



Registration Decision

| | |
|---------------------------------------|---|
| Application name | Southern Yamatji |
| Name of applicant | Mervyn Councillor, Wayne Warner, Stephen Kelly, Leedham Papertalk Snr, Douglas Comeagain, Clarrie Cameron Snr, Rod Little, Delveen Whitby, Frederick Taylor Snr, Ross Oakley and Olive Gibson |
| Federal Court of Australia No. | WAD6002/2004 |
| NNTT No. | WC2017/002 |
| Date of Decision | 27 October 2017 |

Claim accepted for registration

I have decided that the claim in the Southern Yamatji application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Radhika Prasad, Acting Practice Manager

Delegate of the Native Title Registrar.

¹ All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

Cases cited

Anderson on behalf of the Numbahjng Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (*Anderson*)

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

Daniels for the Ngaluma People and Ors v State of Western Australia [1999] FCA 686 (*Daniels*)

De Rose v South Australia [2002] FCA 1342 (*De Rose*)

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People #2 v Native Title Registrar [2008] FCAFC 157 (*Gudjala FC*)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5) [2003] FCA 218 (*Harrington-Smith (No 5)*)

Martin v Native Title Registrar [2001] FCA 16 (*Martin*)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

Mundraby v Queensland [2006] FCA 436 (*Mundraby*)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)

Northern Territory v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

Northern Territory v Ward [2003] FCAFC 283 (*NT v Ward*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)

Wakaman People #2 v Native Title Registrar [2006] FCA 1198 (*Wakaman*)

Ward v Northern Territory [2002] FCA 171 (*Ward*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Western Australia v Ward [2002] HCA 28 (*Ward HC*)

Background

[1] The Southern Yamatji native title determination application (application) has been made on behalf of the members of the Amangu and Naaguja native title claim groups who are connected to the area covered by the application. I have reached the view that the claim in the application must be accepted for registration and this document sets out my reasons.

[2] In September 1997 and April 2004, respectively, the Naaguja Peoples (WAD6194/1998; WC1997/073) and Amangu People (WAD6002/2004; WC2004/002) native title determination applications were filed in the Federal Court of Australia (the Court).

[3] On 6 April 2017, orders were made for the two applications to be combined.

[4] On 10 April 2017, the Registrar of the Court gave a copy of this application to the Native Title Registrar (Registrar) pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[5] As the nature of the amendments, being a combination of two previously separate applications, are not envisaged by the circumstances in either ss 190A(1A) or 190A(6A), I am satisfied that neither subsection apply.

[6] A number of notices have been issued in relation to the grant of tenements in accordance with s 29 of the Act, including a notice (E70/4953) with a notification date of 28 June 2017. The application was filed over the area affected by the future act notice within the three month timeframe and this has required me to use my best endeavours to finish considering the claim by the end of four months after the notification day, that is by 28 October 2017.²

[7] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B and 190C and therefore it must be accepted for registration.³ Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

[8] In reaching this decision, I have considered s 190A(3) which 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 are the primary sources of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- additional information provided by the applicant on 8 June 2017;
- the geospatial assessment prepared by the Tribunal's Geospatial Services on 8 May 2017; and
- the results of my own searches using the Tribunal's registers and mapping database.

Section 190C

Registration: conditions about procedural and other matters

190C(2) Information etc. Required by sections 61 and 62

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

What is required to meet this condition?

[10] In coming to the above 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).⁴ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[11] 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

² Section 190A(2).

³ Section 190A(6).

⁴ *Doepel* at [16], [35] – [37] and [39].

consider the requirements of ss 61(2) and (5), as those subsections either impose no obligations of this nature in relation to the application or are already tested where required by those parts of ss 61 and 62.

Does the claim contain the prescribed information and is it accompanied by the prescribed documents?

[12] The claim meets this condition because it does contain the prescribed details and other information and is accompanied by the prescribed affidavit/s, as set out in the following reasons.

Applications that may be made: s 61(1)

[13] Schedule A of the application provides a description of the native title claim group and the s 62 affidavits indicate that the persons comprising the applicant are included in the native title claim group.⁵ 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.

Applicant's 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.

Applications authorised by persons: s 61(4)

[15] 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.

Affidavits in prescribed form: s62(1)(a)

[16] 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).

Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)

[17] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. That Attachment as well as Schedule B contain information of areas within those boundaries that are not covered by the application.

[18] Attachment C contains a map showing the external boundary of the application area.

Searches of any non-native title rights and interests carried out: s 62(2)(c)

[19] Schedule D states that the applicant has not conducted any searches to determine the existence of any non-native title rights and interests in relation to the application area.

Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)

[20] 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.

⁵ At [6].

General description of factual basis for assertion that native title exists: s 62(2)(e)

[21] 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, including Schedules E and G.

Activities: s 62(2)(f)

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

Other applications: s 62(2)(g)

[23] Schedule H states that there are no applications that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title.

Future act notices: ss 62(2)(ga) and (h)

[24] Attachment I contains the details of notifications under paragraph 24MD(6B)(c) and notices issued under s 29 that have been given and that relate to the whole or part of the application area.

