunately someone had dug them up ([19]).

When I cross over the bririe which is a watercourse on the eastern boundary of our claim near Noondale on the Thallon Dirranbandi road that's when I know I'm in Yuwaalaraay country. When I get here I know I'm at home on my country, it's a hard thing to explain, but you just know your home. Whenever I get home I normally go straight up to three mile near the burial site on top of the sandhill. That's a special place for me ([20]).

Also on Comale lagoon there are scare trees which we always go back to check on, we've put fences around them. I also know of scar trees on birch lagoon, Yilgangandi, Mooramanna Lake, Shirley, Johnstone, down near Ooraine and Narine, and all along the Narran, Bokhara and Culgoa rivers. Aunty [Name deleted] and Uncle [name deleted] told me about many of these, and I've found some myself over the years when I've been out on country. I find them all the time when I'm visiting country and I've shown my kids these. They even find them today when they are out there and tell me about it ([21]).

[77] [Name deleted], born in the claim area in [text deleted], is also a member of the Yuwaalaraay People, through his descent from Billy Biddigae (Biddy) Murray [Hall] and Lucy 'Sookie' Murray. Biddy Murray was associated with Yeranbah Station, which is on the Queensland/NSW border. Her daughter was born at Yeranbah in 1880 and her sons were born at Angledool. Lucy 'Sookie' Murray identified with the Angledool area. (Attachment F/M, page 6).

[78] [Name deleted] says that these identified ancestors were all Yuwaalaraay People, which in the past was referred to as 'Euahlayi'. He explains the history of association with the claim area that he and his family has:

Dad's parents, my grandparents, were [names deleted]. They were married in 1936 in Dirranbandi. Granny [name deleted] was a Yuwaalaraay woman and Grandfather [name deleted] was a white man from around Armadale. He was disowned by his family when he married Nana. I knew Nana well, I spent a lot of time with her growing up. I lived on the river with her at the camp in Dirranbandi for a few years, but Nana lived there into the mid-1970s until her house burnt down and she moved into town. I remember other Yuwaalaraay families lived there too, especially Jack and Mary Murray's grandchildren, the Washingtons and Halls ([5]).

My great grandparents, Granny [name deleted]'s parents, were John Jack Hall and Mary Murray, they were both Yuwaalaraay but through different lines. John Jack Hall was the son of Biddigae (Biddy) Murray and Mary was the daughter of Lucy 'Sookie' Murray and Bill Murray. I didn't know my great grandparents but they were often spoken about by Dad and his family, they were called grandfather and grandmother. They also called Sookie Murray grandmother too ([6]).

We would go all over Yuwaalaraay country, for example we would go to Dunwold, Yamburgan (means sandhill in Yuwaalaraay language), Noondoo (which means tasteless in Yuwaalaraay language, Johnstone and Ballandool ([12]).

When we lived on the riverbank in Dirranbandi we'd go fishing all the time. Dad used to like going out to the Culgoa, we'd all pile in the ute and head out for the day and we'd camp over the weekend. There are a number of good fishing holes on the Culgoa, windmill fishing hole is one, another is Corawa, they are both on Cubbie station ([13]).

Out at Whyenbah there is a great waterhole, it's beautiful, it is just inside the current claim area where the Balonne and Culgoa split. Dad's mother [name deleted], my Nana told us that we had to stay on the sandbank whenever we went there, otherwise the baggy man would get us. I've taken my children to this spot and I've told them this too. They know not to go off the sandbank ([17]).

Other than for work, as Mum still lives out at Dirranbandi we always go out there to visit her and other friends, and to go fishing and camp on the river. These days our children and my grandchildren also come out with us too. We probably go out there every month and some of the grandkids come out nearly every time, Mum likes to see them. Mum used to come camping on the river with us, but these days she's getting a bit old. We go fishing at a waterhole called Donnigry which is out on the Culgoa River, we will also go to the waterhole out at Whyenbah where the Balonne and Culgoa split. We used to go out to Cubbie growing

up all the time, it's the best fishing in the world out there, but we don't go out there anymore as they don't like us going there. Today we still get cat fish, cod fish and yellow belly, we don't get the big cod but as they eat the carp ([21]).

Sufficiency of the factual basis to support the association of the predecessors and native title claim group

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

[80] Early research from Parker documents the existence of named countries among the Yuwaalaraay. Parker (source: 1905) names several hunting grounds, including the Noongahburrah of Kurrajong country, the Ghureurrah of orchid country and the Mirrieburrah of polygon country. Mathews (source: 1917) also records how the Gamilaraay people from Kunopia, Mungindi, Gundabloui and Talwood, Bigambul people from Welltown and Goondiwindi, Yuwaalaraay people from the Narran and St George, and 'Kogai' people from St George were all invited to attend *bora* ceremonies together.

