

Registration Decision

Application name	Lappi Lappi and Ngulupi Claim Group
Name of applicant	Peter Tex, Christine Ellis Michaels, Cheryl Darkie, Nelson Tex, Megan Darkie, Donovan Brown, Tammy Wilson, Teddy Gibson
Federal Court of Australia No.	WAD48/2018
NNTT No.	WC2018/003
Date of Decision	24 April 2018

Claim accepted for registration

I have decided that the claim in the Lappi Lappi and Ngulupi Claim Group 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

*Delegate of the Native Title Registrar*²

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

² Delegate of the Native Title Registrar pursuant to ss 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.

Reasons for Decision

CASES CITED

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

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)

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

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

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

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

Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC*)

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

Gumana v Northern Territory (No 2) [2005] FCA 1425 (*Gumana*)

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

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

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

Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26 (*Sampi FC*)

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

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

Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia [2016] FCA 910 (*Tjungarrayi 2016*)

Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3) [2017] FCA 938 (*Tjungarrayi 2017*)

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

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

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

BACKGROUND

- [1] The application was filed on behalf of the Lappi Lappi and Ngulupi Claim Group on 14 February 2018. It covers land and waters encompassing the lake system in the western part of the Tanami Desert in Western Australia, with the eastern boundary adjoining the Western Australian – Northern Territory border.

- [2] The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 15 February 2018 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [4] 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.⁵ Attachment A contains information that will be included in the Register of Native Title Claims (the Register).
- [5] 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 is the primary source of information for the decision I make. Accordingly, I have taken into account the following material:
- the information contained in the application and accompanying documents;
 - the additional material provided by the applicant on 28 February 2018;
 - the geospatial assessment prepared by the Tribunal’s Geospatial Services on 2 March 2018;
 - the results of my own searches using the Tribunal’s registers and mapping database.

Procedural and other matters (s 190C)

Information etc. required by sections 61 and 62 – s 190C(2)

- [6] 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?

- [7] 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).⁶ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).
- [8] 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

³ Section 190A(6).

⁴ Section 190A(6B).

⁵ Section 190A(6).

⁶ *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 prescribed documents?

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

Applications that may be made: s 61(1)

[10] Attachment 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.⁷ 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)

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

Applications authorised by persons: s 61(4)

[12] I consider that Attachment 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: s 62(1)(a)

[13] The application is accompanied by affidavits affirmed 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)

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

[15] 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)

[16] Attachment D provides the details and results of the searches carried out to determine the existence of non-native title rights and interests in relation to the land or waters in the area covered by the application.

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

[17] 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

⁷ At [1].

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.

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

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

Activities: s 62(2)(f)

[19] Attachment G contains details of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[20] Schedule H states that as at 9 February 2018, no other applications that seek a determination of native title or a determination of compensation in relation to native title have been made in relation to the application area, and no determinations of native title fall within the application area.

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

[21] Attachment HA provides that, as at 9 February 2018, the applicant is not aware of any notifications under paragraph 24MD(6B)(c) that have been given and that relate to the whole or part of the area and remain active.

[22] Attachment I provides details of notices issued under s 29, as at 9 February 2018, that the applicant is aware have been given, and that relate to the whole or part of the application area and remain active.

No previous overlapping claim group – s 190C(3)

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

[24] 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).⁸

[25] 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]’.⁹ The explanatory memorandum further discusses the general discouragement of overlapping claims by

⁸ *Strickland FC* at [9].

⁹ At 29.25.

members of the same claim group and encouragement of consolidation of such multiple claims into one application.¹⁰

- [26] 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.
- [27] I note that in assessing this requirement, I am able to address information which does not form part of the application.¹¹
- [28] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application that falls within the terms of subsection (a) to (c) of 190C(3).
- [29] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.
- [30] 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.

Identity of claimed native title holders – s 190C(4)

- [31] 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?

- [32] 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.
- [33] Attachment R contains the certificate of the representative body. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.
- [34] 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 correctness of the certification by the representative body'.¹² 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.
- [35] 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)'.¹³

Has the application been certified?

Does the certifying body have the power to certify?

¹⁰ At 35.38.

¹¹ *Doepel* at [16].

¹² *Doepel* at [72], [78], and [80] – [82]; see also *Wakaman* at [32].

¹³ *Doepel* at [80].