190C(3) No previous overlapping claim group

[25] As indicated in my reasons below, the application **satisfies** the condition of s 190C(3).

[26] In my view, this condition requires that the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).⁶

[27] Although the text of this provision reads in the past tense, 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 provides that 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]'.⁷ The explanatory memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.⁸

[28] 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.

⁶ *Strickland FC* at [9].

⁷ At 29.25.

⁸ At 35.38.

[29] I also note that in assessing this requirement, I am able to address information which does not form part of the application.⁹

[30] The geospatial assessment does not identify any previous application that covered the whole or part of the area covered by the current application apart from the two applications, namely Naaguja Peoples and Amangu People, that are being combined to form the current application.

[31] It is my view that neither of these applications constitute 'previous overlapping applications' for the purposes of s 190C(3) as they are both the pre-combination applications that comprise the current combined application that I am considering.

[32] Subsection (b) requires that no overlapping claim be on the Register at the time the current application is made. It is my view, that like amended applications, a combined application can be taken to be made at the date that the first of the pre-combination applications was filed, or in the alternative, at both of the dates that the pre-combination applications were first filed.

[33] The current application is a combination of the Naaguja Peoples application, which was made on 8 September 1997 and entered on the Register that date, and the Amangu People application, which was made on 19 April 2004 and entered on the Register on 3 March 2005. There were no previous applications for the purposes of s 190C(3) at the time both pre-combination applications were made or registered.

[34] Therefore there were no registered native title applications overlapping either pre-combination application when they were made. The geospatial assessment confirms that there continues to be no other registered native title claims overlapping the combination claim area as at the date of this decision. My search of the Tribunal's mapping database revealed an overlap with the Mullewa Wadjari Community (WAD6119/1998; WC1996/093) application, Yued (WAD6192/1998; WC1997/071) application, Widi Mob (WAD6193/1998; WC1997/072) application and Wajarri Yamatji (WAD6033/1998; WC2004/010) application. Attachment B provides that the current application specifically excludes these applications.

[35] 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.

190C(4) Identity of claimed native title holders

[36] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(a) are met.

What is required to meet this condition?

[37] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.

[38] Schedule R indicates that the representative Aboriginal body, Yamatji Marlpa Aboriginal Corporation (YMAC), has certified the application and Attachment R contains the certificate. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

[39] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the

⁹ *Doepel* at [16].

correctness of the certification by the representative body'.¹⁰ 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.

[40] 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)'.¹¹

Has the application been certified?

Does the certifying body have the power to certify?

[41] Attachment R is titled 'Southern Yamatji – Native Title Claim (WAD 6002 of 2004) – Certification' and states that it was certified on 3 April 2017 by the Chief Executive Officer of YMAC.

[42] The certificate indicates that the application has been certified pursuant to ss 203BE of the Act.¹²

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

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

Have the requirements of s 203BE been met?

[45] To meet the requirements of this condition, the certification must comply with the provisions of s 203BE(4)(a) to (c). For the reasons that follow, I find that these requirements are met and I am therefore satisfied that the claim meets the requirements of s 190C(4)(a).

[46] The certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and 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.

[47] The certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion, including that:

- YMAC has provided anthropological and legal services to the Amangu and Naaguja native title claim groups in relation to their applications respectively;
- YMAC has ensured that extensive community consultation in relation to the applications has been undertaken by its staff;
- YMAC has organised and been present at a series of meetings of the Amangu and Naaguja claim groups and has observed the decision making processes of the Amangu and Naaguja claim group members;
- YMAC has taken instructions from the Amangu and Naaguja claim group and has observed how such instructions are given;

¹⁰ *Doepel* at [72], [78], and [80] – [82]; see also *Wakaman t* [32].

¹¹ *Doepel* at [80].

¹² See note to s 190C(4)(a) which allows an application to be certified under s 203BE.

- YMAC staff and consultants have performed historical, anthropological and genealogical research in relation to the Amangua and Naaguja claim group members, including research on connection to country of the Amangu and Naaguja claim group;
- YMAC are confident that the decision to amend and combine the Amangu and Naaguja claims to form the Southern Yamatji claim is approved by both claim groups; and
- All reasonable efforts have been made to identify and consult with the Amangu and Naaguja claim groups and that the applicants for the Southern Yamatji application have the authority to make the application and to deal with all matters arising in relation to it under the Act.¹³

[48] Subsection 203BE(4)(c) applies where the application area is covered by an overlapping application for determination of native title.

[49] Subsection 203BE(3) sets out the steps that a representative body must take if there are overlapping applications. In short, a representative body must use reasonable efforts to achieve agreement between competing claimants and minimise the number of applications being made. That subsection further provides that a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[50] The certificate is silent as to the steps taken by YMAC to address this requirement.

[51] I note that the certificate must address the requirements of s 203BE(3). YMAC's silence, in my view, constitutes failure to address this subsection in the certification. However, in my view, failure by YMAC to comply with this subsection does not render the certification invalid.