[81] There is evidence to support that the Yuwaalaraay People were at sovereignty, and continue to be, part of a regional or cultural block society, where distinct local estate groups (such as the Yuwaalaraay People) hold landholding rights in their local areas, including in the application area:

In the 1840's Sir Thomas Mitchell recorded the occupation of the Narran, Balooone, Culgoa, Maranoa, Coogoon and Warrego Rivers and surrounding country and specifically reported encountering Yuwaalaraay/Euahlayi People occupying parts of the Application Area (attachment F/M, Table, page 12).

[82] The factual basis provides details of each of the group's ancestors and their association with land and waters either close to or within the application area. In addition, each of the claimants who have sworn affidavits provide details that are known about their forebears dating back several generations, including parents, grandparents and great grandparents. This information sufficiently supports that many of the ancestors were associated with the application area.

[83] From the information in the historical written record coupled with details of the group's ancestors, I consider it is reasonable to favourably infer that the group's predecessors were similarly associated with the claim area at the time of sovereignty even though little may be known or recorded about that time.

[84] In the settlement period when a number of pastoral stations were created in the claim area, this allowed the ancestors of the Yuwaalaraay to continue their physical presence on the claim area. The factual basis records that the establishment of the Aboriginal reserve in Angledool and another at Goodooga (on Yuwaalaraay country) in the late 1800s and early 1900s enabled the Yuwaalaraay People to continue living on or very close to the application area.

[85] The material contains sufficient evidence of the continuity of association throughout successive generations. In that regard, the oral history as told by current claimants is as important as the historical or anthropological sources. One claimant 'talks about her mother living on the river bank at Dirranbandi and her continued connection to this Dirranbandi area. She recalls growing up around the area and going fishing for yellow belly. She says she still goes to places like Goodooga, Lightning Ridge, Hebel and Dirranbandi. She describes those places as her country – that's where she grew up, it's her home and it's where she and her family have a sense of belonging and feel at peace' (Attachment F/M, Table, pages 12-13).

[86] [Name deleted] recounts details of his own association and that of his forebears. His mother was born in Goodooga (on the NSW border, just under the claim area) [text deleted]. His cultural mother taught him about how to collect bush tuck and she took him all over Yuwaalaraay country. His uncle and father also taught him about sacred sites on the claim area, including about a bora ring site [text deleted]. He knows of other places too. He spent thirty-six years living on Yuwaalaraay country and he continues to regularly return.

[87] [Name deleted] retains considerable knowledge of his forebears' association with the claim area. Growing up, his mother and other old people taught him the language songs, dance and all about bush tucker. He is familiar with significant sites and areas of particular cultural significance.

[88] Throughout the material there are various accounts of how claimants and their families have maintained an association, both physical and spiritual, with the claim area. Claimant's recall their ancestor's association with the area. They are also able to describe places of importance and how they have maintained their connection with the claim area. When considering this material, I have had regard to the map provided with the application. I have been able to locate many of the areas that are referred to. It is clear that claimants have been taught about the location of their traditional country by their parents and grandparents. They have also been taught details and stories relating to great grandparents. Within the affidavit material, the current claimants retain an intimate knowledge of natural features of the land and waters, referring to some areas by their traditional names.

[89] The material, in my view, is sufficient to support that the association is with the whole of the claim area. I consider the factual basis to be sufficient to support the assertion at s 190B(5)(a).

Section 190B(5)(b)

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

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

Claimants' factual basis about the society and its traditional laws and customs

[92] The application area is within a regional or cultural bloc, where separate but closely linked local estate or language groups have distinct boundaries of country. The Yuwaalaraay People are comprised of family groups descended from 'a pre-sovereignty cluster of closely linked local estate groups. These estate groups were connected by commonalities in dialect speech variety and rights and interests to the country in question' (Attachment F/M, page 3). Observing the protocols, Mitchell (source: 1848) documented the features of this regional society, of which the Yuwaalaraay People are a part of:

Thomas Mitchell was very careful to observe the necessary protocols as he travelled through the region. At each new camp, he acquired new guides who would take the party to the boundary of their own country.

Mitchell describes when attempting to head west to the Balongo [i.e. Balonne river] near what is now the town of Dirranbandi, he and Youranigh came across a black phalanx of natives presenting a front like a battalion. Youranigh could not communicate with this group and would not advance another step. Clearly the men were making it clear that it was their country and that permission had to be sought to pass through. It was after the local Yuwaalaraay guide, went and spoke to them that passage was secured.