- [36] Attachment R is signed by the Chief Executive Officer and the Principal Lawyer of Central Desert Native Title Services Ltd (Central Desert) on 14 February 2018.
- [37] The certificate provides that the statements and reasons within the certificate are made pursuant to s 203FEA(1) of the Act. Schedule K of the application provides that the Central Desert is a body to whom money has been granted under s 203FE for the purpose of enabling the body to perform some or all of the functions of a representative body and has statutory responsibility for the application area.
- [38] If a body is funded under s 203FE(1) to perform the functions, including the certification in s 203BE, of a representative body over an area, then that body will have the power to certify an application under Part 11.
- [39] The geospatial assessment identifies the Central Desert to be the only representative body for the area covered by the application.
- [40] Having regard to the above information, I am satisfied that the Central Desert was the relevant s 203FE funded body for the application area and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

- [41] 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).
- [42] 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.¹⁴
- [43] The certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion, specifically the following information:
4. Staff at Central Desert (and its predecessors the Ngaanyatjarra Council Native Title Unit) have provided legal and anthropological services within, and adjacent to, the application area since 2000.
 5. Staff members of Central Desert have attended two (2) meetings of the native title claim group members and multiple meetings of native title holders in adjacent areas and have observed the process of decision-making and taken instructions that have arisen from that process.
 6. Central Desert is confident that the requirements for authorisation, in accordance with the NTA, have been met in relation to authorisation. The native title claim group have decision-making processes in accordance with their traditional laws and customs that have been observed at meetings where this application has been discussed. The decision by the native title claim group to authorise the applicant to make the application and to deal with matter arising in relation to it was made in accordance with these decision-making processes.

¹⁴ At [2] – [3].

7. Central Desert is satisfied that the research anthropologists who researched the application have made all reasonable efforts to ascertain and identify all the members of the claim group.

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

[45] 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.

[46] Under the heading 'Response to section 203BE(4)(c) of the [Act]', the certificate states 'Not applicable' and provides no further details of what the representative body has done to meet the requirements of s 203BE(3). Even if this is insufficient for the purposes of s 203BE(4)(c), in my view, failure by Central Desert to comply with this subsection does not render the certification invalid. I also note that I do not consider that any application currently overlaps the application area.¹⁵ Accordingly, in my view, the requirements of s 203BE(3) are not applicable to the area covered by this application and, therefore, the response by Central Desert is appropriate in respect of those requirements.

Decision

[47] 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.

¹⁵ See my reasons at s 190C(3).

Merits of the claim (s 190B)

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

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

What is needed to meet this condition?

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

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

[50] Attachment B describes the application area with a metes and bounds description referencing native title determinations, the Western Australia – Northern Territory border and coordinate points. Attachment B specifically excludes two native title determinations, and Schedule B lists some general exclusions.

[51] Attachment C is a copy of a map prepared by the Tribunal's geospatial services, titled 'Lappi Lappi Ngulupi' and dated 9 February 2018. The map includes the application area depicted by a bold outline and includes a topographic background, the Western Australia – Northern Territory border, waterways, commencement point, scalebar, legend, location diagram, coordinates, and notes relating to the source and datum of data used to prepare the map.

Decision

[52] The geospatial assessment concludes that the written description and map of the application area are consistent and identify the application area with reasonable certainty.

[53] 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.

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

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

What is needed to meet this condition?

[55] 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)).

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

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

¹⁶ *Doepel* at [51] and *Gudjala 2007* at [30].

- 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’;¹⁷
- 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’;¹⁸
- 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’.¹⁹

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

[57] Attachment A describes the native title claim group as comprising those persons who:

38. ...

- (a) hold native title rights and interests in part or all of the application area according to traditional laws and customs, including through one or more of the following pathways:
 - (i) their own birth on the application area;
 - (ii) the birth of an ancestor on the application area;
 - (iii) having religious, sacred or ritual authority for the application area; or
 - (iv) long traditional association with the application area through occupation, custodianship or use by one’s self and/or relevant kin; and
- (b) are recognised under traditional laws and customs by other members of the native title claim group as having rights and interests in part or all of the application area.

39. At the date of this application, the persons referred to in paragraph 38 above includes the descendants of the [eight listed apical ancestors].

[58] I understand that the description of the native title claim group contains a number of conditions as detailed under paragraphs (38)(a) and (b). Those criteria include that membership may be by birth on the application area, birth of an ancestor on the application area, having religious, sacred or ritual authority for the application area, or long traditional association with the application area. Membership is further qualified by the additional criterion of those persons being recognised, under traditional laws and customs, by other members of the native title claim group as having rights and interests in the application area. I am of the view that this description is to be read as a discrete whole.²⁰

[59] I note that the way in which the claim group has been described has been accepted by the Courts in determinations of native title that are proximate to the application area.²¹ I will, however, discuss each criterion below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

¹⁷ *Gudjala 2007* at [33].

¹⁸ *Gudjala 2007* at [34].

¹⁹ *WA v NTR* at [67].

²⁰ *Gudjala 2007* at [34].

²¹ See for instance *Tjungarrayi 2016* at [13] and *Tjungarrayi 2017* at Schedule 3.

[60] I note that in reaching my view, I have been informed by the applicant's factual basis material contained in the application and accompanying documents and not the additional material provided as I consider that I am confined to the material contained in the application for the purposes of s 190B(3). In particular, the factual basis that I have considered in reaching my view is contained in Attachment F to the application.

Birth/conception

[61] The first criterion includes those persons who have been born within the application area.