[52] I also do not consider that any application currently overlaps the application area — see my reasons at s 190C(3) above. In my view, the requirements of s 203BE(3) are therefore not applicable to the area covered by this application.

Decision

[53] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and therefore find that the criteria under s 190C(4)(a) have been met.

Section 190B

Registration: conditions about merits of the claim

[54] The application satisfies the condition of s 190B, because it meets the requirements of ss 190B(2)-(9), as set out in the reasons below.

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

[55] For the reasons set out below, the application satisfies the condition of s 190B(2).

What is needed to meet this condition?

¹³ At [1] – [7].

[56] For the purposes of s 190B(2), I must be satisfied that the information and map contained in the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

What information has been provided about the external boundary and excluded areas within this boundary?

[57] Attachment B has been prepared by the Tribunal's geospatial services on 24 March 2017 and describes the application area by metes and bounds referring to native title determination applications, parcel boundaries, the lowest astronomical tide line, the 12 kilometre nautical mile sea limit and geographic coordinates. That Attachment specifically excludes five native title determination applications. Schedule B lists some general exclusions.

[58] Attachment C is a copy of a map titled 'Native Title Determination Application – Southern Yamatji' prepared by the Tribunal's geospatial services on 24 March 2017. The map includes the application area depicted by a bold outline, tenure, towns, roads, waterways, the 12 nautical mile limit labelled, ten kilometres seaward of the lowest astronomical tide line labelled, commencement point, scalebar, coordinate grid, location diagram, legend, and notes relating to the source, currency and datum of data used to prepare the map.

Is the description and map of the application area reasonably certain?

[59] The geospatial assessment states that the area covered by the combination application does not include any areas which have not previously been claimed in the original Naaguja Peoples and Amangu People applications and 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.

[60] Schedule B contains some general exclusions to categories of land and waters, which provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described.¹⁴

[61] 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.

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

[62] For the reasons set out below, the application satisfies the condition of s 190B(3).

What is needed to meet this condition?

[63] I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[64] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;¹⁵
- section 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';¹⁶

¹⁴ Daniels at [29] – [38].

¹⁵ Doepel at [51] and Gudjala 2007 at [30].

- where a claim group description contains a number of paragraphs, 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';¹⁷
- 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'.¹⁸

Does the description of the persons in the native title claim group meet this condition?

[65] Schedule A describes the native title claim group as comprising all persons who are descendants of a list of apical ancestors.

[66] 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.

[67] The approach of identifying members of the native title claim group as descendants of named people has been accepted by the Court as satisfying the requirements of s 190B(3)(b).¹⁹

[68] 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 claim group.

Decision

[69] 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).

190B(4) Identification of claimed native title

[70] For the reasons set out below, the application satisfies the condition of s 190B(4).

What is needed to meet this condition?

[71] 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.²⁰

[72] 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'.

¹⁶ *Gudjala 2007* at [33].

¹⁷ *Gudjala 2007* at [34].

¹⁸ *WA v NTR* at [67].

¹⁹ *WA v NTR* at [67].

²⁰ *Doepel* at [91], [92], [95], [98] to [101] and [123].

[73] 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)'.²¹

[74] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.²²

Does the description of the native title rights and interests meet this condition?

[75] Schedule E contains a description of the claimed native title rights and interests. I am satisfied that they are understandable and have meaning.

[76] I have considered the description of the native title rights and interests claimed and find that the rights and interests are sufficient to fall within the scope of s 223 and are readily identifiable as native title rights and interests.

190B(5) Factual basis for claimed native title

What is needed to meet this condition?

[77] 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.²³

[78] 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 claimant's factual basis material.²⁴

[79] 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.²⁵

[80] 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).

[81] The factual basis material is contained in the statement dated 8 June 2017 by an anthropologist, statutory declaration of a claimant dated 11 November 2004 and affidavits from five claimants.

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

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

²¹ *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.

²² *Doepel* at [16].

²³ *Doepel* at [17] and *Gudjala FC* at [57], [83] and [91].

²⁴ *Gudjala FC* at [92].

²⁵ *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

[83] 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’;²⁶
- that the predecessors of the group were associated with the area over the period since sovereignty;²⁷ 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’.²⁸

What information has been provided in support of the assertion at s 190B(5)(a)?

[84] 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 mid-western region of Western Australia.
- The first major exploration of the area occurred in 1839 and it was observed that the area was ‘thickly-populated’.²⁹ Surveying led to settlement of the claim area around the 1840s, with the township of Geraldton was established in 1849.³⁰
- Early historical materials from 1839 to 1860 contain numerous references to Aboriginal occupation of the claim area including references in 1841 to huts, wells, yam grounds, well-formed paths and a burial site in the northwestern region of the application area and the presence of Aboriginal people in 1846 in the central region.³¹
- In 1908, an anthropologist and ethnographer records a number of the apical ancestors as occupying parts of the application area.³² A detailed tribal map and genealogies relating to the claim area was also produced.³³
- In relation to the apical ancestors’ association with the application area, the factual basis provides the following information:
 - [Apical ancestor name deleted]’s daughter was born in 1893 in the northwestern region.³⁴ This apical ancestor is consistently recorded in the northern area of the claim, close to the northwestern region. Her descendants speak of cultural responsibilities relating to traditional law grounds, burial grounds in the northwestern region, boundary information with the neighbouring group to the north, mythological stories associated with the northwestern region, responsibilities to look after sites and traditional ecological knowledge relating to the northern areas.