As Mitchell passed through Yuwaalaraay/Euahlayi country, both south of the current N.S.W. /Queensland border and north of it within the Application Area, he reported several camps near lagoons and waterholes, containing small shelters, fires and evidence of subsistence activities. At the 'Carawy' ponds, between the Barwon and the Narran Swamp Mitchell describes finding several huts made of fresh branches of trees and the remains of fires, doubtless the deserted home of the fugitives of yesterday (Attachment F/M, Table, pages 12-14).

[93] Attachment F/M also contains information and evidence of the pre-sovereignty society and in particular that supports the existence of 'local estate groups' that 'had well defined boundaries and that rules of access to its resources were enforced'. Parker (source: 1905) reported, for instance, that the 'Yuwaalaraay had rules about permission to access resources in someone else's local hunting ground.' Similarly Howitt (source: 2001 [1904]) 'recorded that local subdivisions of each tribe occupied separate portions of the tribal territory and disputes would occur if trespasses occurred without permission.' Parker also documented evidence of named countries among the Yuwaalaraay (Attachment F/M, page 3).

[94] The factual basis also includes details of the system of ownership in land that arises pursuant to the laws and customs that govern the regional society. Members of the Yuwaalaraay People are recruited via way of cognatic descent and choose to identify as Yuwaalaraay. Further:

Clan estates are discernible within the external boundary through family groupings such as the clan estates of the Mirriyaburra People (lignum country), the Bibbla Billar People (bimble box and billar tree) and the Nunggaburra (kurrajong country). Today traditional forms of identity are recognised through families of polity, which have now become the most visible customary structure. A senior Yuwaalaraay Elder, explained the following:

The country between about The Big Warnanbool and the Briarie Rivers and the Moonie is the clan estates of Mirriyaburra (lignum country) people, this is the Halls, Taylors, Washington's and Drapers. The area in the far South West, East of the Culgoa River is Churriburra country, this the Eckfordss, Chapmans and Danceys. North of the Ghurriburra country is Mirriyaburra country, this is the Sands and east of Ghurriburra and Mirriyaburra country is Nunggaburra country, this is the Dixons (Attachment F/M, page 9).

[95] Consistent with this, the identified ancestors are linked to particular parts of country within or very close to the application area. For instance, Peter Hippi/Hippi Peters was associated with Bangate Station. He was titled 'Peter Hippi King of the Noogahburrahs'. Albert Murray is identified as a 'Jualrai' man from Dirranbandi and the Balonne River area. Mary Murray Orchard (born 1842), identified as a Yuwaalaraay woman, was associated with the Balonne River from St George to Hebel.

[96] Continuing into the present context 'claimants are clear about where their family's country is within the Application Area, which other families are also associated with that area, and which families are associated with other parts of the Application Area'. Under the relevant traditional

laws and customs of the regional society, only Yuwaalaraay People may assert native title rights and interests in the application area.

[97] The Yuwaalaraay People's rights in relation to country are said to arise and be maintained through the responsibility that they have under the traditional laws and customs to control access to it and to use and manage its resources and to protect sacred sites and other places associated with activities of creative beings and the activities of ancestors (Attachment F/M, page 9).

[98] There is early evidence of this responsibility to care for and manage the country. For instance, along the upper reaches of the Maranoa river, Mitchell (1846) records seeing Aboriginal people 'firing the grass, presumably to promote re-growth or flush out game' (Attachment F/M, Table, page 23).

[99] [Name deleted] provides details of his ancestry and how via that he has a connection to Yuwaalaraay country. He explains that:

I am a member of the Yuwaalaraay People Native Title Claim Group ('Claim Group') through my descent from Billy Biddigae (Biddy) Murray [Hall] and Lucy 'Sookie' Murray who are both named as apical ancestors on our Yuwaalaraay/Euahlayi People's native title determination application ('Application').

Biddigae (Biddy) Murray was Dad's great grandmother through grandfather Jack Hall and his mother [name deleted]. Lucy 'Sookie' Murray was Dad's great grandmother through Mary Murray, who was [name deleted]'s mother. They were all Yuwaalaraay, I remember being told this when I was a boy. Back then they said Euahlayi.

My father was [name deleted], [text deleted] and is buried in Dirranbandi which is where he wanted to be, home. He was a Yuwaalaraay man through his mother, my Nana, [name deleted]. Nana [name deleted] was born in Collarenebri in New South Wales, but that's not Yuwaalaraay country. Her father [name deleted] did a lot of travelling for work so the kids were born in [a] lot of places.