[62] I consider that requiring a member to demonstrate that they were born in the application area provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[63] Describing a claim group in reference to birth is another method that has been accepted by the Courts.²²

[64] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Birth of an ancestor

[65] In my view, this criterion includes those persons who are descended from an apical ancestor born within the application area. My understanding is that it is those ancestors identified in paragraph (39) that were born in the application area. I have reached this view by considering the wording of that paragraph which states that 'the persons referred to in paragraph 38 above includes the descendants of the following persons'. I therefore understand that the descendants of the persons listed in paragraph (39) will meet this criterion of the claim group description.

[66] I consider that requiring a member to show descent from the ancestors identified in paragraph (39) provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[67] I note that describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b).²³

[68] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Religious, sacred or ritual authority

[69] I have been informed of the role of ritual authority in traditions of the native title claim group by considering the factual basis material contained in Attachment F. I understand from this information that under the traditional laws and customs of the claim group, having religious, sacred or ritual authority for the application area involves having religious, sacred, ritual, practical and/or historical knowledge of the application area including by:

- taking responsibility for the area, including by maintenance and protection of sacred knowledge about the area and places in it;

²² *De Rose* at [926].

²³ *WA v NTR* at [67].

- passing on sacred knowledge about the application area and places within it under approved circumstances;
- looking after sacred objects relating to places within the application area;
- being actively present at ritual engagements relating to places within the application area; and
- accepting and asserting of roles of cultural heritage protection, landscape management and site custodianship.²⁴

[70] I note that the Court has also accepted forms of religious, sacred or ritual authority in other matters as a method of identifying who may comprise the claim group.²⁵

[71] In light of this and having regard to the facts relevant to this particular matter as outlined above, I am of the view that with some factual inquiry it would be possible to determine the persons who have religious, sacred or ritual authority for the application area.

Long traditional association

[72] This criterion includes those persons who have long traditional association with the application area through occupation, custodianship or use by one's self and/or relevant kin.

[73] In my view, requiring a member to demonstrate that they have long traditional association through either occupation, custodianship or use by that member or relevant kin provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group. Attachment F indicates that emphasis has been placed on parental and grandparental connections to country and on long association with an area.²⁶

[74] Describing a claim group in reference to long traditional association is another method that has been accepted by the Courts.²⁷

[75] I consider that with some factual inquiry it will be possible to identify the persons who fit this part of the native title claim group description.

Recognition

[76] As noted above, I am of the view that the description of the native title claim group is to be read as a discrete whole and recognition as a member of the claim group is not meant to be a stand alone criterion. Rather, it is a qualifier to membership by birth, descent, authority and long traditional association. I discuss below my reasons for coming to this view, including the relevant case law that have considered recognition as a criterion of itself.

[77] I note that a description of membership containing qualifiers of recognition is not one with an external and objective point of reference from which to commence an inquiry.

[78] The case law demonstrates that membership of a claim group is based on group acceptance and indicates that it is the claim group that must determine its own composition.²⁸ The Court

²⁴ At [60].

²⁵ See for instance *De Rose* at [926] – [928], *Gumana* at clause 2 and 3, *Tjungarrayi 2016* at [13], and *Tjungarrayi 2017* at Schedule 3.

²⁶ Attachment F at [64].

²⁷ *De Rose* at [897], *Tjungarrayi 2016* at [13], and *Tjungarrayi 2017* at Schedule 3.

notes that '[i]t is not necessary that all of the members of the claim group be identified in the application', however it is 'necessary that such identification be possible at any future point in time'.²⁹ The High Court in *Yorta Yorta* found that the existence of a society depended upon mutual recognition within the group.³⁰ In *Sampi FC*, the Full Court noted that 'in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group ... [t]he unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.³¹

[79] I understand from the factual basis material that the members of the claim group are biologically and/or socially recognised descendants of the members of the pre-sovereignty society who were, and continue to be, united in and by their acknowledgement and observance of laws and customs.³² The claimants have a close connection or association with the application area which continues to involve spiritual, physical, historical, (customary) legal, economic and social elements.³³ The traditional laws and customs of the native title claim group include rules and principles for the recognition of a person as holding rights and interests in relation to an area and as to the nature and extent of the rights and interests held by a person.³⁴ The nature and extent of rights and interests exercisable by a person in relation to an area include birth or conception, birth of an ancestor, having religious, sacred, ritual, practical and/or historical knowledge, burial sites of ancestors, initiation sites, long association, and generation or length of time of identification, with or on the application area.³⁵

[80] Having regard to the above information, it is my view that recognition as a member of the claim group is linked to their connection to the land. I understand that a person may be connected to an area by birth or conception, if their ancestor was born there, having religious, sacred, ritual, practical and/or historical knowledge of the area, having burial sites of their ancestors or their initiation site in the area, long association with the area, or by generation or the length of time of their identification with the area. It follows that, in my view, recognition is inherently linked to the recognition of one's association, through one of these factors, with the application area. It is through this connection that other members of the claim group recognise whether a person is a member of their claim group.