²⁶ *Gudjala 2007* at [52].

²⁷ *Gudjala 2007* at [52].

²⁸ *Martin* at [26]; see also *Corunna* at [39] and [45].

²⁹ Anthropologist’s statement at [25].

³⁰ At [26].

³¹ At [27] – [28].

³² At [29].

³³ At Annexure CA-3.

³⁴ At Annexure CA-3.

- [Apical ancestor names deleted] are recorded in the northwestern region from the 1870s and were associated with this area near the time of effective sovereignty.³⁵ Their daughter was born between 1867 and 1877 which suggests that [apical ancestor names deleted] were born around 1847 to 1857.
- Historical evidence connects [apical ancestor name deleted] to the claim area from the northwestern to the northeastern regions.³⁶ Her son was born in the northwestern region around 1860 and therefore it was likely she was born around 1840 within the claim area. There are close genealogical connections between some of [apical ancestor name deleted]'s descendants and those of apical ancestor [apical ancestor name deleted]. In particular, [apical ancestor name deleted]'s daughter married the son of [apical ancestor name deleted] in 1913.
- [Apical ancestor name deleted] was likely to have been born around 1869.³⁷ Historical records associate her with the central and southern regions. Her mother may have been from the southern region around 1847.
- [Apical ancestor name deleted] was born around 1883 and was associated with the southern, northwestern, western and northeastern regions.³⁸ She was married in the southern region in 1906.
- [Apical ancestor name deleted] was recorded as belonging to the southern/mid-western regions in the early 1900s.³⁹ One of the daughters of [apical ancestor names deleted] was recorded as being within the central region in 1901 and she was likely to have been born around 1850 in the western region. These apical ancestors were therefore likely to have been born around 1830.
- [Apical ancestor name deleted]'s daughter was born around 1896 in the western region and therefore [apical ancestor name deleted] was likely to have been born around 1876.⁴⁰ She later married in the western region in 1910 and died in that area in 1910.
- One of [apical ancestor name deleted]'s sons was born near the northwestern region in the 1860s and had an association with the southern portion of the claim area around the time of sovereignty. [Apical ancestor name deleted] was born around the 1840s and died in 1905. She lived around the southern region towards the end of her life.
- [Apical ancestor names deleted]'s son was born around 1892 in the northwestern region.⁴¹ These apical ancestors were from the western region.
- [Apical ancestor name deleted] was from near the northwestern region and was present in the northwestern region at various times in the early 1900s.⁴² Her descendants have a connection to, traditional knowledge of and responsibilities in the very northern portion of the claim area.

³⁵ At Annexure CA-3.

³⁶ At Annexure CA-3.

³⁷ At Annexure CA-3.

³⁸ At Annexure CA-3.

³⁹ At Annexure CA-3.

⁴⁰ At Annexure CA-3.

⁴¹ At Annexure CA-3.

⁴² At Annexure CA-3.

- The descendants, including current claimants, of these apical ancestors have remained associated with the areas the ancestors were connected with.⁴³ Members of family groups have knowledge of the sites in the areas they are connected to and continue to speak for those areas.⁴⁴ For instance, one family group has knowledge of law grounds, ceremony grounds, and dreaming sites to which they belong between the mid-northern region to the eastern region.⁴⁵
- Many claimants continue to practice their traditional laws and customs which are passed on by their predecessors such as through telling stories, and showing places and practices.⁴⁶ They use a number of places throughout the claim area, particularly along the coast and the major river systems located in the western region.⁴⁷ For instance, one claimant goes hunting, fishing and collecting bush food in the northwestern and mid-northern regions. They have knowledge of a spiritual presence in the northwestern region and old corroboree and law grounds in this region. They have knowledge of the old meeting grounds in the central region and speak of the responsibility of protecting this site.
- The affidavits and statutory declaration of the claimants also provide further detail of members of the native title claim group having knowledge of the boundary of their country, and gathering bush tucker and medicine, hunting, visiting and looking after significant sites, showing respect to spirits, residing, building shelters, camping and burying family within the application area. They also speak of telling stories, showing important sites and teaching the traditional practices to the younger generation.

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

Is there a sufficient factual basis relating to the relationship members of the claim group have in common in connection with the land?

[85] For the purposes of this condition, I understand that the Registrar is required ‘to address the relationship which all members claim to have in common in connection with the relevant land’⁴⁸. 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)’.⁴⁹ 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 have with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of their

⁴³ At Annexure CA-3.

⁴⁴ At [30] – [35].

⁴⁵ At [33].

⁴⁶ At [35] and [41].

⁴⁷ At [41].

⁴⁸ *Gudjala 2007* at [40].