[100] [Name deleted]'s affidavit evidences that he retains significant knowledge of the country of his forebears and that he continues to take seriously the responsibilities that he has in caring for the land and waters. He says that:

I have looked after country around Dirranbandi by helping the cockies (pastoralists) put up fences and fence the river off, and also spray weeds. We also do water sampling. I have also helped fenced [sic] off [text deleted] at Dirranbandi, this is a responsibility I have as a Yuwaalaraay man, it's respecting those that have passed and making sure [text deleted] are protected. We also fenced off [text deleted] where we were told the [text deleted] (or otherwise spelt [text deleted]) lives, I was told by Dad and Nana that is our god, our creator and I have told my children about this too. It is a special place for us. We also make sure we keep the old camp at Dirranbandi neat and tidy ([20]).

[101] Similarly, [name deleted] explains his claim to having a connection with the application area. He says that:

I am a member of the Yuwaalaraay/Euahlayi People's Native Title Claim Group ('Claim Group') through my descent from John Jack Simpson who is named as an apical ancestor on our Yuwaalaraay/Euahlayi People's native title determination application ('Application'). John Simpson was my mother's grandfather through her mother [name deleted]. John Simpson was my great grandfather ([2]).

My mother is [text deleted]. Mum is a Yuwaalaraay woman through her mother, my grandmother. Mum was [text deleted] ([3]).

Mum's parents, my grandparents, were [names deleted]. Grandmother [name deleted] was a Yuwaalaraay woman, I think she was born [text deleted] in New South Wales, she died [text deleted] in St George ([5]).

[102] In the earliest contact period there are records that evidence the existence of a vibrant ceremonial life occurring in the claim area:

In 1846, just to the north of Dirranbandi, Thomas Mitchell came upon the bulk of the tribe apparently pained up for a ceremony: *'They were seated in three groups, old men on the right, painted red; old women in the centre, painted white; and other women and children on the left.'* Mitchell was careful to advise them that they were only passing through and did not wish to disturb them (Mitchell, 1846, Attachment F/M, Table, page 19).

[103] There is also evidence of a regional ceremonial life, recorded, for instance, by Mathews (source: 1917) who described the occurrence of *bora* ceremonies in the post contact period. This, it is stated, continued well into the 20th century:

Aboriginal people in the Application Area recalled ceremonies being conducted well into the 20th Century. Katie Langloh-Parker, the wife of Langloh-Parker of Bangate Station, on the Narran River 25 kilometres south east of Goodooga in North Western NSW, published several works on the 'Euahlayi tribe'. Langloh Parker recorded the conduct of the 'borah' ceremonies of the Euahlayi, including the summoning of neighbouring tribes from hundreds of miles around to attend the 'borah' (Attachment F/M, page 4).

The ceremonial practices were ordained by the laws of the Baaymi as explained in the Yuwaalaraay/Euahlayi myth of the 'Bora of Baime' which explains, among other things, the origin and form of the bora ceremonies, the laws prohibiting women from the bora, the practice initiating young men so that they may marry, eat certain foods and become warriors, the creation of the trees and birds and animals (Parker, source: 1953, Attachment F/M, Table, page 19).

[104] In 1905, Parker reported that other ceremonies, along with the *bora*, were also common among the Yuwaalaraay/Euahlayi, observing that:

Besides Booras [*bora ceremonies*] are minor corroboree meetings where marriages are arranged; meeting where the illegality of marriages is gone into, and if necessary, exchanges effected or

arranged; meetings where the *wirreenuns* [medicine men] of the Boogahroo produce the bags of hair, etc, and vendettas are sworn; meeting of Boodther or giving, where each person receives and gives presents (Attachment F/M, Table, page 20).

[105] This continues in the present context, with current claimants retaining knowledge of traditional ceremonial practices. [Name deleted], for instance, describes that:

I've been taught by [names deleted] who are now both deceased that women had women's business and men had men's business, but women also knew some men's business as they had to be able to teach the boys things if the men didn't come back.

We still do smoking today, it's for cleansing and we use sandalwood, but if we can't get that we use what we can. The last time I did one was in Toowoomba for Yuwaalaraay man who had passed. We did a ceremony for him. I did another one when we had a dance ceremony for native [A]mericans and [C]anadians, they came to Dirranbandi for cultural exchange. We also grind up our own ochre and make up our own ceremonial belts. I learnt this from the old people and by watching them dance when I was growing-up. I have taught my nephew [name deleted] how to make a spear, and do the smoking ceremony, that was a few months ago. The last full smoking ceremony was for the repatriation in Dirranbandi, it went on for two days before the re-burial. We painted up, dressed up and did our dance and smoking ceremony. Afterwards we made sure [we] cleared the ground and left it how it was when we got there ([35]-[36]).