Decision

[81] 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).

²⁸ *Aplin* at [256] and [260].

²⁹ At [256].

³⁰ At [108].

³¹ At [45].

³² Attachment F at [63].

³³ At [45] – [52].

³⁴ At [58].

³⁵ At [59] – [60].

Identification of claimed native title – s 190B(4)

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

What is needed to meet this condition?

[83] 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.³⁶

[84] The description referred to in s 190B(4), and as required by s 62(2)(d) 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’.

[85] 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)’.³⁷

[86] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.³⁸

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

[87] Schedule E contains a description of the claimed native title right and interest. I am satisfied that it is understandable and has meaning.

[88] I have considered the description of the native title right and interest claimed and find that the right and interest is sufficient to fall within the scope of s 223 and is readily identifiable as a native title right and interest.

Factual basis for claimed native title – s 190B(5)

[89] For the reasons set out below, the application satisfies the condition of s 190B(5).

What is needed to meet this condition?

[90] 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.³⁹

[91] 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

³⁶ *Doepel* at [91], [92], [95], [98] to [101] and [123].

³⁷ *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.

³⁸ *Doepel* at [16].

³⁹ *Doepel* at [17] and *Gudjala FC* at [57], [83] and [91].

particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimants' factual basis material.⁴⁰

[92] 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.⁴¹

[93] 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).

[94] The factual basis material is contained in Attachment F and the additional material provided by the applicant, including the applicant's submissions on the registration test (submissions), anthropological report dated February 2018 (anthropological report), and two affidavits from claimants dated 18 October 2017 and 19 October 2017.

[95] 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)?

[96] 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';⁴²
- that the predecessors of the group were associated with the area over the period since sovereignty,⁴³ 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'.⁴⁴

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

[97] 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 western portion of the Tanami Desert in Western Australia, with the eastern boundary adjoining the Western Australia – Northern Territory border.⁴⁵ The application area encompasses the lake system consisting of Lakes Jeavons, Dennis, Lucas, White, Wills and Hazlett.
- Early explorers in the 1870s, travelled over the claim area and observed indigenous people in camps and 'tracks of natives' around the eastern and southern regions of the claim area.⁴⁶

⁴⁰ *Gudjala FC* at [92].

⁴¹ *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

⁴² *Gudjala 2007* at [52].

⁴³ *Gudjala 2007* at [52].

⁴⁴ *Martin* at [26]; see also *Corunna* at [39] and [45].

⁴⁵ Anthropological report at [2.1] – [2.2].

⁴⁶ At [3.1] – [3.3].

- Explorers in 1896 to 1897, travelled though the claim area around the mid-eastern portion.⁴⁷ In 1931, explorers visited the mid-eastern and southern regions of the claim area.⁴⁸
- In 1957, the Welfare Patrol visited the claim area and the journal associated with the patrol extensively describes the area visited and the Aboriginal people who accompanied the patrol.⁴⁹ The patrol visited the southern and western regions where tracks and camps could be seen on the clay pans despite the heavy rains.⁵⁰ It is likely that the Aboriginal group travelling with the patrol are the family of *Partuta*/Arthur *Tjapanangka*.⁵¹ An anthropologist and ornithologist travelling in the patrol took photographs of Aboriginal people at rockholes and other locations in the southern region.⁵²
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
 - Banjo *Tjungarrayi* and his wife were born in the bush around the southern region of the application area.⁵³ Banjo *Tjungarrayi*'s father and his father's brothers were all born in the southern region.⁵⁴ Banjo and his wife lived around that area until they were moved to a station near the southeastern boundary and then moved again further southeast where one of their sons was born in 1968.⁵⁵ Their son grew up southeast of the claim area where they lived in one of the creeks. In the 1980s, their son became a 'lawman'.⁵⁶ He says his *ngurra*, namely the place he can talk for through his father's side, is in the southern region.⁵⁷ He says, similarly, his children get their country through him.⁵⁸
 - Porky Darkie, *Mirlkiya* and *Patarrs* were born in the northern region of the application area.⁵⁹ The descendants of these ancestors regularly visit the claim area, including a deserted station in the northern region where they go camping and hunting.⁶⁰
 - *Katangiinyi* and her son were from the southern region of the application area.⁶¹ They would walk around country such as in the southern region.
 - *Tjitjirri* and *Nyutinka* came from country around the southern region.⁶²
 - *Wipulyulyu*, *Bokoboko* and *Pampatu* were from an area proximate to the southern boundary.⁶³

⁴⁷ At [3.4].

⁴⁸ At [3.5].

⁴⁹ At [3.6].

⁵⁰ At [3.9].

⁵¹ At [3.11] – [3.12].

⁵² At [3.13] and images 1 – 5.

⁵³ At [7.9].

⁵⁴ Affidavit of 18 October 2017 at [5].

⁵⁵ At [6].