⁴⁹ At [39].

traditional land and waters including sacred and important places such as law grounds, ceremony grounds and dreaming sites.

Does the factual basis show the history of the association the claim group has, and previously had, with the area?

[86] 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.⁵⁰ The factual basis contains references to the presence of some of the apical ancestors within the application area prior to the date of European settlement, which I understand from the factual basis to have occurred around the 1840s. For instance, [apical ancestor names deleted] were likely to have been born around 1830 and [apical ancestor name deleted] was born around 1840 within the claim area. The other apical ancestors were also born, resided or died in the application area. The descendants of these ancestors continue to be born, reside, access and use the application area as well as continue to be connected with the areas with which their ancestors were associated.

[87] 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 to show the history of that association. The native title claim group have knowledge of the sacred places including law grounds, ceremony grounds, burial sites and dreaming sites associated with dreaming beings. They also have knowledge of the mythological stories associated with areas. This knowledge is passed to them by their immediate predecessors, which I understand is 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.

Is there a sufficient factual basis that the association both past and present relates to the area as a whole?

[88] 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.

[89] The factual basis indicates that the daughter of apical ancestor [apical ancestor name deleted] was born in the northwestern region and [apical ancestor name deleted] was recorded as being in the northern/northwestern area of the claim. Her descendants have cultural responsibilities relating to law grounds, burial grounds, boundary information with the neighbouring northern group, mythological stories, responsibilities to look after sites and traditional ecological knowledge relating to the northern areas. Apical ancestors [apical ancestor names deleted] were associated with the northwestern region, and [apical ancestor names deleted] with the western region. [Apical ancestor name deleted] was connected with the northern regions and [apical ancestor name deleted] with the central and southern regions. [Apical ancestor name deleted]'s son was born near the northwestern region and she lived in the southern region. [Apical ancestor name deleted] belonged to the southern/mid-western regions and [apical ancestor name deleted] was associated with the southern, northeastern, western and northwestern regions. The descendants of these ancestors continue to be connected to the areas their ancestors were associated with. There are also spiritual sites located in the application area from the mid-northern region to the eastern region.

⁵⁰ *Gudjala 2007* at [51].

[90] 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'.⁵¹ 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.

Decision

[91] 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).

What is needed to provide a sufficient factual basis for s 190B(5)(b)?

[92] 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'.⁵²

[93] 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;⁵³
- 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';⁵⁴
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁵⁵
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.⁵⁶

[94] 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 demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁵⁷

⁵¹ See *Gudjala 2007* at [52].

⁵² See *Gudjala 2007* at [26] and [62] to [66].

⁵³ At [46] and [49].

⁵⁴ At [47].

⁵⁵ At [46] and [79].

⁵⁶ At [87].

- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;⁵⁸ and
- that the factual basis contains 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).⁵⁹

What information has been provided in relation to the society?

[95] 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 pre-sovereignty society consists of a number of local estate or landholding groups, [text deleted]. The landholding groups were interlinked through a system of laws and customs that regulated kinship including marriage, traditional land tenure and usage, trade, manufacture of material goods, and the religious and spiritual beliefs that underpinned these within the region, including the application area.⁶⁰
- Membership of the traditional landholding groups was likely attained and recognised through certain types of descent.⁶¹ The apical ancestors were descendants of Aboriginal people who were members of local estate groups and the current claimants are identifiable as members through their descent from the apical ancestors.⁶² Native title rights and interests are inherited through this descent.

What information has been provided in relation to the traditional laws and customs?

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

[97] The predecessors observed a system of religious and spiritual belief that their country was imbued with spiritual presence and the importance of protecting the dreaming and other spiritual beings, spiritual places and other important places as well as maintaining the spiritual balance of the landscape.⁶³ Current claimants have knowledge of mythological stories associated with the application area and the location of spiritual presence on country, including the location of

⁵⁷ At [37] and [52].

⁵⁸ At [40].

⁵⁹ At [29], [54] and [69].

⁶⁰ Anthropologist's statement at [38].

⁶¹ At [39].

⁶² At [40].

⁶³ At [41] – [42], [51] and [53].

dreaming, birthing and other spiritual sites.⁶⁴ The claimants also observe behavioural protocols to interact with the spirits to avoid serious ramifications, such as throwing sand and introducing oneself and their companion, to avoid getting sick and they avoid places where the spirits can torment a person if they camp or visit that place.⁶⁵

[98] The native title claim group observe a system of landholding whereby native title rights and interests are inherited through descent of an apical ancestor.⁶⁶ Family groups continue to remain associated with and are responsible for areas their ancestors were associated with. For instance, descendants of apical ancestors [apical ancestor names deleted] have knowledge of law grounds, ceremony grounds and dreaming sites to which they belong and which they speak for.⁶⁷ Anthropological research record these apical ancestors as belonging to those areas. Similarly, the descendants of [apical ancestor names deleted] speak for and the senior women have knowledge of birthing sites, dreaming sites and burial grounds where these apical ancestors are recorded as having resided.⁶⁸