[106] Another claimant recalls her grandmother doing a smoking ceremony at her house when her husband passed away. She recalls the house being smoked for a month or six weeks because the spirit was there (Attachment F/M, Table, page 19).

[107] In this way, the material demonstrates a consistency between those cultural practices of the pre-sovereignty society evidenced in the historical record and those that continue to be acknowledged and observed.

Sufficiency of the factual basis to support the assertion that there exist traditional laws and customs

[108] As stated above, the factual basis must clearly identify the relevant pre-sovereignty society and give details of that society. The relevant society must be identified as it is 'the source of the traditional laws and customs' that establishes a group's claim to hold the native title rights and interests — *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215, [40].

[109] Here, the relevant society is said to be a broader regional society or cultural block of which the Yuwaalaraay are a distinct landholding group. In that way, they are closely linked to neighbouring groups, such as Gunggari and Bigambul, whom they share significant elements of law and custom.

[110] There is, within the material, clear historical accounts of occupation of the claim area by Aboriginal people and the material is sufficient to support the assertion that the traditional

country of the Yuwaalaraay includes the land and waters within the application. For instance, Attachment F/M contains the following extracts from those records:

Mitchell's party found many indications of the occupation of Yuwaalaraay speakers along the Narran from the current Queensland and New South Wales border to the junction with the Balonne in the north.

Rev. William Ridley replicated in part Mitchell's 1845-46 expedition when, in 1855, he arrived at Bulgora, a station about 15 kilometres upstream of the present day St George. According to Ridley the people he encountered were a mixture of both Uolaroi and Kogai speakers. It was clear to Ridley that Kogai was the language of the Maranoa and that Yuwaalaraay country extended along the east of the Balonne, at least as far north as Bulgora (Attachment F/M, page 1).

[111] The information provided about the group's ancestors generally supports that they were within or close to the application area at the time of sustained contact (which occurred between 1840-1860). In most part, the ancestors are clearly identified as Yuwaalaraay, either through their known language affiliations and/or their presence within the area. Current claimants cite details of their forebears, including the named ancestors. These details support that the ancestors were Yuwaalaraay and are known to have been associated with the area.

[112] In that regard, I consider there is sufficient information which supports the link between the claim group's ancestors and the application area. Given this, I consider that I can reasonably infer from the information that if the ancestors and their descendants were in or around the application area at the time of contact (which is what the information supports), they were also part of the relevant society or had some connection to that society and similarly so did their predecessors.

[113] Although the details of the nature of the society are relatively limited, a feature of the pre-sovereignty society is the 'cluster of closely linked estate groups' who were connected by commonalties, but were distinct in the sense of their being a landholding group for their own country (Attachment F/M, page 3). The assertion within the material is that those 'clan estates' are still discernible via family groupings or 'families of polity' which continue to be recognised by current claimants. [Name deleted], for instance, talks about the history of connection that he and his forebears have with the country around Dirranbandi. I believe that the information is sufficient to infer that this is his family's clan estate. He provides information that supports that his apical ancestors were Yuwaalaraay and they came from this country. His father and grandmother were instrumental in teaching him about his country and his responsibilities. As a young child he lived on the Dirranbandi camp on the river and would go all over Yuwaalaraay country with his family. His father showed his places, such as [text deleted], Quinnine trees around Dirranbandi and waterholes at Whyenbah.

[114] The material provides some explanation of how laws and customs of the current claim group may be said to be traditional in that there is clear evidence of the transmission and

teachings from one generation to the next. Of itself, the assertion that laws and customs have been handed down from generation to generation may not be sufficient to support the assertion at s 190B(5)(b). However, when complemented by tangible examples of transmission as well as facts that elicit a similarity between the laws and customs of the earlier society to those now acknowledged and observed, the material may be sufficient.

[115] Current claimants, such as [name deleted], speak about how they were taught about Yuwaalaraay country by their parents, grandparents, uncles and aunties. He says that his aunty took him all over Yuwaalaraay country. His uncle and father taught him about men's business, including the bora ring site on [place names deleted].

[116] [Name deleted] says that the old people taught him as he was growing up and he is now teaching his children and other younger members of the group and there is evidence that customs continue to be observed. He says that:

I still talk to the spirits of the old people before I go back to country. It's like a permission, letting them know I'm coming back to country and to make sure its ok. When you leave you have to leave it the same as when you came. If we did a dance or ceremony, we clean up and leave country how we found it. Whether it be a rock, or piece of dirt, you don't disturb it, we leave it how it was when we found it ([34]).