⁵⁶ At [7].

⁵⁷ At [10].

⁵⁸ At [11].

⁵⁹ Anthropological report at [7.9].

⁶⁰ At [8.32] – [8.33].

⁶¹ At [7.9].

⁶² At [7.9].

- *Partuta/Arthur Tjapanangka* was born near the southern boundary and his country extended into the claim area, encompassing the southern region.⁶⁴ One of his daughter's was also born on his country, in the southern region of the claim area. A photograph taken of this apical ancestor shows him in the southern region in 1957 when he was 35 years old.⁶⁵
 - *Tjiti Tjiti/Mickey Tjupururrla* was from near the southern boundary but his country extended into the southern regions of the application area. His son was born in the southwestern region.⁶⁶ They were moved to a station near the southeastern boundary and a year later, they were moved to a mission further southeast where *Tjiti Tjiti* worked in the clinic healing people, as he was a 'witch doctor'.⁶⁷ *Tjiti Tjiti's* son grew up, worked and was married following the traditional skin system, at this place.⁶⁸
- The family groups descended from these ancestors continue to hold native title rights and interests in the claim area through descent of their relevant ancestor.⁶⁹
 - Anthropological material indicates that all the living claimants or their ancestors have been born within or adjacent the claim area.⁷⁰
 - The members of the claim group believe their country is imbued with spiritual presence and have knowledge of five *Tjukurrpa* (dreamings) associated with the claim area.⁷¹ The claimants speak of the stories of the dreaming beings located in the southern region.⁷²
 - Despite the remoteness and difficult terrain, the claimants say they continue to visit the application area, such as the southern region, where they hunt kangaroo, emu, goanna, rabbits, bush turkey, and use trees to make boomerangs, woomera and bush medicine.⁷³
 - The claim members continue to visit sites, such as in the southern region, and speak of the importance of taking children there and teaching them about country.⁷⁴
 - The claimants continue to perform ceremony, such as in the southern region, and speak of the importance of passing on ceremony associated with country to their children.⁷⁵

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

[98] 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'⁷⁶. In my view, this criterion relates to the 'alleged facts [supporting] the claim that the

⁶³ At [7.9].

⁶⁴ At [7.9].

⁶⁵ At [3.11] and image 6.

⁶⁶ At [7.9].

⁶⁷ Affidavit of 19 October 2017 at [10].

⁶⁸ At [10] – [14].

⁶⁹ Anthropological report at [7.9].

⁷⁰ At [7.10].

⁷¹ At [8.13].

⁷² At [8.14] and [8.16] – [8.17] and affidavit of 18 October 2017 at [19].

⁷³ Anthropological report at [8.31] – [8.36] and [10.6] – [10.9].

⁷⁴ Attachment M, anthropological report at [8.26] and affidavit of 18 October 2017 at [15].

⁷⁵ Anthropological report at [8.27] and affidavit of 18 October 2017 at [16].

⁷⁶ *Gudjala 2007* at [40].

identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'.⁷⁷ I consider that these principles are relevant in assessing the sufficiency of the claimant's 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, which is both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of their traditional land and waters including location of sites associated with dreaming stories, rockholes and trees to make traditional items.

[99] 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.⁷⁸ The factual basis indicates that first European contact occurred in the 1870s where the explorers observed Aboriginal people in the area. Further exploration expeditions occurred in the 1890s and the 1930s. In 1957, the Welfare Patrol visited the area and were accompanied by Aboriginal people including apical ancestor *Partuta/Arthur Tjapanangka* who was aged 35 at the time. I understand this ancestor was born in the early 1920s in the claim area, and from my recounting of the history his grandparents would have been born in the early 1860s and therefore were likely to have been associated with the application area when the first explorers visited the area. Apical ancestor *Partuta/Arthur Tjapanangka's* daughter was also born in the claim area and the descendants of each of the ancestors were either born, visited, hunted, gathered natural resources or camped in the application area.

[100] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The asserted facts indicate that apical ancestors *Porky Darkie, Mirkiya* and *Patarrs* were born in the northern region of the application area and their descendants regularly visit the claim area, including a deserted station in the northern region where they go camping and hunting. The other apical ancestors, their parents and/or other predecessors, were born or came from country in or around the southern regions of the claim area. Many of their descendants were born or lived in or around the southern region and have continued to visit, hunt, use the resources and perform ceremony in the area. The claimants also have knowledge of sites associated with dreaming beings in the southern region.

[101] 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'.⁷⁹ 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

⁷⁷ At [39].

⁷⁸ *Gudjala 2007* at [51].

⁷⁹ See *Gudjala 2007* at [52].

[102] 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)?

[103] 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’.⁸⁰

[104] 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;⁸¹
- 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’;⁸²
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁸³
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.⁸⁴

[105] I note that in *Gudjala 2009*, Dowsett J also discussed some of the factors that may guide the Registrar, or her 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;⁸⁵
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;⁸⁶ 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

⁸⁰ See *Gudjala 2007* at [26] and [62] to [66].