[99] Knowledge of traditional laws and customs have been passed from generation to generation by telling stories and being shown sites and how to perform traditional practices. Current elders were taught the laws and customs by their parents or grandparents and have now passed this knowledge to their children.⁶⁹ One claimant speaks of being taught by his father about places on country such as old law grounds and places women need to avoid and he now shares this knowledge with his children. Other claimants speak of the importance of taking their children out on country and teaching about places to avoid, areas for hunting and techniques for sourcing and using the natural resources.⁷⁰ The transmission of cultural knowledge is an ongoing practice which is regularly carried out and spoken about.⁷¹

[100] The claimants continue to observe traditional practices and use the application area. The claim group members camp, hunt, fish, collect bush food and medicines, cook in a traditional manner and look after country like their predecessors.⁷² For instance, the claimants hunt kangaroos and gather potatoes, bush onions, wild gum, yabbies, crayfish and bush medicine such as *murren* bush. They continue to cook kangaroos and goannas in the traditional way and make boomerangs, fish spears and traditional shelters.⁷³

[101] The claimants continue to speak some language, have traditional names and have knowledge of their totems.⁷⁴ The claimants continue to also observe a system whereby permission is required to access or use their country as they have inherited the responsibility to look after the land of which they have custodianship and the people who visit it.⁷⁵

⁶⁴ See also Annexure CA-3.

⁶⁵ At [54] – [56].

⁶⁶ At [11].

⁶⁷ At [33].

⁶⁸ At [34].

⁶⁹ At [44].

⁷⁰ At [46], [51] – [52] and [54] – [55].

⁷¹ At [47].

⁷² At [41] – [50].

⁷³ At [41]; see also the statutory declaration and the affidavits of the claimants.

⁷⁴ See the statutory declaration and the affidavits of the claimants.

⁷⁵ Anthropologist's statement at [57].

[102] 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).

Is the factual basis sufficient for the assertion of s 190B(5)(b)?

Does the factual basis address the identity of a pre-sovereignty society for the area?

[103] My understanding of the factual basis material is that the pre-sovereignty society encompasses a wide area of land in the mid-western region of Western Australia which is held at a localised level by various landholding groups, including the native title claim group. I understand that these landholding groups hold distinct territories, although may be overlapping depending on the connection to particular land and waters, but share a system of social organisation and a body of laws and customs regarding, among other things, religious and spiritual beliefs, land tenure and traditional usage of the resources of their land and waters. Membership of the traditional landholding groups was likely attained and recognised through certain types of descent.

[104] 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 are based on regionally held and practiced laws and customs. Relevant to this proposition, I note that the Court has observed 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]'.⁷⁶

[105] The factual basis reveals that the laws and customs currently observed and acknowledged by the native title claim group are based on religious and spiritual beliefs 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.

Does the factual basis address the links between the pre-sovereignty society, the claim group and their apical ancestors?

[106] In my view, the factual basis demonstrates that some of the ancestors were living within the application area, or were among 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 the apical ancestors were part of or were born into the claim group of the pre-sovereignty society that existed at and prior to European settlement.⁷⁷ From the factual basis, I understand the current claim members are the descendants of these ancestors.

Is the factual basis sufficient to support the 'traditional laws and customs' assertion?

[107] I am 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.

⁷⁶ *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 at [53].

⁷⁷ See *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above.

[108] The native title claim group observe a landholding system where claimants continue to inherit native title rights and interests in country through descent of an apical ancestor. Family groups continue to have an association with, and knowledge and responsibility of particular parts of the application area in which their ancestors were associated.

[109] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as camping, hunting, fishing, gathering bush tucker and medicine and cooking in a traditional manner. This in my view demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[110] 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 have knowledge of dreaming stories and know the location of the associated sites. They have knowledge of important places, such as law grounds, ceremony grounds, birthing sites and burial grounds. They observe behavioural protocols and acknowledge the spiritual presence on country.

[111] 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 have knowledge of dreaming sites, birthing sites, burial grounds, law grounds and other important places, camp, hunt, fish, gather natural resources and have traditional names, speak some language and have knowledge of their totems. 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 between a few generations, 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 European settlement.

Decision

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

What is needed to provide a sufficient factual basis for s 190B(5)(c)?

[113] 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.

[114] 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.⁷⁸ 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.

⁷⁸ *Martin* at [29].

[115] I also understand that if the claimants' 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'.⁷⁹

Is the factual basis sufficient for the assertion of s 190B(5)(c)?

[116] 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.

[117] The factual basis states that knowledge of traditional laws and customs has been passed from generation to generation by telling stories, showing, teaching and common practice and continues today among the current generation who are members of the claim group. For instance, the claimants continue to be taken onto country and shown sites, learn about bush tucker and medicines, and are taught how to hunt and cook in a traditional manner by their parents, grandparents, aunts and/or uncles.⁸⁰

[118] 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.

Decision

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

190B(6) Prima facie case

[120] As set out below, I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim **satisfies** the condition of s 190B(6).

What is needed to meet this condition?

[121] 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'.⁸¹ Nonetheless, it does involve some 'measure' and

⁷⁹ *Gudjala 2009* at [33].