[117] I consider that the factual basis is sufficient to support the assertion at s 190B(5)(b).

Section 190B(5)(c)

[118] This assertion relates to 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. Upon my understanding, this assertion relates to the continued holding of native title in the area claimed through the continued observance of the traditional laws and customs of the group.

[119] For the factual basis to meet this requirement there must be sufficient facts about the continuity of the connection of the native title claim group with the claim area in accordance with their traditional laws and customs. There should be tangible examples of how the laws and customs of the pre-sovereignty society have continued since at least the time of effective sovereignty.

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

[121] There is material that supports the presence of the group's ancestors in the application area at the time around contact. In the affidavits claimants speak to the history of association that they

and their forebears have with the application area. They also speak to laws and customs being handed down through the generations and how these have been acknowledged and observed in relation to the claim area. In addition to the oral history, there are also written records that support a continuity of presence within the claim area and that this was regulated by a regional system of laws and customs by which the native title claim group and their predecessors were bound.

[122] I consider that there is sufficient information within the factual basis to support the assertion of a continuity of laws and customs.

Conclusion

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

Subsection 190B(6)

Prima facie case

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

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

[126] It may require the making of some favourable assumptions. It may also involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Where appropriate, s. 190B(6) may also require some consideration of contradictory material — *Doepel*, 145-146/[126], [127] and [132].

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

[128] Given that native title '*owes its existence and incidents to traditional laws and customs* [emphasis added], not the common law' (*Yorta Yorta* at [110]) a prima facie case to establish a particular native title right or interest is one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

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

Where claimable, including where section 47, 47A or 47B of the Native Title Act 1993 (Cth) applies to an area, the right to possess, occupy, use and enjoy the land and waters covered by the application to the exclusion of all others

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

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

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

[133] There is some information within the factual basis material that within the relevant pre-sovereignty society there were clearly defined boundaries that existed between the separate clans that were demarcated by language affiliations. Parker (source: 1905), for instance, reported that territorial disputes occurred if trespass occurred into the tribal territory of another without permission. Current claimants continue to refer to themselves as the members of the Yuwaalaraay People and believe that only they have rights and interests in the area of the application. They retain intimate knowledge of their descent lines and of their predecessor’s connection with particular parts of the claim area.

[134] Whilst the information about how the pre-sovereignty society operated is relatively scant on details, I consider that there are sufficient facts to infer that there is an arguable basis for the existence of this right pursuant to the traditional laws and customs.

[135] This right is *prima facie* established.

Access, be present on, move about on and travel over the application area

Camp and live temporarily on the application area as part of camping, and for that purpose erect temporary shelters

[136] These rights flow from the traditional laws and customs relating to the land tenure system and how rights and interests in country are acquired by claimants, being primarily by descent from an ancestor born in the vicinity of the claim area and who are identified as Yuwaalaraay. There is sufficient information to support the assertion that there was occupation by Aboriginal people within the claim area at the time of contact (and by reasonable inference this occupation has been ongoing since before sovereignty). There is information to support that this occupation was by the persons now known as Yuwaalaraay. The material relating to the identified ancestors supports that this physical presence on the claim area continued even despite the effects of colonisation. It is noted that the establishment of reserves on Yuwaalaraay country enabled the group's ancestors to continue living on or near the application area. This connection that has been maintained, by being both physically and spiritually present within the claim area, continues today. [Name deleted], for instance, outlines how he and his family continue to access, be present on, camp and live within the claim area:

All of my children identify as Yuwaalaraay through me. They come back to country with me all the time and we do things like go fishing, hunting, collecting bush foods and checking important sites. They are also learning traditional dance and songs from [names deleted] who are also Yuwaalaraay, and they are learning language from me ([10]).

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

Hunt, fish and gather on the land and waters of the application area

Take, use, share and exchange natural resources from the land and waters of the application area

Take and use the water of the application area

[138] There is sufficient material to support the assertion that these activities were undertaken by the group's predecessors. For instance, Attachment F/M contains the following information:

As Sir Thomas Mitchell traversed the region in 1845-46 he travelled up the Narran, Balonne and Maranoa, and recorded subsistence activities such as the use of fishing fences and hoop nets, and the gathering of edible berries, grass seeds for making a kind of bread and melons.