⁸¹ At [46] and [49].

⁸² At [47].

⁸³ At [46] and [79].

⁸⁴ At [87].

⁸⁵ At [37] and [52].

⁸⁶ At [40].

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).⁸⁷

What information has been provided in relation to the society?

[106] The identification of a pre-sovereignty society or a society that existed prior to first European contact 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 relevant pre-sovereignty society is the Western Desert Cultural Bloc that extends over a vast area of the Australian interior including the application area, and that gives rise to the traditional laws and customs of the claim group.⁸⁸
- The members of this society sustained interaction between its members, possessed common aims, and had effective and consistent communications between them.⁸⁹
- The people of this society share a ‘high degree of cultural homogeneity among the hundreds of Aboriginal groups that inhabit the area’.⁹⁰
- The members of the society speak mutually intelligible dialects, have similar forms of social organisation, have similar forms of marriage rules and conducts similar religious rituals.⁹¹
- The characteristics of the Western Desert Cultural Bloc include common languages, kinship system, particular ritual authority for and responsibility to the Dreaming or *Tjukurrpa*, a concept of totems that connect people to the *Tjukurrpa*, and a land tenure system that may recognise rights to country along multiple pathways.⁹²
- The claim group adheres to the normative laws and customs established by the Western Desert Cultural Bloc and their shared belief in the *Tjukurrpa*, and members speak languages associated with this society.⁹³

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

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

[108] The current claimants continue to identify themselves by the dialects they speak, namely Pintupi, Luritja and Kukatja, which are dialects of language associated with the Western Desert Cultural Bloc.⁹⁴ For instance, the son of apical ancestor Banjo *Tjungarrayi* says his father and

⁸⁷ At [29], [54] and [69].

⁸⁸ Anthropological report at [5.1] and [5.6].

⁸⁹ At [5.3].

⁹⁰ At [5.4].

⁹¹ At [5.5].

⁹² At [5.1] – [5.6] and submissions at [8].

⁹³ Anthropological report at [5.6].

⁹⁴ At [6.1] – [6.10].

mother taught him traditional languages.⁹⁵ Similarly, the son of *Tjiti Tjiti* says his parents taught him traditional languages.⁹⁶

[109] The members of the claim group follow a landholding system where they are connected to particular tracts of country through their father and grandfather.⁹⁷ The claimants hold traditional native title rights and interests to the claim area under their laws and customs through association of their predecessors to the claim area.⁹⁸ In addition, they hold native title rights through the pathways of having religious, sacred, ritual, practical and historical knowledge of the claim area.⁹⁹ This includes taking responsibility for the area such as by maintenance and protection of sacred knowledge of the area and places within it, passing on sacred knowledge about the claim area, looking after sacred objects relating to places, being actively present at ritual engagements, asserting roles of cultural heritage protection, landscape management and site custodianship, and asserting connection with the area and having that assertion accepted by others.

[110] The claimants continue to believe in the *Tjukurrpa*, which explains the formation of the landscape, lays down the rules or principles by which people both relate to and conduct themselves in relation to land and waters, and provides a moral, social and judicial guide to everyday life.¹⁰⁰ The *Tjukurrpa* is the basis for the traditional laws and customs observed by the members of the Western Desert Cultural Bloc. The claimants continue to have knowledge of the stories and travels associated with the five *Tjukurrpa* associated with the claim area.¹⁰¹ The son of *Tjiti Tjiti* speaks of his family's *Tjukurrpa* or totem, which they dance and perform at ceremony, namely during men's business, which his father passed on to him.¹⁰²

[111] The claimants continue to follow the 'skin' and 'section' system in accordance with the traditional laws and customs of the Western Desert Cultural Bloc.¹⁰³ One claimant says she followed the marriage rules as dictated by the skin system that came from the *Tjukurrpa*.¹⁰⁴ The son of Banjo *Tjungarrayi* says he teaches his children about the skin system and to marry the proper way.¹⁰⁵ The son of *Tjiti Tjiti* says he married the proper way, following the skin system, or he would have been punished.¹⁰⁶ He has taught the skin system to his children which they follow.

[112] The claim group members continue to visit and camp on country, hunt kangaroo, emu, goanna, cats and rabbits, and gather the natural resources to make items like boomerangs, woomera and for bush medicine.¹⁰⁷

⁹⁵ Affidavit of 18 October 2017 at [25] – [27].

⁹⁶ Affidavit of 19 October 2017 at [15].

⁹⁷ Affidavits of 18 October 2017 at [10] – [11] and 19 October 2017 at [6] – [7].

⁹⁸ Anthropological report at [7.10].

⁹⁹ At [7.11].

¹⁰⁰ At [8.2].

¹⁰¹ See for instance affidavit of 18 October 2017 at [19].

¹⁰² Affidavit of 19 October 2017 at [17].