⁸⁰ Anthropologist's statement at [41] and [44] – [47].

⁸¹ *Doepel* at [135].

‘weighing’ of the factual basis and imposes ‘a more onerous test to be applied to the individual rights and interests claimed’.⁸²

[122] I note that this section is one that permits consideration of material that is beyond the parameters of the application.⁸³

[123] 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).⁸⁴ 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.

[124] 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 it is possessed pursuant to the traditional laws and customs of the native title claim group.⁸⁵

[125] 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’.⁸⁶ I also note that the phrase ‘in relation to’ is ‘of wide import’.⁸⁷ Having examined the native title rights and interests set out in Schedule E of the application they are, prima facie, rights or interests ‘in relation to land or waters.’

[126] I also note that I consider that Schedule B of the application sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6).

[127] 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).

Which rights and interests can be established on a prima facie basis?

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to Area A, if the claim to exclusive possession cannot be recognised, and to Area B:

- 1. The right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose*
- 2. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area*

⁸² *Doepel* at [126], [127] and [132].

⁸³ *Doepel* at [16].

⁸⁴ *Gudjala* 2007 at [85].

⁸⁵ *Yorta Yorta* at [86] and *Gudjala* 2007 at [86].

⁸⁶ *Ward HC* per Kirby J at [577].

⁸⁷ *Alyawarr* at [93].

The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm

[128] The factual basis indicates that the predecessors of the native title claim group resided, visited, used and travelled across country.⁸⁸ For instance, huts, wells, yam grounds, well-formed paths and a burial site was observed in the early 1840s. The current claimants speak of their regular use of country, including residing, camping, hunting, fishing, visiting and caring for sites, building shelters, gathering natural resources such as bush tucker and medicine, and travelling over the application area.⁸⁹

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

3. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong

[130] The factual basis contains references to sites of avoidance, such as not camping or visiting places where the tormenting spirits are located and gender specific sites, and to claimants having the right to be consulted about the use of and access to country by others.⁹⁰

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

Which rights cannot be prima facie established?

Rights in Area A

In relation to Area A, the Applicant claims the following native title rights and interests:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

[132] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]'.⁹¹ The High Court further noted that the expression, collectively, 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'.⁹²

[133] In *Griffiths*, the Full Court, while exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added].⁹³

[134] I also note the Full Court's observations in relation to control of access to country that:

⁸⁸ Anthropologist's statement at [27] – [29] and Annexure CA-3.

⁸⁹ At [41], [48] – [56] and Annexure CA-3; see also the affidavits of the claimants.

⁹⁰ At [44], [51], [55] and [57].

⁹¹ At [93].

⁹² At [93].

⁹³ At [71].

[i]f control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.⁹⁴

[135] In examining whether the claimants’ material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[136] The factual basis is such that it is asserted that at the time of European settlement, there existed an association between the native title claim group and its land and waters.⁹⁵ The asserted facts indicate that family groups are associated with particular parts of country and have the responsibility of caring for country.⁹⁶ The claimants speak of the importance of outsiders going on to country with them as they may go somewhere they are not supposed to and get sick. They speak of their responsibility to warn people about the consequences of going to certain places to which they should not be going.

[137] In my view, however, the factual basis is not sufficient to prima facie establish the existence of exclusive native title rights and interests in the application area. For instance, the factual basis speaks of the right of the claimants being consulted about access to country, however I do not consider the asserted facts sufficiently explain how the native title claim group excludes outsiders from the application area under the traditional laws and customs of the claim group.⁹⁷

[138] I consider that this right is not prima facie established.

Rights in Area A and Area B

4. The right to invite and permit others to have access to and participate in or carry out activities in the area

[139] The way this right is expressed, in my view, exerts a degree of control indicating a level of exclusivity. I therefore consider that the case law in relation to this right is closely linked to that involving ‘the right to determine use and enjoyment’ of land. The High Court expressed concern in *Ward HC* of non-exclusive rights expressed in exclusive terms and stated that ‘without a right [as against the whole world to possession of land], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put’.⁹⁸

[140] In *De Rose*, however, O’Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and

⁹⁴ At [127].

⁹⁵ See my reasons at s 190B(5)(a).

⁹⁶ At [41].

⁹⁷ See for instance [57].

⁹⁸ At [52].

customs of the native title holders.⁹⁹ His Honour, however, did not make a subsequent determination of native title. In a subsequent consent determination, the Court recognised the non-exclusive right to ‘make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]’.¹⁰⁰ I also note that in another consent determination, the Full Federal Court held that ‘there is a clear distinction between a right to control access ... and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lease entitling the pastoral lessee to determine who has access to the land; the latter right is not’.¹⁰¹

[141] In light of the case law cited above, I consider that there is willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who are bound by the laws and customs of the native title holders. The right being claimed here is, in my view, not qualified or limited this way. In my opinion, therefore, this right cannot be *prima facie* established under the traditional laws and customs of the native title claim group.

190B(7) Physical connection

[142] For the reasons set out below, the application **satisfies** the condition of s 190B(7).