Mitchel [sic] describes the food of the tribe who confronted him on 31 March 1846 near Dirranbandi:

Their food consisted of the fish of the river, ducks, and the small indigenous melon, cucumis pubescens, which grew in such abundance, that the whole country seemed strewn with the fruit, then ripe, and of which the natives eat great quantities, and were very fond.

K. Langloh Parker described the subsistence activities of the Yuwaalaraa [sic] people at Bangate. They trapped birds – ducks, galahs, crows, pigeons – as well as possums and turkeys and pademelons by using elaborate stick nets at watering holes ('dheelgoolee'), larger game such as emu and kangaroo was caught using a trap called a 'murraghul' which was made with logs and string. They also caught emu by enticing them by blowing a bibbil wood horn called a 'boobeen' which sounded like an emu cry, or with strong grass nets five foot high and 200 to 300 yards long.

Parker also documented the gathering and use of gypsum and ochres for painting, gidya wood for the production of boomerangs, hatchet-shaped weapons and spears, swamp oak for spears, and kurrajong and birrah (whitewood) for shields.

Sir Thomas Mitchell also reported the use of 'fishing fences': 'Crossing the Narran there, by a beaten track, beside a native fishing fence...' (Attachment F/M, Table, page 16 citing Parker, 1905 and Mitchell, 1848)

[139] Current claimants speak to their right to take and use the natural resources of the application area and how they were taught about this by their parents or other forebears. For instance, [name deleted] says that his father used to show him where to find fruit and vegetables on country. His favourite was the quandong. He says there are also lots of other fruit all over their country. He was also taught by his father and grandmother about the Quinnine tree, which is all over Dirranbandi. His father also taught him about hunting emu. [Name deleted] says that his mum and aunty taught him about collecting emu eggs and he taught by his uncle about catching cod.

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

Conduct, participate in and attend ceremonies, cultural activities and dance on the application area

Hold and attend meetings on the application area

Teach on the application area the physical and spiritual aspects of the application area

[141] There is material supporting that there was an active ceremonial and cultural life involving the groups or tribes within the regional society, dating back to the time of contact. Early historical reports evidence that *bora* and other ceremonial gatherings took place.

[142] Current claimants continue to acknowledge and participate in ceremonial and cultural activities and speak of their importance to the native title claim group. [Name deleted] says that he has participated in traditional burial ceremonies, smoking ceremonies and traditional dance on country ([26] and [28]).

[143] Teaching on country remains vital to the continuity of the laws and customs. [Name deleted] says that he was taught by the old people and that he is continuing to teach his children and the younger generation ([33]).

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

Light fires on the application area for domestic purposes including cooking, but not the purpose of hunting or clearing vegetation

[145] The application states the Yuwaalaraay/Euahlayi People had the right to manage the land and waters and their natural resources, including by lighting fires. Attachment F/M cites the evidence in the historical sources of camps within the claim area and remains of fires as evidence of this.

[146] Whilst there is not detailed material on this right, I consider that it is sufficient such that I can favourably infer that it arises pursuant to the traditional laws and customs. Evidence of occupation of the group's predecessors within the claim area reasonably supports that this right would also have been held pursuant to the traditional laws and customs.

[147] This right is prima facie established.

Be buried and bury native title holders on the application area in accordance with traditional laws and customs

[148] In 1905 Parker observed burial customs practiced by the Yuwaalaraay people around Bangate station, observing and documenting that:

The men came back with some pine saplings; two of these laid at the bottom of the grave, which was about five feet deep. Of these pines they spread strips of bark, then a thick bed of Dheal twigs; then a woman handed a bag containing the belongings of the dead woman – boogurr they were called – to the oldest male relative who was standing by the grave; he placed it as a pillow at one end. Then Hippi and the daughter's husband took each an end of the coffin and lowered it into the grave (Attachment F/M, Table, page 24, Parker, 1905).

[149] Current claimants talk about continuing to observe and practice ceremony for burial of claim group members.

[150] This kind of information evidences that it has been practiced for a significant period of time and it is reasonable to infer that it was similarly practiced at a time before sovereignty. This, in my view, sufficiently demonstrates that this right arises pursuant to the traditional laws and customs.

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

Maintain places of importance and areas of significance to the native title holders under their traditional laws and customs, and protect those places, and areas from physical harm

[152] Current claimants speak about places of importance and areas of significance within the claim area and their obligation to maintain and protect these from harm. [Name deleted] was taught about bora ring sites on [place names deleted], which is a special place for Yuwaalaraay people. He also knows of other bora ring sites on the claim area. He says that he has 'a responsibility as a Yuwaalaraay man to make sure things on country are being looked after' ([18] and [19]). Similarly, [name deleted] speaks of the obligations he has been taught that he has in respect of the claim area, including protecting the burial sites of ancestors ([20]).