¹⁰³ Anthropological report at [8.23].

¹⁰⁴ At [8.8].

¹⁰⁵ Affidavit of 18 October 2017 at [29].

¹⁰⁶ Affidavit of 19 October 2017 at [14].

¹⁰⁷ Anthropological report at [8.30] – [8.40], affidavit of 18 October 2017 at [30] and [32] – [33], and affidavit of 19 October 2017 at [19].

[113] The traditional laws and customs are transferred down the generations from the old people.¹⁰⁸ For instance, knowledge of the *Tjukurrpa* and the related country continue to be passed to children.¹⁰⁹ The claimants also pass on information about ceremony associated with country and about appropriate food preparation such as how to cook kangaroo, hunting techniques and bush medicine.¹¹⁰ The son of apical ancestor Banjo *Tjungarrayi* says his mother taught him about bush medicine and how to use it to heal scabies, colds and sores.¹¹¹

[114] 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)?

[115] My understanding of the factual basis material is that the pre-sovereignty society, being the Western Desert Cultural Bloc, encompasses a wide area of land which is held at a localised level by various groups, including the native title claim group. I understand that these landholding groups had common aims, had effective and consistent communications, spoke mutually intelligible dialects, had similar forms of social organisation and marriage rules, and conducted similar religious rituals.

[116] In my view, the factual basis indicates that the application area is situated within this society and their traditional laws and customs 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 members of the native title claim group are based on regionally held and practiced laws and customs. Relevant to this proposition, the Courts have said 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]'.¹¹²

[117] The factual basis reveals that the laws and customs currently observed and acknowledged by the claim group are based on a system of 'skin' and 'section', spiritual observance and ceremony and include observance of laws relating to 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.

[118] In my view, the factual basis demonstrates that the ancestors were among the generation born to those who were living within the application area at the time of first European contact. In this sense, I understand that the information supports the assertion that the apical ancestors were born into the claim group of the pre-sovereignty society that existed at and prior to first contact.¹¹³ From the factual basis, I understand the current claim members are the descendants of these ancestors.¹¹⁴

¹⁰⁸ Submissions at [61].

¹⁰⁹ Anthropological report at [8.24] – [8.25].

¹¹⁰ At [8.27] – [8.29] and affidavit of 18 October 2017 at [31] and [33] and affidavit of 19 October 2017 at [23] – [24].

¹¹¹ Affidavit of 18 October 2017 at [33].

¹¹² *Harrington-Smith (No 5)* at [53].

¹¹³ See *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above.

¹¹⁴ Attachment A and anthropological report at [7.7] – [7.9].

- [119] 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. The claim group members continue to follow a system of skin which provides rules regarding marriage.
- [120] The native title claim group observe a landholding system where rights and interests to land are based on association of their ancestors to the claim area and the claimants are connected to particular parts of country through their father and grandfather. In addition, rights are also held through pathways of having religious, sacred, ritual, practical and historical knowledge of the claim area. The claimants continue to take responsibility for country such as through maintenance and protection of sacred knowledge of the area and places within it.
- [121] 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, gathering resources for bush medicine or to make traditional items like boomerangs. 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.
- [122] 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 the *Tjukurrpa* and the related stories and sites. They also speak of performing ceremony related to the *Tjukurrpa* on country.
- [123] 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 teaching and practical instruction, 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 *Tjukurrpa* sites and of food preparation protocols, hunting techniques and bush medicine. The factual basis provides that the apical ancestors, Banjo *Tjungarrayi* and *Tjiti Tjiti*, taught their sons language and other traditional practices. I therefore infer that these ancestors, given the current claimants are either the children or grandchildren of the apical ancestors, the other 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 first European contact.

Decision

- [124] 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)?

- [125] 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.

[126] 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.¹¹⁵ 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.

[127] I also understand that if the claimant's factual basis relied upon the drawing of inferences, that '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.¹¹⁶

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

[128] 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.

[129] The factual basis indicates that the native title claim group learn from their old people.¹¹⁷ The claimants speak of the importance of transferring knowledge of their *Tjukurrpa* to their children, and taking children to the countryside to which it relates.¹¹⁸ The claimants also pass on information about ceremony associated with country and about marriage rules, appropriate food preparation, hunting techniques and bush medicine.¹¹⁹

[130] 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

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

Prima facie case – s 190B(6)

[132] As set out below, I consider that the claimed right and interest has been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

What is needed to meet this condition?

¹¹⁵ *Martin* at [29].

¹¹⁶ *Gudjala 2009* at [33].

¹¹⁷ Submissions at [61] and affidavit of 18 October 2017 at [15] – [16].

¹¹⁸ At [8.24] – [8.25].

¹¹⁹ At [8.27] – [8.29].

[133] 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'.¹²⁰ Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'.¹²¹

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

[135] 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).¹²³ 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.