What is needed to meet this condition?

[143] This condition requires that I must be satisfied that 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, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[144] The courts have 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’.¹⁰² 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’.¹⁰³

[145] 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.¹⁰⁴

Is there evidence that a member of the claim group has a traditional physical connection?

⁹⁹ At [553].

¹⁰⁰ *Mundraby* at [3(c)(ii)].

¹⁰¹ *NT v Ward* at [27].

¹⁰² *Gudjala 2009* at [84].

¹⁰³ At [86].

¹⁰⁴ *Doepel* at [18].

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

[147] The factual basis contains relevant information that describes a traditional physical association of the claim group with the application area, including members travelling, residing, camping, hunting, fishing, gathering bush food and medicine, and performing other practices, such as making boomerangs, fishing spears and traditional shelters, within the application area.¹⁰⁵

[148] 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.

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

[149] As set out in my reasons below, 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).

[150] Section 190B(8) requires that 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.

[151] 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.

No native title determination application if approved determination of native title (s 61A(1))

[152] 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 this. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

Claimant application not to be made covering previous exclusive possession over areas (s 61A(2))

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

Claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas (s 61A(3))

[154] Schedules B and E appears to indicate that exclusive possession is not claimed over areas that are subject to valid previous non-exclusive possession acts except to the extent ss 47, 47A or 47B apply.

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

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

¹⁰⁵ Anthropologist's statement at [41] – [56]; see the affidavits of the claimants and the anthropologist's statement.

[156] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not be aware of the matters set out in (a) to (c).

No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown (s 190B(9)(a))

[157] Schedule Q provides that the applicant does not claim any rights, title or interest in any minerals, petroleum or gas wholly owned by the Crown.

Exclusive possession is not claimed over all or part of waters in an offshore place (s 190B(9)(b))

[158] Schedule P states that the applicant does not claim exclusive possession of any offshore place that falls within the claim area.

Native title rights and/or interests in the application area have otherwise been extinguished (s 190B(9)(c))

[159] 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.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

| | |
|-------------------------------------|------------------|
| Application name | Southern Yamatji |
| NNTT file no. | WC2017/002 |
| Federal Court of Australia file no. | WAD6002/2004 |

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:

8 September 1997

Date application entered on Register:

27 October 2017

Applicant:

As follows:

Mervyn Councillor, Wayne Warner, Stephen Kelly, Leedham Papertalk Snr, Douglas Comeagain, Clarrie Cameron Snr, Rod Little, Delveen Whitby, Frederick Taylor Snr, Ross Oakley, Olive Gibson

Applicant's address for service:

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

Area covered by application:

As follows:

The external boundaries of the land and waters covered by the Application are as set out in the document entitled "Description of External Boundary" which is annexed as Attachment 'B'.

Areas of land and waters within those boundaries that are not covered by the Application

1. Subject to 4), the Applicant excludes from the Application area any areas that are covered by any of the following acts as these are defined in either the Act, as amended (where the act in question is attributable to the Commonwealth of Australia), or Titles (Validation) and

Native Title (Effect of Past Act) Act 1995 (WA), as amended, (where the act in question is attributable to the State of Western Australia at the time of the Registrar's consideration:

(a) Category A past acts;

(b) Category B intermediate period acts;

(c) Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.

(d) Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.

2. Subject to 4), The Applicant excludes from the Application area any areas in relation to which:

(a) A "previous exclusive possession act", as defined in s 23B of the Act, was done and the act was an act attributable to the Commonwealth of Australia; or

(b) A "relevant act" as that term is defined in s 121 of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) was done and the act is attributable to State of Western Australia; or

(c) A previous exclusive possession act under s 23B(7) of the Act was done in relation to the area and the act was attributable to the State of Western Australia.

3. Subject to 4), the Applicant also excludes from the Application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.

4. The Application area includes any area in relation to which the non-extinguishment principle (as defined in s. 238 of the Act) applies, including any area to which ss 47, 47A and 47B of the Act apply, particulars of which will be provided prior to the hearing but which such areas may be listed in Schedule L.

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 follows:

Application area means the area of land and waters covered by this Application as described in Schedule B.

Area A means land and waters within the Application area that are landward of the high water mark and which

comprises:

1. areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the

Crown;

2. areas to which s 47 of the Act applies;

3. areas to which s 47A of the Act applies;
 4. areas to which s 47B of the Act applies; and
 5. other areas to which the non-extinguishment principle, set out in s 238 of the Act, applies and in relation to which
- to there has not been any prior extinguishment of native title.

Area B means land and waters within the Application area that is not included in Area A above.

Subject to laws and customs

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

1. The common law and the laws of the State of Western Australia and the Commonwealth of Australia;
2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth of Australia; and
3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed

and by which the native title claim group have a connection to the land and waters the subject of this Application.

Rights in Area A and Area B

The Applicant claims the following native title rights and interests in relation to Area A, if the claim to exclusive possession cannot be recognised, and to Area B:

1. The right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose;
2. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
3. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm.

End of document