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

Speak for and make non-exclusive decisions in relation to the application area

[154] It is clear from the material that the Yuwaalaraay/Euahlayi People consider they have the right to speak for and make decisions about the application area. The non-exclusive aspect of this reflects that this right is not being claimed to the exclusion of all others, so is consistent with being a non-exclusive right.

[155] This right clearly flows from the Yuwaalaraay/Euahlayi People's continual occupation of the land and waters and their obligations under the traditional laws and customs.

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

Be accompanied onto the application area by certain non-native title holders, being:

i. immediate family of native title holders, pursuant to the exercise of traditional laws acknowledged and customs observed by the native title holders; and

ii. people required under the traditional laws acknowledged and traditional customs observed by the native title holders for the performance of, or participation in, ceremonies and dance.

[157] Attachment F/M states that the Yuwaalaraay/Euahlayi People lived in small family groups and therefore the spouses had a right to camp on, erect shelters on and live on their spouse's country. Further, that there is nothing to suggest that their rights to live on their husband's or wife's country was in any way affected by their language or origins. Within the factual basis, there is also evidence of the existence of a regional society and that there were laws and customs relating to access of another language group's country.

[158] I consider there is sufficient material to support the assertion that the predecessors of the claim group were in occupation of the land and waters and that they controlled access to it. This

right of being able to permit others to come onto the land for certain activities is a natural consequence of their rights of occupation.

[159] This right is prima facie established.

Conclusion

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

Subsection 190B(7)

Traditional physical connection

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

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

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

[164] I consider that each of the affidavits from the current claimants contains sufficient evidence of a traditional physical connection. Each of the deponents explain their relationship with the land and waters and how it is in accordance with the relevant traditional laws and customs. This includes that they provide details of their descent from an identified ancestor of the Yuwaalaraay/Euahlayi People and that there has been a continuity of laws and customs and the society that is a modern manifestation of the pre-sovereignty society. [Name deleted] (a descendant of Kitty Booth), for example, explains that he was born on and has lived a significant part of his life on the application area. He explains that he continues to visit significant sites and to acknowledge and observe relevant laws and customs. Whilst he no longer lives on the application area, he continues to visit and he feels a significant connection to the area.

[165] I consider this kind of information that is in all three affidavits is sufficient to satisfy me that at least one member of the claim group has a traditional physical connection.

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

Subsection 190B(8)

No failure to comply with s 61A

[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.

Section 61A(1)

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

[169] The geospatial assessment and overlap analysis dated 1 February 2017 states that no determinations of native title fall over the application area. I consider that this information is current at the date of my decision (*see overlap analysis dated 5 May 2017*).

Section 61A(2)

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

[171] Schedule B, paragraph (6), makes clear that only areas where native title has not been extinguished are covered unless the circumstances described in subparagraph (4) apply.

Section 61A(3)

[172] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply.

[173] Schedule B (3) makes clear that exclusive possession is not claimed over areas that are subject to a valid previous non-exclusive possession act.

Conclusion

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

Subsection 190B(9)

Claim to minerals, offshore places and no extinguishment etc. of claimed native title

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

Section 190B(9)(a)

[176] Schedule Q of the application states that there is no claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[177] Schedule P of the application states that there is no claim to an offshore place.

Section 190B(9)(c)

[178] There is no information before me that would suggest the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Yuwaalaraay/Euahlayi People
NNTT file no.	QC2017/001
Federal Court of Australia file no.	QUD32/2017

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:

23 January 2017

Date application entered on Register:

5 May 2017

Applicant:

As per schedule extract

Applicant's address for service:

As per schedule extract, except delete 'Timothy Wishart'

Area covered by application:

As per schedule extract, with the following addition to the beginning:

The area of land and waters covered by the application ('the application area') is provided at Attachment B [Attachment B, a written description of the external boundaries, and Attachment C, a map of the application area, is attached to this registrar extract]

And the following corrections:

Remove 'the' from paragraph 5. 'Pastoral leases etc covered by the claimant application'

Remove 'the' from paragraph 5. 'Vacant Crown land covered by the claimant application'

Replace 'That' with 'The' at paragraph 5. 'That are covered by the act is not excluded...'

Persons claiming to hold native title:

As per schedule extract, but with the following corrections:

Kitty Hibbett not 'Hibert'

Peter Hippi alt. Hippi Peters not 'Hippit'

Registered native title rights and interests:

As per schedule extract