[136] 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.¹²⁴

[137] 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'.¹²⁵ I also note that the phrase 'in relation to' is 'of wide import'.¹²⁶ Having examined the native title right and interest set out in Schedule E of the application it is, prima facie, a right or interest 'in relation to land or waters.'

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

[139] 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).

¹²⁰ *Doepel* at [135].

¹²¹ *Doepel* at [126], [127] and [132].

¹²² *Doepel* at [16].

¹²³ *Gudjala 2007* at [85].

¹²⁴ *Yorta Yorta* at [86] and *Gudjala 2007* at [86].

¹²⁵ *Ward HC* per Kirby J at [577].

¹²⁶ *Alyawarr* at [93].

Which of the claimed native title rights and interests can be established on a prima facie basis?

The nature and extent of the native title rights and interests held by the native title claim group in the whole of the application area (including any areas where extinguishment must be disregarded pursuant to sections 47, 47A and 47B of the NTA) is the right to possess, occupy, use and enjoy the land and waters of the application area to the exclusion of all others

[140] 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]'.¹²⁷ 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'.¹²⁸

[141] 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].¹²⁹

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

[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.¹³⁰

[143] 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.

[144] The factual basis indicates that the native title claim group consider that receiving or giving permission to access country is a fundamental right in the acknowledgement of land ownership.¹³¹ The claim members say they can talk for a particular area through their father's side.¹³² The claimants are protective of their country and its resources and attempt to

¹²⁷ At [93].

¹²⁸ At [93].

¹²⁹ At [71].

¹³⁰ At [127].

¹³¹ Anthropological report at [9.1].

¹³² Affidavit of 18 October 2018 at [10].

maintain control of access by others.¹³³ The claimants say that if visitors go to particular areas, the dreaming being ‘might get them’ and ‘[t]hey might die, get eaten, or get sick’.¹³⁴ The claimants say that visitors need to be taken around by a member of the claim group. In the past, other Aboriginal groups would use smoke signals to request access to their country, and the old people would go and give them permission to enter country.¹³⁵ This need to seek permission still continues today and is practiced by the groups of the region.¹³⁶ Permission needs to be sought by all outsiders, not only other Aboriginal groups.¹³⁷ The asserted facts also say that the claimants continue to expect visitors to receive permission from them to access their country, which equates to a right of exclusive possession exercised in accordance with traditional laws and customs.¹³⁸

[145] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a ‘spiritual affair’ with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[146] I consider that this right is prima facie established.

Physical connection – s 190B(7)

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

What is needed to meet this condition?

[148] 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.

[149] 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’.¹³⁹ 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’.¹⁴⁰

¹³³ At [9.1].

¹³⁴ At [9.2].

¹³⁵ At [9.3].

¹³⁶ At [9.3] – [9.4].

¹³⁷ At [9.5].

¹³⁸ At [9.6].

¹³⁹ *Gudjala 2009* at [84].

¹⁴⁰ At [86].

[150] 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.¹⁴¹

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

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

[152] The factual basis contains relevant information that describe a traditional physical association of members of the claim group with the application area, including being born and living on country, travelling through country, visiting places, looking after country, camping, hunting kangaroo, emu, goanna, cats and rabbits, gathering natural resources to make boomerangs, woomeras and bush medicine and performing ceremony on country.¹⁴²

[153] 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.

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

[154] 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).

[155] 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.

[156] 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))

[157] 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 shows an overlap with two determinations, namely WAD160/1997 Tjurabalan People and WAD357/2006 Nguruupa. However, I note that Attachment B specifically states that the application area does not overlap with both determinations. 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))

¹⁴¹ *Doepel* at [18].

¹⁴² See for instance Attachment M and my reasons at s 190B(5).

[158] Schedule B states that areas subject to a previous exclusive possession act are excluded from the application.¹⁴³

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

[159] I understand s 61A(4) specifically provides that s 61A(3) does not apply to an application in circumstances where the application states that ss 47, 47A or 47B applies to it.

[160] The application appears to indicate that native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others is not claimed in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A and 47B of the Act may apply.¹⁴⁴

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

[161] 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 subparagraphs (a) to (c).

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

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

[163] Schedule Q provides that to the extent that any minerals, petroleum or gas within the area covered by the application are wholly and validly owned by the Crown, they are not claimed by the members of the native title claim group.

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

[164] Schedule P states that no offshore places comprise part of the application area.

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

[165] Schedule B states that any areas where native title rights and interests have otherwise been wholly extinguished are not covered by the application.¹⁴⁵

End of reasons

¹⁴³ At [9].

¹⁴⁴ See Schedules B, E and L.

¹⁴⁵ At [9].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Lappi Lappi and Ngulupi
NNTT No.	WC2018/003
Federal Court of Australia No.	WAD48/2018

Section 186(1): Mandatory information

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.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

14 February 2018

Date application entered on Register:

24 April 2018

Applicant:

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

Applicant's address for service:

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

Area covered by application:

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

Persons claiming to hold native title:

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

Registered native title rights and interests:

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

End of document